Law Firm Ownership and Lawyer Regulation:

*DRI’s Center for Law and Public Policy, Law Firm Ownership and Services Working Group*

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I. Introduction

One thing we know for sure is that the legal profession is changing. Faster than ever before, technology is making our jobs more mobile, law firms more efficient, and client management of their lawyers more systematic. Advancements in technology have made legal services more accessible – internet-based companies are providing legal services to people and companies all over the world. The increased availability of legal services makes for a more competitive marketplace and, consequently, regulators are looking at how these changes affect their methods of protecting the public and the legal profession. More and more, consumers are seeking “legal services” – instead of lawyers.

One option being considered by regulators to make legal services, provided by lawyers, more accessible and affordable is by relaxing law firm ownership rules. This option, much like developments in litigation funding, non-traditional delivery of legal services, and globalization, could change the business of law for DRI members. Whether lawyer regulation keeps pace with these possible changes is yet to be seen.

The three options being proposed to deal with these issues are: (1) relaxing law firm ownership requirements to permit alternative business structures (ABS); (2) entity regulation, which permits regulation of firms and companies, in addition to individual lawyers; and (3) outcome, compliance-based, or pro-active practice management regulation (as opposed to a complaint-based system as we currently have).

ABS, entity regulation, and regulatory outcome regulation are already well-established in many common law jurisdictions around the world and are taking hold in a few U.S. states. Supporters of these initiatives argue that existing law firm ownership restrictions and lawyer-based regulation harms the public’s access to justice and does not address modern business realities. But, regulators must ensure that they will be able to regulate law firms owned by non-lawyers if ownership restrictions are eased. They also appear interested in regulating non-traditional legal services providers like web-based commodity legal services companies and web-based temporary lawyer hiring agencies.

One of the most interesting aspects about this trend is sharp divide between proponents of these changes and those opposed. In many cases, the difference appears to be generational, with younger lawyers favoring change more than seasoned lawyers. Some practice areas also appear more inclined to these changes than others. The American Bar Association has hosted several information sessions discussing practical experiences of law firm ownership by non-lawyers in jurisdictions outside the United States.

II. Alternative Business Structures

The term “alternative business structures” is used to denote any non-traditional business structure for the delivery of legal services. Some examples include alternative ownership (non-lawyer or non-paralegal equity/debt interest); firms that offer legal but also other professional services; do-it-yourself legal service firms providing automated legal forms or apps. ABS proponents suggest that law firms are, as traditionally constituted, unable to secure adequate financing or motivation) to evolve technologically to offer services more affordably to clients. The only financing we can embrace is debt financing. Permitted equity ownership in law firms, even majority ownership, would attract investors from the business world who would bring management experience to the traditional firm.
III. Entity Regulation

Individual lawyers in most common law jurisdictions are regulated now by bar associations and law societies. But, law firms themselves are not regulated. Entity Regulation is a new idea that allows the regulating body to control the “entity” through which lawyers and paralegals provide legal services, for example – a law firm. Entity regulation recognizes that more and more professional decisions (staffing, billing, conflict of interest check, advertising/marketing, etc.) are now made by non-lawyers in a firm (accountants, paralegals, office managers, etc.). An entity can be defined to include businesses other than law firms, including non-lawyer owned firms known as alternate business structures (ABS). Recently in Ontario, the Law Society proposed permitting “civil societies” like trade unions and charities (in addition to insurance companies and law firms already permitted) to the group of entities allowed to employ lawyers for the purpose of providing legal services to the public.

IV. Regulatory Objectives Regulation

A new concept in lawyer governance is emerging amid the discussions about relaxing law firm ownership rules. Regulatory Objective Regulation, sometimes called Compliance-Based Regulation, prescribes practice management principles and standards to supplement the Rules of Professional Conduct for lawyers and paralegals. It is like a mandatory quality assurance program for legal service providers. It is emerging particularly in jurisdictions where there is no mandatory professional liability insurance for attorneys.

The guidelines generally include something like an “Ethical Practices Self-Evaluation Tool” checklist and may include “Practice Management, Client Management, File Management, Financial Management and Sustainability, Professional Management, Equity, Diversity & Inclusion and Access to Justice.” Regulatory Outcome Regulation usually accompanies Entity Regulation such that the entity as a whole, not just a lawyer or paralegal acting in it, is subject to the principles and expectations. Typically, a “designated practitioner” is identified as individual responsible for the implementation of and adherence to the practice management principles and expectations.

V. DRI Center for Law and Public Policy

In Spring 2017, the DRI Center for Law and Public Policy Law Firm Ownership Working Group sought input from DRI’s State Representatives, Regional Directors and Presidents of the State and Local Defense Organizations. Through this outreach, the working group learned that several states are already considering the issue of alternative business structures for law firms, entity regulation, and/or regulatory outcome regulation of lawyers. The experience of these states, and the experience of other common law countries, will form the foundation of a white paper resource being prepared by the DRI Center for Law and Public Policy. The Center will offer a variety of resources on these topics for the benefit of DRI members and State and Local Defense Organizations both for those who are interested now, and for when these issues arise in the jurisdiction.
VI. From the ABA Commission on the Future of Legal Services—for Comment: Issues Paper Regarding Alternative Business Structures

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individual Clients and Client Entities

From: The ABA Commission on the Future of Legal Services

Re: For Comment: Issues Paper Regarding Alternative Business Structures

Date: April 8, 2016

The ABA Commission on the Future of Legal Services has not decided at this time whether to propose any Resolutions concerning the issues described in this Paper.

I. Background

In August 2014, the American Bar Association created the Commission on the Future of Legal Services1 to examine how legal services are delivered in the United States and recommending innovations to improve the delivery of, and the public’s access to, those services. To advance this mandate, the Commission has studied a range of issues, which are described in detail on the Commission’s website. The Commission also has formed priority project teams that have been focused on concrete projects, such as the facilitation of court-annexed online dispute resolution systems and a proposed ABA Center for Innovation.

In addition to these efforts, the Commission’s Regulatory Opportunities Working Group has been studying the extent to which regulatory innovations might enhance the public’s access to affordable and competent legal services. The Group’s work includes the ABA Model Regulatory Objectives for the Provision of Legal Services, which were adopted by the ABA House of Delegates in February 2016,2 an issues paper on the growing number of court-authorized-and-regulated legal service providers, an issues paper on the extent to which currently unregulated legal service providers should be subject to regulation, and continuing discussion of additional regulatory developments and opportunities.

The Commission believes that any consideration of possible regulatory reforms should include an examination of Alternative Business Structures (ABS). The ABA

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1 The Commission consists of prominent lawyers from a wide range of practice settings as well as judges, academics, and other professionals who have important perspectives and expertise on the delivery and regulation of legal services in the United States. The Commission roster is available here.

Commission on Ethics 20/20 conducted the last ABA review of this issue, and decided not to propose any policy changes. Since that Commission completed its work in 2013, there have been many developments in this area. This document describes those developments and seeks broad feedback and additional factual information regarding ABS. Before deciding whether to proceed with a recommendation on this complex and sensitive topic, the Commission wants to ensure that it has as much information and data as possible.

II. What are Alternative Business Structures?

The Model Rules of Professional Conduct prohibit nonlawyer ownership of law firms, nonlawyer management of law firms, and sharing fees with nonlawyers (except under very limited circumstances). Almost every U.S. jurisdiction follows this restriction. In this Issues Paper, ABS refers to business models through which legal services are delivered in ways that are currently prohibited by Model Rule 5.4.

A variety of ABS structures exist in other jurisdictions, and they have three principal features that differentiate them from traditional law firms:

- First, ABS structures allow nonlawyers to hold ownership interests in law firms. The percentage of the nonlawyer ownership interest may be restricted (as in Italy, which permits only 33% ownership by nonlawyers) or unlimited (as in Australia).

- Second, ABS structures permit investment by nonlawyers. Some jurisdictions permit passive investment, while other jurisdictions permit nonlawyer owners only to the extent that they are actively involved in the business.

- Third, in some jurisdictions, an ABS can operate as a multidisciplinary practice (MDP), which means that it can provide non-legal services in addition to legal services.

In short, a variety of ABS models exist:

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5 MODEL RULES OF PROF’L CONDUCT R. 5.4.

(1) Entities that deliver only legal services and in which individuals who are not licensed lawyers are permitted to actively participate in the entities’ operations and have a minority ownership interest;

(2) The same as (1), but where there is no limitation on the percentage of nonlawyer ownership;

(3) Entities that provide both legal and non-legal services and in which individuals who are not licensed lawyers actively participate in the entities’ operations and are permitted to have a minority ownership interest;

(4) Same as (3), but where there is no limitation on the percentage of nonlawyer ownership; and

(5) Any of the above options but with passive investment by nonlawyers.  

III. What Jurisdictions Permit ABS?

A. ABS in the United States

In the United States, two jurisdictions permit forms of ABS: the District of Columbia and Washington State. D.C. Rule 5.4(b) provides:

[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 the [D.C. Bar] 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; [and] (4) The foregoing conditions are set forth in writing.  

Thus, D.C. permits the second category of ABS described above.

Although D.C. permits nonlawyer ownership, very few ABS firms have organized there. The Commission is aware of at least two possible reasons for the small number of ABS in D.C. First, many lawyers who are licensed in D.C. are also licensed in other U.S. jurisdictions, and because only one other U.S. jurisdiction permits nonlawyer ownership,

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8 D.C. RULES OF PROF’L CONDUCT R. 5.4.
“an attorney who is dual-licensed in DC and another jurisdiction may be concerned that
the formation of or participation in an ABS in DC will constitute a violation of the Rules
of Professional Conduct in the other jurisdiction in which the attorney is also licensed.” 9
Similarly, a D.C. firm that permits nonlawyer ownership could not expand outside of D.C.
because of the prohibition on nonlawyer ownership in most other U.S. jurisdictions. 10
Given the limited opportunity for growth, lawyers may decide that an ABS is not an
attractive structure.

Washington State also permits a form of nonlawyer ownership. 11 The
Washington Supreme Court recently created the Limited License Legal Technician
(LLLT), “the first independent paraprofessional in the United States that is licensed to
give legal advice.” 12 On March 23, 2015, the Washington Supreme Court issued a new
rule permitting LLLTs to own a minority interest in law firms. 13 As a result, Washington
State falls into the first category of ABS described above, except that ownership by
nonlawyers is limited to LLLTs.

B. ABS Outside the United States

Outside of the United States, more jurisdictions permit ABS.

9 Alternative Business Structures: Frequently Asked Questions, supra note 7, at 2; see also N.Y. State Bar
Ass’n Comm. on Prof’l Ethics, Op. 1038 (2014) (concluding that a New York lawyer practicing primarily
in New York may not join a D.C. firm that includes a nonlawyer partner).
11 Id.
12 Paula Littlewood, The Practice of Law in Transition, NW LAW., July-Aug. 2015, at 13, available at
13 Rule 5.9 of the new Washington Rules of Professional Conduct, titled “Business Structures Involving
LLLT and Lawyer Ownership,” provides:

[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.

WASH. RULES OF PROF’L CONDUCT R 5.9(a). Rule 5.9(b) goes on to say that joint ownership is permitted
only if:

(1) LLLTs do not direct or regulate any lawyer’s professional judgment in rendering legal
services; (2) LLLTs have no direct supervisory authority over any lawyer; (3) LLLTs do
not possess a majority ownership interest or exercise controlling managerial authority in
the firm; and (4) lawyers with managerial authority in the firm 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.

WASH. RULES OF PROF’L CONDUCT R 5.9(b). In addition, the New York State Bar Association Committee
on Professional Ethics recently issued an opinion concluding that a New York lawyer may enter into a
partnership with a Japanese benrishi – a professional licensed to practice intellectual property law in Japan
who need not have a law school degree – provided that the partnership “would not compromise the New
York lawyer’s ability to uphold the ethical requirements of this State . . . .” N.Y. State Bar Ass’n Comm.
• **All Australian Jurisdictions.** In 2001, New South Wales, the most populous state in Australia, became the first Australian jurisdiction to allow ABS when it authorized “incorporated legal practices.”\(^\text{14}\) New South Wales permits “legal practices, including multidisciplinary practices (MDPs) to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners.”\(^\text{15}\)

At the same time that New South Wales introduced ABS, it also launched a number of regulatory changes. First, “[t]he legislation required that on incorporation a legal practice must appoint at least one ‘legal practitioner director’ . . . to ensure that a legal practitioner maintains a direct interest in and accountability for the management of legal services of the practice.”\(^\text{16}\) Second, the legislation required that all incorporated law firms “establish and maintain a management framework, legislatively coined ‘appropriate management systems,’ to enable the provision of legal services in accordance with the professional and other obligations of lawyers.”\(^\text{17}\) The Office of the Legal Services Commissioner in New South Wales subsequently created ten criteria to measure whether law firms had in place “appropriate management systems.”\(^\text{18}\) All of the other Australian jurisdictions have since followed suit.\(^\text{19}\)

• **England and Wales** now permit ABS as a result of the passage of the Legal Services Act of 2007 (LSA). The LSA permits lawyers to form an ABS that allows external ownership of legal businesses and multidisciplinary practices (providing legal and other services), but with two significant regulatory requirements. First, under the LSA, nonlawyers who want to be owners of law firms must pass a fitness-to-own test.\(^\text{20}\) Second, the Solicitors Regulation Authority (SRA) and the Legal Services Board overhauled the regulation of law firms. Among other things, the new SRA Code of Conduct requires that firms “have effective systems and

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\(^{14}\) _Alternative Business Structures: Frequently Asked Questions_, supra note 7 at 2.; _see_ _Legal Profession Amendment (Incorporated Legal Practices) Act 2000_ (NSW); _see also_ _Legal Profession Amendment (Incorporated Legal Practices) Regulation 2001_ (NSW). New South Wales has permitted MDPs since 1994.


\(^{16}\) _Id._

\(^{17}\) _Id._

\(^{18}\) _Id._ at 3.

\(^{19}\) _Legal Profession Act 2006_ (ACT) pt 2.6; _Legal Profession Act 2004_ (NSW) pt 2.6; _Legal Practitioners Act 2006_ (NT) pt 2.6; _Legal Profession Act 2004_ (Vic) pt 2.7; _Legal Practice Act 2003_ (WA) pt 6; _Legal Profession Act 2007_ (Qld) pt 2.7; _Legal Profession Act 2007_ (Tas) pt 2.5; _Legal Practitioners Act 1981_ (SA), sch 1.

controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook”\(^{21}\) and to “identify, monitor and manage risks to compliance.”\(^{22}\)

- **Other European countries.** While England and Wales permit law firms to be owned entirely by nonlawyers, other European countries permit ABS on a more limited scale. For example, **Scotland** (up to 49% nonlawyer ownership), **Italy** (33%), **Spain** (25%), and **Denmark** (10%) all require lawyers to have majority control of the ABS.\(^{23}\) **Germany**, the **Netherlands**, **Poland**, **Spain**, and **Belgium** permit various forms of MDPs.\(^{24}\)

- **Some Canadian provinces** also have permitted nonlawyer ownership and/or MDP for some time.\(^{25}\) In **Quebec**, nonlawyers may own up to 50% of law practices, and law firms may engage in multidisciplinary practice.\(^{26}\) **British Columbia** permits MDPs.\(^{27}\) An **Ontario** working group examining nonlawyer ownership has decided against recommending majority ownership by nonlawyers, but is continuing to consider minority ownership by nonlawyers.\(^{28}\)

- **Singapore** now also permits nonlawyer ownership. The **Legal Profession (Amendment) Bill 2014**,\(^{29}\) will permit lawyers to own businesses called Legal Disciplinary Practices (LDPs) in which nonlawyers may own up to

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\(^{22}\) Id. at cl. 7.3; see also *SRA Authorisation Rules 2011* in SOLICITORS REGULATION AUTHORITY HANDBOOK (Nov. 1, 2015), available at http://www.sra.org.uk/solicitors/handbook/authorisationrules/content.page.


\(^{24}\) Id. at 205-06.


\(^{27}\) CANADA BAR ASS’N, *supra* note 25, at 41.


25% of the entity. The bill does not permit MDPs, however; Singapore’s LDPs may only provide legal services.

- **New Zealand** also permits limited nonlawyer ownership: the nonlawyer owners must be relatives of the actively involved lawyers (or a qualifying trust) and are only permitted to own non-voting shares.

IV. **Analyzing the Potential Benefits and Risks of ABS**

A. **Potential Benefits of ABS**

Proponents of ABS argue that it offers a number of potential benefits.

1. **Increased Access to Justice**

Proponents of ABS believe that it will increase access to justice. As one commentator has explained:

First, [limits on nonlawyer funding] constrain the supply of capital for law firms, thereby increasing the cost which the firms must pay for it. To the extent that this cost of doing business is passed along to consumers, it will increase the price of legal services. Second, bigger firms might be better for access to justice, due to risk-spreading opportunities and economies of scale and scope. Individual clients . . . must currently rely on small partnerships and solo practitioners, and allowing non-lawyer capital and management into the market might facilitate the emergence of large consumer law firms. Large firms would plausibly find it easier than small ones to expand access through flat rate billing, reputational branding, and investment in technology. Finally, insulating lawyers from non-lawyers precludes potentially innovative inter-professional collaborations, which might bring the benefits of legal services to more people even if firms stay small.

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31 Id.


In short, it is said that ABS may improve consumer choice and value because additional sources of capital may encourage legal service providers to “take greater risks in improving their services.” That innovation in turn, may allow lawyers to deliver better services at lower prices.

2. Enhanced Financial Flexibility

Proponents also argue that ABS may offer law firms significant and needed financial flexibility. The Queensland (Australia) Law Society suggests that those benefits include asset protection, greater flexibility for raising and retaining capital, greater flexibility for remunerating employees, possible tax advantages, and opportunities to introduce more effective management and decision-making arrangements. The traditional law firm relies on law partners and banks for funding, but a proponent of nonlawyer ownership has suggested that this limitation is a disadvantage:

This is a rather primitive, pre-industrial model of financing the firm . . . The owners bear significant risk, which effectively increases their cost of capital and restricts available funding. Part of the risk is from a mismatch of revenues and expenses. Even a fundamentally viable firm may face a liquidity crunch when its bank loans come due and its only assets are accounts receivable and pending cases.

The traditional financial model “potentially prevents law firms from expanding their scale and scope to engage in risky but potentially lucrative businesses.” Permitting nonlawyer investment might also help young lawyers who would be able to afford, for example, to partner with skilled information technology professionals to develop innovative ways to deliver legal services.

3. Enhanced Operational Flexibility

to offer clients assistance in a wider range of legal areas; introduce alternative billing arrangements such as fixed fees for all retainers (not just for personal injury matters); develop online services thereby facilitating greater access for clients; and, provide pro bono and other non-legal services clients often require.”).
ABS is promoted as offering firms flexibility in how they structure and run their businesses. ABS may permit firms to strengthen their management teams through the increased use of nonlawyers. Although some firms already employ nonlawyers in leadership roles, it might be easier for firms to attract and keep talented nonlawyers to help in firm management if firms can offer them a share of the firm’s ownership. Those nonlawyer professionals may offer firms distinct insight that can improve those firms’ delivery of legal services to their clients.

4. Increased Cost-Effectiveness and Quality of Services

Proponents of ABS also argue that MDPs offer benefits to both law firms and consumers. The “major benefit of multidisciplinary services is the delivery of an integrated team approach to serving client interests – in other words, providing clients with a ‘one-stop shopping’ approach for problems requiring services in different fields.” This results in an “efficiency that translates into savings of time or money, and ensures the delivery of a higher quality product to the client with lower transaction costs.”

B. Potential Risks of ABS

Critics of ABS raise a number of concerns.

1. Threat to Lawyers’ Core Values

The primary argument against ABS is that any form of nonlawyer ownership or management threatens lawyers’ “core values,” particularly, professional independent judgment and loyalty to clients. Specifically, opponents of ABS fear that lawyers will act in the financial interests of the firm’s nonlawyer owners rather than in the best interests of their clients. Even if measures are put in place to ensure that nonlawyer owners will obey the rules of professional conduct, critics of ABS point out that this is

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38 Solicitors Regulation Auth., Executive Report (2014), available at http://www.sra.org.uk/sra/how-we-work/reports/research-ABS-executive-report.page (“Our research also shows that firms viewed the adoption of an ABS model as an opportunity to strengthen their management teams through the introduction of non-legal managers.”).
39 Practice Note on Alternative Business Structures, The L. Soc’y (July 22, 2013), http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/ (“Non-solicitor employees may be rewarded by partner, member or director status, with a direct stake in the firm, thus enabling a practice to both: retain high-performing non-solicitor employees [and] attract outside legal talent.”).
41 Id. at 118.
insufficient: after all, lawyers must demonstrate their understanding of the rules by graduating from law school and passing the bar examination and the multistate professional responsibility examination.\textsuperscript{43} Relatedly, nonlawyer ownership could pose a threat to the quality of legal services, particularly if lawyers feel beholden to investors rather than their clients.\textsuperscript{44}

2. **Decreased Pro Bono Work**

Another concern about ABS is that if nonlawyer ownership causes lawyers to focus on maximizing return on their investment, lawyers may perform less pro bono work. Thus, nonlawyer ownership may actually harm both clients and the public.\textsuperscript{45}

3. **Threat to Attorney-Client Privilege**

Opponents of ABS also argue that nonlawyer ownership may threaten the attorney-client privilege. If nonlawyer partners are privy to privileged conversations between attorneys and clients, courts might refuse to uphold the attorney-client privilege. For example, courts have generally declined to uphold the privilege when lawyers (particularly in-house lawyers) are involved in offering business – as opposed to legal – advice.\textsuperscript{46}

4. **Failure to Deliver Identified Benefits**

Critics also contend that nonlawyer ownership will not deliver the benefits that proponents of ABS identify. For example, critics say that nonlawyer ownership is not necessary to attract talented nonlawyers to work in law firms because firms can already offer generous compensation other than a share in the firm’s profits. Similarly, critics say that ABS may not improve access to justice for poor and moderate income populations. A

\textsuperscript{43} Washington has addressed this issue by requiring limited license practitioners, Limited Practice Officers and Limited License Legal Technicians to follow rules of professional conduct specific to each group. See Limited Practice Officer Rules of Professional Conduct, \textit{available at} http://www.wsba.org/~/media/Files/Licensing_Lawyer%20Conduct/LPO/Part%203%20-%20LPO%20Rules%20-%20Professional%20Conduct.ashx; http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Committee%20on%20Professional%20Ethics/25700-A-1096.ashx.

\textsuperscript{44} Nick Robinson, \textit{When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism}, 29 GEO. J. L. ETHICS (forthcoming), \textit{available at} http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878 (manuscript at 14) (“At the same time, while some have claimed that non-lawyer ownership will lead to an increase in quality of legal services, it is not obvious this will be the result and pressure for investors for profits may actually undercut standards in the profession.”).

\textsuperscript{45} Id. at 11 (arguing that nonlawyer ownership may “undermine the public-spirited ideals of the profession, making it less likely lawyers in these firms will engage in pro bono or take on riskier cases that may have a broader social benefit”).

\textsuperscript{46} \textit{Lindley v. Life Investors Ins. Co. of America}, 267 F.R.D. 382 (N.D. Okla. 2010) (“If the attorney is providing business advice to the client, even if resulting from a confidential request, no attorney-client privilege attaches to the communication.”).
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study commissioned by the Ontario Trial Lawyers Association concluded that there is “no empirical data to support the argument that [nonlawyer ownership] has improved access to justice” in England or Australia. 47 Another critic of ABS argues that investment is likely to go to sectors that are easy to commoditize and where expected returns are high like personal injury, while “many other areas of legal work may be difficult to scale or commoditize, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits.” 48

V. Analyzing the Evidence Regarding ABS

To date, many of the arguments concerning ABS have been based on predictions about the future. Now, however, there are several empirical studies of ABS, primarily of ABS in Australia and England and Wales. Most of these studies were completed after the ABA Commission on Ethics 20/20 decided that it would not propose any policy changes regarding ABS. The major studies of ABS include:

- Recent studies from the Legal Services Board on the impact of the Legal Services Act and ABS:
  


48 Robinson, supra note 44, at 14.


These studies are helpful in several respects:

- **There is no evidence that ABS has caused harm.** There is currently no evidence that the introduction of ABS has resulted in a deterioration of the legal profession’s “core values.” In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that “the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised.” Despite the creation of hundreds of ABS firms in recent years, the UK report found that “[t]here have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman’s published data.” Moreover, “overall consumer confidence in the quality of work and professionalism of lawyers has held steady since 2011.” Australia also has not experienced an increase in complaints against lawyers. Of course, these findings in England and Australia do not necessarily prove that ABS is not a threat to the legal profession’s core values, but the evidence is nevertheless useful. In sum, the Commission found no studies indicating the erosion of core values or harm to clients in jurisdictions that permit ABS.


50 Id.; see also Andrew Grech & Tahlia Gordon, *Should Non-Lawyer Ownership of Law Firms Be Endorsed and Encouraged?*, supra note 15 at 6 (concluding that jurisdictions that permit ABS have not experienced a rise in complaints against lawyers).

51 Id. at 4.
The U.S. experience with in-house counsel also supports this conclusion. Since the late 19th century, it has been common practice for corporations to employ lawyers in-house. Working in-house for a client in some circumstances may place pressure on a lawyer’s ability to exercise independent professional judgment. After all, within some corporations, in-house lawyers are “business employees, report to corporate officers who are agents of the client but not the client itself, and are often thought to be more beholden to those officers than are the company’s outside counsel…” Although this relationship in some circumstances arguably poses the same threat as ABS to the lawyer’s exercise of independent professional judgment -- indeed, the ABA once espoused this view – the practice of lawyers working in-house is not only well accepted but in-house counsel time and time again have demonstrated their ability to exercise independent professional judgment.

Similarly, although critics of ABS express concern that nonlawyer ownership will place excessive financial pressure on lawyers to act for the benefit of nonlawyer owners rather than the client, it is undeniable that U.S. lawyers already face significant financial pressures. As one commentator described those tensions during the ABA’s debate over MDP in 1999: “Any and all forms of professional practice are subject to pressures, constraints and temptations – pressures from hierarchical superiors or peers, payment systems or fee arrangements, incentives to career advancement or financial reward inside firms or in the profession generally – that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment.”

The question is whether ABS

52 See James W. Jones & Bayless Manning, Getting at the Root of Core Values: A “Radical” Proposal to Extend the Model Rules to Changing Forms of Legal Practice, 84 MINN. L. REV. 1159, 1171 (2000).
54 Jones & Manning, supra note 52 at 1196-97 (arguing that if the aim of Model Rule 5.4 is to maintain professional independence in any context where lawyers are supervised by, paid by, or report to nonlawyers, then the rule “must be dismissed as either grossly ineffective or cynically biased” because there are many arbitrary exceptions, including in-house counsel in corporations and government agencies, and staff attorneys whom liability insurers use to defend their insureds).
55 ABA Formal Opinion 10 (1926) concluded that “a salaried trust officer of a bank may not ethically accept employment to represent the bank in proceedings involving the bank as trustee for minor heirs.” The Opinion suggested that there is a “conflict between [the lawyer’s] duty to his employer as an employee, and the professional duty which he may owe to the Court and to the profession.”
56 Letter from Robert W. Gordon, Fred A. Johnston Professor of Law at Yale Law School, to the Commission on Multidisciplinary Practice (May 21, 1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/gordon.html. See also Jones and Manning, supra note 52 at 1198-99 (arguing that the “threats to the independence of professional judgment from ‘within’ the profession may be just as serious as any from ‘without’” and discussing “innumerable examples” of such pressures, including the “use of the hourly billing system,” “[t]he widespread practice of lawyers holding an interest in a client's business or serving on the client's board of directors,” and the pressure that a lawyer often feels to refer a client to another lawyer in her own firm, regardless of whether she judges the second lawyer to be the ‘best’ person to handle the client matter”).
would pose a greater threat to the professional independence of lawyers than “those that currently exist in the everyday practices of lawyers in law firms, corporate law departments, government agencies, and nonprofit organizations.\textsuperscript{57}

- **ABS has increased funding for innovation.** ABS has made additional money available to law firms.\textsuperscript{58} In a 2014 SRA study, two thirds of respondents “stated they had provided or attracted new investment into the firm.”\textsuperscript{59} Firms have used that money to make long term investment in technology and delivering legal services in new ways.\textsuperscript{60} While it may be too early to say whether this investment has improved access to justice,\textsuperscript{61} the available evidence demonstrates that a diverse group of firms have organized as ABS. For example, in the UK, a 2014 SRA report concluded that the firms selected to operate as an ABS had a “range of different sizes and varied geographical focus, from local to international”\textsuperscript{62} These firms also practiced in a variety of areas. ABS are most prevalent in the personal injury arena, but ABS also exist in the fields of mental health, transactional work (e.g. mergers and acquisitions and probate), consumer law, and social welfare law.\textsuperscript{63} Similarly, in Australia, firms of all sizes have chosen ABS.\textsuperscript{64}

- **Jurisdictions have stayed with ABS.** Finally, those jurisdictions that have adopted ABS have not abandoned it. New South Wales, Australia has now had ABS for 15 years. And seeing the positive experience in New South Wales, all of the other jurisdictions in Australia decided to permit ABS.\textsuperscript{65} Although there have been some instances in which,

\textsuperscript{57} Jones and Manning, \textit{supra} note 52 at 1201.

\textsuperscript{58} SOLICITORS REGULATION AUTH., \textit{RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES (ABS) FINDINGS FROM SURVEYS WITH ABSS AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS} 3 (2014), available at \url{http://www.sra.org.uk/documents/SRA/research/abs-quantitative-research-may-2014.pdf} (“[T]he most significant changes that ABSs have made, as a result of their new business model, relate to how the business is financed and the attraction of new investment.”).

\textsuperscript{59} Id. at 4.

\textsuperscript{60} SOLICITORS REGULATION AUTH., \textit{EXECUTIVE REPORT} (2014), available at \url{http://www.sra.org.uk/sra/how-we-work/reports/research-abs-executive-report.page} (“Access to investment is shown to be a key motivator for many ABSs. It appears that this investment is typically being used in three distinct ways: technology, marketing, [and] delivering legal services in new ways.”).

\textsuperscript{61} Id. (“It is still too early to understand how [ABSs] will affect the development of the wider legal services market and further research and monitoring is needed to explore the extent that ABSs will deliver benefits in terms of access to justice and the affordability of legal services.”).

\textsuperscript{62} Id.

\textsuperscript{63} Id. at 3.

\textsuperscript{64} Grech & Gordon, \textit{supra} note 15 at 6 (May 2015).

\textsuperscript{65} Id.
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

particular ABS have discontinued operations, the authorizing jurisdictions have not retreated from affording ABS as an entity option.

VI. Conclusion

The Commission seeks the following input:

A. Comments on the potential benefits and risks associated with ABS, including whether there is any other available evidence on the impact of allowing ABS.

B. Evidence or other input on the relative advantages and disadvantages of the five forms of ABS:

(1) Entities that deliver only legal services and in which individuals who are not licensed lawyers are permitted to actively participate in the entities’ operations and have a minority ownership interest;

(2) The same as (1), but where there is no limitation on the percentage of nonlawyer ownership;

(3) Entities that provide both legal and non-legal services and in which individuals who are not licensed lawyers actively participate in the entities’ operations and are permitted to have a minority ownership interest;

(4) Same as (3), but where there is no limitation on the percentage of nonlawyer ownership; and

(5) Any of the above options but with passive investment by nonlawyers.

The Co-Chairs of the Regulatory Opportunities Project Team, Paula Littlewood and Chief Justice Barbara Madsen, welcome your feedback. Should you have questions, please contact Paula Littlewood at paulal@wsba.org; the Commission’s Chair, Judy Perry Martinez, jpmartinez6@gmail.com; and the Commission’s Vice Chair, Andrew Perlman, aperlman@suffolk.edu. We are eager to receive and incorporate your input. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by Monday, May 2, 2016:

Katy Englehart
American Bar Association
Office of the President
321 N. Clark Street

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Chicago, IL 60610
(312) 988-5134
F: (312) 988-5100
Email to: IPcomments@americanbar.org

Comments received may be posted to the Commission’s website.
VII. Conference of Chief Justices: Resolution 9 Recommending Consideration Of ABA Model Regulatory Objectives for the Provision of Legal Services

CONFERENCE OF CHIEF JUSTICES

RESOLUTION 9

Recommending Consideration of ABA Model Regulatory Objectives for the Provision of Legal Services

WHEREAS, the American Bar Association (ABA) Commission on the Future of Legal Services was created to examine how legal services are delivered and to recommend innovations that improve the delivery of, and the public’s access to, those services; and

WHEREAS, the Conference of Chief Justices and the Conference of State Court Administrators passed Resolution 5 in July 2015, which recognizes “significant advances in creating a continuum of meaningful and appropriate services to secure effective assistance for essential civil legal needs” and supports “the aspirational goal of 100 percent access to effective assistance for essential civil legal needs”; and

WHEREAS, the ABA Commission has concluded that the development of regulatory objectives is a useful step to guide state supreme courts and bar authorities as they assess the existing regulatory framework and identify and implement regulations related to legal services beyond the traditional regulation of the legal profession; and

WHEREAS, the articulation of regulatory objectives clarifies the purpose of regulating lawyers and, where a state chooses to do so, other legal service providers; ensures transparency to the public regarding the regulatory framework for lawyers and other legal service providers; and defines the parameters of regulations; and

WHEREAS, the ABA Commission developed the following model regulatory objectives as a guide to state supreme courts and bar authorities:

“ABA Model Regulatory Objectives for the Provision of Legal Services

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system”

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices recommends consideration of the model regulatory objectives by its members as a means to help assess the state’s existing regulatory framework and to help identify and implement regulations related to legal services beyond the traditional regulation of the legal profession.

Adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the Conference of Chief Justices 2016 Midyear Meeting on February 3, 2016
RESOLVED, That the American Bar Association adopts the ABA Model Regulatory Objectives for the Provision of Legal Services, dated February, 2016.

ABA Model Regulatory Objectives for the Provision of Legal Services

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

FURTHER RESOLVED, That the American Bar Association urges that each state’s highest court, and those of each territory and tribe, be guided by the ABA Model Regulatory Objectives for the Provision of Legal Services when they assess the court’s existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers.

FURTHER RESOLVED, 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.
REPORT

I. Background on the Development of ABA Model Regulatory Objectives for the Provision of Legal Services

The American Bar Association’s Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services.\(^1\) As one part of its work, the Commission engaged in extensive research about regulatory innovations in the U.S. and abroad. The Commission found that U.S. jurisdictions are considering the adoption of regulatory objectives to serve as a framework for the development of standards in response to a changing legal profession and legal services landscape. Moreover, numerous countries already have adopted their own regulatory objectives.

The Commission concluded that the development of regulatory objectives is a useful initial step to guide supreme courts and bar authorities when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

This Report discusses why the Commission urges the House of Delegates to adopt the accompanying Resolution.

II. The Purpose of Model Regulatory Objectives for the Provision of Legal Services

The Commission believes that the articulation of regulatory objectives serves many valuable purposes. One recent article cites five such benefits:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation].

\(^1\) Additional information about the Commission, including descriptions of the Commission’s six working groups, can be found on the Commission’s website as well as in the Commission’s November 3, 2014 issues paper. That paper generated more than 60 comments.
Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.²

In addition to these benefits, the Commission believes Model Regulatory Objectives for the Provision of Legal Services will be useful to guide the regulation of an increasingly wide array of already existing and possible future legal services providers.³ The legal landscape is changing at an unprecedented rate. In 2012, investors put $66 million dollars into legal service technology companies. By 2013, that figure was $458 million.⁴ One source indicates that there are well over a thousand legal tech startup companies currently in existence.⁵ Given that these services are already being offered to the public, the Model Regulatory Objectives for the Provision of Legal Services will serve as a useful tool for state supreme courts as they consider how to respond to these changes.

A number of U.S. jurisdictions have articulated specific regulatory objectives for the lawyer disciplinary function.⁶ At least one U.S. jurisdiction (Colorado) is considering the adoption of regulatory objectives that are intended to have broader application similar to the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.⁷ In addition, the development and adoption of regulatory objectives with broad application has become increasingly common around the world. Nearly two dozen jurisdictions outside the U.S. have adopted them in the past decade or have proposals pending. Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces are examples.⁸

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³ As noted by the ABA Standing Committee on Paralegals in its comments to the Commission, paralegals already assist in the accomplishment of many of the Commission’s proposed Regulatory Objectives.


⁵ https://angel.co/legal

⁶ For example, in Arizona “the stated objectives of disciplinary proceedings are: (1) maintenance of the integrity of the profession in the eyes of the public, (2) protection of the public from unethical or incompetent lawyers, and (3) deterrence of other lawyers from engaging in illegal or unprofessional conduct.” In re Murray, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988). In addition, the Court views “discipline as assisting, if possible, in the rehabilitation of an errant lawyer.” In re Hoover, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987). California Business & Professions Code Section 6001.1 states that “[T]he protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” The Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) adopted the following: “The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action.”

⁷ A Supreme Court of Colorado Advisory Committee is currently developing, for adoption by the Court, “Regulatory Objectives of the Supreme Court of Colorado.”

These Model Regulatory Objectives for the Provision of Legal Services are intended to stand on their own. Regulators should be able to identify the goals they seek to achieve through existing and new regulations. Having explicit regulatory objectives ensures credibility and transparency, thus enhancing public trust as well as the confidence of those who are regulated.9

From the outset, the Commission has been transparent about the broad array of issues it is studying and evaluating, including those legal services developments that are viewed by some as controversial, threatening, or undesirable (e.g., alternative business structures). The adoption of this resolution does not abrogate in any manner existing ABA policy prohibiting non-lawyer ownership of law firms or the core values adopted by the House of Delegates. It also does not predetermine or even imply a position on other similar subjects. If and when any other issues come to the floor of the House of Delegates, the Association can and should have a full and informed debate about them.

The Commission intends for these Model Regulatory Objectives for the Provision of Legal Services to be used by supreme courts and their regulatory agencies. As noted in the Further Resolved Clause of this Resolution, the Objectives are offered as a guide to supreme courts. They can serve as such for new regulations and the interpretation of existing regulations, even in the absence of formal adoption. As with any ABA model, a supreme court may choose which, if any, provisions to be guided by, and which, if any, to adopt.

Although regulatory objectives have been adopted by legislatures of other countries due to the manner in which their governments operate, they are equally useful in the context of the judicially-based system of legal services regulation in the U.S., which has been long supported by the ABA.

Regulatory objectives can serve a purpose that is similar to the Preamble to the Model Rules of Professional Conduct. In jurisdictions that have formally adopted the Preamble, the Rules provide mandatory authority, and the Preamble offers guidance regarding the foundation of the black letter law and the context within which the Rules operate. In much the same way, regulatory objectives are intended to offer guidance to U.S. jurisdictions with regard to the foundation of existing legal services regulations (e.g., unauthorized practice restrictions) and the purpose of and context within which any new regulations should be developed and enforced in the legal services context.

III. Relationship to the Legal Profession’s Core Values

Regulatory objectives are different from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the “legal profession.”10 By contrast, regulatory objectives are intended to guide the creation and

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9 As Professor Laurel Terry states in comments she submitted in response to the Commission’s circulation of a draft of these Regulatory Objectives, if “a regulator can say what it is trying to achieve, its response to a particular issue – whatever that response is – should be more thoughtful and should have more credibility. It seems to me that this is in everyone’s interest.”
interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide.\(^{11}\)

The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.

Further, the Commission recognizes that, in addition to civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct, advancement of appropriate preventive or wellness programs for providers of legal services is important. Such programs not only help improve service as well as providers’ well-being, but they also assist providers in avoiding actions that could lead to civil claims or disciplinary matters.

IV. Recommended ABA Model Regulatory Objectives for the Provision of Legal Services

The Commission developed the Model Regulatory Objectives for the Provision of Legal Services by drawing on the expertise of its own members,\(^ {12}\) discussing multiple drafts of regulatory objectives at Commission meetings, reviewing regulatory objectives in nearly two dozen jurisdictions, and reading the work of several scholars and resource experts.\(^ {13}\) The Commission

\(^{11}\) The Commission notes that there are also important professionalism values to which all legal services providers should aspire. Some aspects of professionalism fold into the Objectives related to ethical delivery of services, independence of professional judgment and access to justice. Others may not fit neatly into the distinct purpose of regulatory objectives for legal services providers, just as they do not fall within the mandate of the ethics rules for lawyers.

\(^{12}\) The Commission includes representatives from the judiciary and regulatory bodies, academics, and practitioners.

also sought input and incorporated suggestions from individuals and other entities, including the ABA Standing Committee on Discipline and the ABA Standing Committee on Ethics and Professional Responsibility.

Respectfully submitted,

Judy Perry Martinez, Chair  
Andrew Perlman, Vice-Chair  
Commission on the Future of Legal Services

February 2016

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GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on the Future of Legal Services

Submitted By: Judy Perry Martinez, Chair

1. **Summary of Resolution(s).**

The Commission on the Future of Legal Services seeks adoption of ABA Model Regulatory Objectives for the Provision of Legal Services by the House of Delegates. The Commission further requests that the House recommend that each state’s highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

It is important for regulators to be able to easily identify the goals they seek to achieve through existing and new regulations. The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services in order that the courts can assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services also will help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public’s trust in judicial regulation, but also the confidence of those who are regulated.

2. **Approval by Submitting Entity.**

The Commission on the Future of Legal Services approved the filing of this Resolution at its meeting on September 25 and 26, 2015.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

This Resolution is consistent with existing and longstanding ABA policies supporting state-based judicial regulation and does not affect them.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

N/A
6. **Status of Legislation.**  (If applicable) N/A

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

   The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies relating to the regulation of the legal profession that are adopted by the House of Delegates. The Policy Implementation Committee works with the Conference of Chief Justices as part of its process. The Commission on the Future of Legal Services has been in communication with Center for Professional Responsibility volunteer leadership and the Center Director in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Commission on Ethics 20/20, Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct. The Commission will also engage the ABA Legal Services Division regarding the implementation effort should the House adopt the Resolution.

8. **Cost to the Association.**  (Both direct and indirect costs)

   None

9. **Disclosure of Interest.**  (If applicable)

10. **Referrals.**

    On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. In addition, the Commission consulted with the ABA Standing Committee on Professional Discipline and Standing Committee on Ethics and Professional Responsibility at an earlier stage during its study of regulatory objectives. The Commission carefully considered the feedback from those entities in the development of this Resolution.

11. **Contact Name and Address Information.**  (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Ellyn S. Rosen  
    Deputy Director and Regulation Counsel  
    ABA Center for Professional Responsibility  
    321 North Clark Street, 17th floor  
    Chicago, IL  60654-7598  
    Phone: 312/988-5311  
    Ellyn.Rosen@americanbar.org
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Judy Perry Martinez
1724 Valence Street
New Orleans, LA  70115
Phone:  504/914-7912
Email:  jpmartinez6@gmail.com

Stephen A. Saltzburg
George Washington University Law School
2000 H Street NW
Washington, DC  20052
Phone:  202/994-7089
Email:  ssaltz@law.gwu.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Commission on the Future of Legal Services is proposing for House of Delegates adoption ABA Model Regulatory Objectives for the Provision of Legal Services. The Commission also requests that the House adopt the part of the Resolution that recommends that each state’s highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, and that enhances not only the public’s trust in judicial regulation, but also the confidence of those who are regulated.

2. Summary of the Issue that the Resolution Addresses

The ABA Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services. As one part of its multifaceted work, the Commission engaged in extensive research about regulatory developments in the U.S. and abroad. The ABA has long supported state-based judicial regulation; its policies doing so do not, however, set forth a centralized framework of broad and explicit regulatory objectives to serve as a guide for such regulation. This Resolution, if adopted, would fill this policy void and serve as a useful tool to help courts easily identify the explicit goals they seek to achieve when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of broad regulatory objectives, and given that providers of legal assistance other than lawyers are already actively serving the American public, the Commission believes that it is timely and important for the ABA to offer guidance in this area.

3. Please Explain How the Proposed Policy Position will address the issue

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create the valuable and needed framework to help courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services: (1) assess their existing regulatory framework and (2) identify and implement regulations related to legal services beyond the traditional regulation of the legal profession. While allowing for jurisdictional flexibility, the centralized framework set forth in the ABA Model Regulatory Objectives for the Provision of Legal Services would also facilitate jurisdictional consistency.
Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public’s trust in judicial regulation, but also the confidence of those who are regulated.

4. **Summary of Minority Views**

From the outset, the Commission on the Future of Legal Services has been committed to and implemented a process that is transparent and open. The Commission has engaged in broad outreach and provided full opportunity for input into its work. Inherent in any undertaking of this scope and complexity is the recognition that there will be disagreements about the approach to issues as well as the substance of proposals.

On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. At the time this Executive Summary was filed with the House of Delegates, the Commission was aware only that the following disagree with the Resolution:

The New Jersey State Bar Association has expressed its belief that the Resolution is contrary to the profession’s core values and promotes a tiered system of justice.

Larry Fox filed comment in opposition in his individual capacity.
CALL FOR INPUT
Consultation paper: “Promoting better legal practices”

COMPLIANCE-BASED ENTITY REGULATION TASK FORCE

January 2016
INTRODUCTION

PURPOSE

The Law Society of Upper Canada’s Task Force on Compliance-Based Entity Regulation (Task Force) was established by Convocation in June 2015, to study and make recommendations on options for professional regulation that focus on objectives for the entities, or organizations, through which lawyers and paralegals provide legal services. The goal of this public interest initiative is to establish a proactive approach to regulation intended to help lawyers and paralegals (sometimes referred to as “practitioners” in this document) to improve their practice standards and client service.

The Task Force is seeking input from lawyers, paralegals and others about compliance-based regulation and entity regulation.

Task Force members are Ross Earnshaw (Chair), Gavin MacKenzie (Vice-Chair), Raj Anand, Robert Burd, Teresa Donnelly, Howard Goldblatt, Joseph Groia, Carol Hartman, Malcolm Mercer and Peter Wardle.

This document provides context and background on compliance-based regulation and entity regulation. All interested parties are encouraged to review this consultation paper and to comment on the paper as a whole and on the questions raised in it.

Please send written submissions to the Law Society by March 31, 2016, by email to mdrent@lsuc.on.ca. You can also respond online at www.lsuc.on.ca/better-practices. The Task Force also welcomes responses by regular mail to the following address:

Call for Input on Compliance-Based Entity Regulation
Policy Secretariat
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON
M5H 2N6

All feedback will be carefully considered by the Task Force, which will be reporting to Convocation (the governing body of the Law Society) on these issues later in 2016.
BACKGROUND AND CONTEXT FOR THE LAW SOCIETY’S INITIATIVE

INTRODUCTION

The Law Society regulates lawyers and paralegals to achieve appropriate professional conduct by setting rules and by-laws which are applicable to individual practitioners. Spot Audit and Practice Review programs, extensive resource materials, and continuing professional development programs assist with compliance. However, the regulatory process is primarily reactive, responding to conduct that has already occurred. It does not formally recognize the influence of practice arrangements on the way that legal services are being provided, and is based on proscriptive rules that must be followed by all individual lawyers and paralegals.

These limitations have led the Law Society to look for a new approach, one that includes not only lawyers and paralegals, but also the entities through which they provide legal services. Compliance-based regulation supports individuals and entities to achieve best practices in a manner best suited to their environment. Rather than reacting to misconduct after it occurs, it would be much better for both the public and for practitioners if the problem never occurred in the first place.¹

WHAT IS COMPLIANCE-BASED REGULATION?

“Compliance-based regulation” emphasizes a proactive approach in which the regulator identifies practice management principles and establishes goals, expectations and tools to assist lawyers and paralegals in demonstrating compliance with these principles in practice. This approach recognizes the increased importance of the practice environment in influencing professional conduct and how practice systems can help to guide and direct conduct to meet appropriate professional standards. Lawyers and paralegals would report on their compliance with these expectations, and would have autonomy in deciding how to meet them. Practitioners would also have flexibility in deciding which policies and procedures should be adopted in order to achieve effective and compliant practice management.

WHAT IS ENTITY REGULATION?

“Entity regulation” refers to the regulation of the business entity through which lawyers and/or paralegals provide services, and may include sole proprietors. For example, a law firm would be an entity.

Entity regulation recognizes that many professional decisions that were once made by an individual lawyer or partner are increasingly determined by law firm policies and procedures and firm decision-making processes. The environment in which a lawyer works plays an increasingly significant role in determining an individual’s professional conduct.² Practice environment can also be an important influence on the professional conduct of paralegals, although paralegal firms tend to be smaller than many law firms.

¹
²
HOW DO COMPLIANCE-BASED REGULATION AND ENTITY REGULATION FIT TOGETHER?

“Compliance-based entity regulation” refers to the proactive regulation of the practice entity through which professional legal services are delivered. As noted in the Treasurer’s June 2015 Report to Convocation, which established the Task Force, compliance-based regulation has generally been implemented together with entity regulation. The reason for this is that practice management principles relate to the practice, or entity, as a whole, and not only to the individual practitioner.

Other Ontario regulators, including the Ontario Securities Commission and the Chartered Professional Accountants of Ontario, have already moved in this direction, regulating the entity, or practice structure, and introducing proactive requirements for regulated professionals.

WOULD COMPLIANCE-BASED REGULATION AND ENTITY REGULATION HAVE TO BE IMPLEMENTED TOGETHER?

These two initiatives do not necessarily have to be implemented together, but proactive regulation may be more effective if the business entity is also involved. To ensure compliance with these principles by the entity as a whole, the Task Force believes there is merit to considering the regulation of the practice itself, in addition to the individual practitioner.

WHY CONSIDER A NEW REGULATORY APPROACH?

Current Scope of the Law Society’s Regulatory Authority

Regulation of lawyers and paralegals by the Law Society is currently based on the regulation of the individual practitioner, although some aspects of the Law Society’s regulatory activity affects firms. For example, the Law Society may restrict the name that a firm may use, and there are rules governing the ownership of firms. The Spot Audit Program, which is described in greater detail below, focuses on the firm, not the individual. However, the Law Society’s primary focus is on the regulation of the individual, rather than on the practice entity through which the legal services are provided.

The current regulatory scheme at the Law Society is primarily reactive. Practice issues, such as client service issues, and questions about the lawyer’s or paralegal’s integrity, are usually identified after the fact through complaints.

The Emergence of Proactive Regulation

The Law Society’s research on developments in legal services regulation during the past 10 years provides support for the belief that lawyers and paralegals achieve greater success in their professional practices when they focus on how their practices are best managed and establish policies and procedures to achieve the professional goals set out in the Law Society’s rules and requirements.
The Task Force believes that a focus on proactive regulation is appropriate, particularly given that the majority of complaints about lawyers and paralegals relate to practice management issues. In 2014, 4,781 complaints were referred to the Law Society’s Professional Regulation Division. More than half of these complaints involved client services (52 per cent) and other issues relating to practice management infrastructure, including financial matters. This could include a variety of issues, including a lack of effective communication by the practitioner with the client. Fourteen per cent concerned financial matters (such as books and records) and 8 per cent concerned conflicts of interest. While not every complaint is well-founded, many complaints result in some form of warning or sanction for the lawyer or paralegal.

Even if the Law Society responds with some form of regulatory outcome for the lawyer or paralegal — for example, advice on how to change the process or activity that resulted in the problem — the client or clients may have already suffered the consequence of the poor practice. Further, research has shown that many clients who receive inadequate or improper service do not make a complaint to a Law Society. This suggests that the practice management standards of some lawyers and paralegals could be improved for the benefit of clients and practitioners.

The malpractice claims LawPRO handles paint a similar picture. Only one in eight claims involve a failure to know or apply the law. Year after year, one-third of claims involve lawyer/client communication issues (i.e., miscommunication, poor communication or lack of communication). Eighteen per cent of claims involve missed deadlines and procrastination issues. Five per cent of claims arise due to conflicts of interest. For claims reported to LawPRO in 2014, indemnity payments to clients who suffered damages due to the negligence of their lawyer on just these three types of claims are estimated at $12.1 million. Therefore, LawPRO’s claims data also clearly suggest that there is room for improvement in practice and file management standards.

Law Society data also indicate that the majority of complaints concern sole practitioners (53 per cent in 2014) and firms of between two and five lawyers (26 per cent of complaints during that year). Fifteen per cent of complaints were made against lawyers in medium-sized firms of between six and 20 lawyers. Six per cent were made against lawyers in firms of more than 20 lawyers. Seventy-three per cent of complaints made against paralegals in 2014 concerned sole practitioners. Twenty-one per cent concerned paralegals in small firms of two or three practitioners.

The Task Force believes that encouraging all practitioners to reflect on and improve the systems they have in place could improve practice management overall and may have the effect of increasing client satisfaction and reducing the incidence of complaints and claims.

**HOW PROACTIVE REGULATION MAY BENEFIT LAWYERS AND PARALEGALS**

Proactive regulation through a compliance-based approach could benefit legal practices in a number of ways:
1. Practitioners would have access to Law Society resources identifying and explaining principles of effective practice management. The implementation of proactive regulation would benefit the management and culture of the firm as a whole, which would promote and improve ethical best practices of both the firm and the lawyers and paralegals associated with it.¹⁰

2. Compliance-based entity regulation recognizes that a firm has a role to play in ensuring that the ethical behaviour of lawyers and paralegals is promoted and that a firm may be accountable for system failures that resulted in the lawyer’s or paralegal’s conduct.¹¹

3. A focus on compliance could lead to reduced complaints, by encouraging practitioners to consider how practice management problems might be avoided, rather than reacting to problems after the fact. Responding to complaints can be time-consuming and stressful. As noted in Innovating Regulation: A Collaboration of the Prairie Law Societies, “this model of regulation seeks to prevent problems from arising in the first place”.¹²

4. Compliance-based entity regulation provides practitioners the flexibility and autonomy to develop internal systems and processes that take into consideration risk, size, practice type, and client base.¹³

5. A renewed focus on effective practice management will better protect the public and increase public confidence in the legal profession.¹⁴

6. Compliance-based entity regulation allows the regulator to respond to new issues as they arise without having to create new rules.¹⁵

CONSIDERATION OF PROACTIVE REGULATION BY OTHERS

**Canadian Regulators**

Other Ontario regulators (the Ontario Securities Commission, Chartered Professional Accountants of Ontario, and some health regulatory colleges) have implemented various approaches, including the regulation of entities, proactive regulation, and self-assessment. The Ontario health regulatory colleges engage in a variety of proactive approaches. Some health regulatory colleges already regulate entities; other health regulators are currently exploring doing so.¹⁶

Among legal regulators across Canada, there is increasing interest in the potential for proactive and preventive initiatives to avoid matters becoming regulatory issues. These initiatives are described below.

The Law Society of British Columbia (LSBC) established a Task Force on Law Firm Regulation.¹⁷ On November 9, 2015, the LSBC launched a consultation on law firm regulation.¹⁸
Initiatives are currently being undertaken by the Prairie law societies in this area, which have published a paper (“Innovating Regulation: A Collaboration of the Prairie Law Societies), and will shortly be consulting with the profession. The Law Society of Saskatchewan now has legislative authority over law firms. On November 5, 2015, the Legal Profession Amendment Act received Third Reading in the Legislative Assembly of Manitoba; the bill provides benchers of the Law Society of Manitoba with the legislative authority to regulate law firms.

The Barreau du Québec (Barreau) requires firms to provide a detailed undertaking to facilitate the ethical behaviour of advocates working in the firm. The firm must provide a signed form listing the members of the firm indicating the following:

a. The entity ensures that all members who engage in professional activities in the firm have a working environment that allows them to comply with any law applicable to the carrying on of their professional activities.

b. The partnership or company, as well as all persons within it, shall comply with applicable legislation and regulations.

The Barreau requires firms to designate someone to act as a representative with the Barreau.

The Nova Scotia Barristers’ Society (NSBS) has had authority over law firms since 2005. Since 2013, NSBS has been involved in an extensive review of all aspects of its regulatory scheme. The ambit of this review is more wide-reaching than Ontario’s, and includes both entity and compliance-based regulation.

In collaboration with the inaugural New South Wales Legal Services Commissioner and the former Research Projects Director from that office, NSBS Council has drafted a self-assessment tool, referred to as the “Management System for Ethical Legal Practice”. The NSBS Management System for Ethical Legal Practice, which is currently the subject of extensive stakeholder consultation, asks respondents to rate their compliance with each objective on a scale of 1-5.

International Jurisdictions

In England and Wales, all lawyers holding practice certificates must work in regulated entities. The Solicitors Regulation Authority (SRA), which regulates solicitors in England and Wales, has established 10 professional and practice principles that apply to individuals and entities. The SRA has also identified five mandatory outcomes that individuals and entities are required to achieve to demonstrate compliance with the 10 principles. The SRA has the authority to monitor, investigate and sanction entities. The Bar Standards Board regulates barristers; in March 2015, it also began regulating entities.

There is a correlation in England between the implementation of proactive regulation and the reduction of complaints. According to the Legal Ombudsman of England and Wales, which has responsibility for these matters, there has been a 22 per cent reduction in complaints about law firms since 2011/2012. The chair of the Office of Legal Complaints in the Ombudsman’s
office suggests that one factor that may have contributed to this decline is an improvement in solicitors’ ability to respond to complaints and ensure client satisfaction.\textsuperscript{25}

In Australia, there is also a correlation between the implementation of proactive regulation and a reduction in the number of complaints. Researchers have studied the implementation of proactive regulation in New South Wales where Incorporated Legal Practices (ILPs), mainly small firms and sole practices, have been required to implement and maintain “Appropriate Management Systems” (AMS) for more than 10 years.\textsuperscript{26}

Although AMS was not defined in the legislation, 10 practice management objectives were identified in collaboration with the profession, which became the subject of AMS.\textsuperscript{27} A lawyer in the ILP was required to complete a Self-Assessment Form rating the entity’s compliance with these objectives, and to submit this form to the regulator using an online portal. The regulator assisted law practices that appeared to be experiencing difficulties, based on the response to the form.

A 2008 article reported that the complaints rate for ILPs went down by two-thirds after self-assessment. The authors suggested that “it appears to be the learning and changes prompted by the process of self-assessment that makes a difference, not the actual (self-assessed) level of implementation of management systems”.\textsuperscript{28}

A second study involved the use of an anonymous online questionnaire which asked ILPs with two or more solicitors to assess the impact of AMS and self-assessment on these firms. The survey results revealed that the majority of respondents recognized the value of requiring firms to implement and maintain AMS, as well as to engage in self-assessment. Further, the process of self-assessment had a positive impact on firm management, risk management, and client services issues. The study’s authors concluded that “the results from this study and earlier research should inspire regulators to consider proactive partnerships with lawyers, rather than resorting to the traditional paradigm of reactive complaints-driven regulation of firms”.\textsuperscript{29}

The Australian experience described above, suggests that self-assessment may be beneficial to firms of fewer than 10 lawyers. A study undertaken by Professor Susan Fortney of Texas A & M School of Law and Hofstra University examined the impact of self-assessment on the management of ILPs with between two and 10 solicitors. Eighty-eight per cent of respondents came from firms of fewer than 10 solicitors. Eighty-four per cent of the respondents in this study indicated that they had revised firm policies and procedures for the delivery of legal services.\textsuperscript{30}

There have been some recent changes regarding legal services regulation in Australia, and an apparent move away from mandatory self-assessment. As a result of the implementation of the Legal Profession Uniform Law, which applies throughout Australia as of July 1, 2015, it appears that in New South Wales it is no longer a requirement that a lawyer in the firm completes a self-assessment regarding the entity’s compliance with AMS.
It does not appear that the move away from mandatory self-assessment was motivated by a view that the process of self-assessment was not valuable. In Queensland, Western Australia, South Australia, the Northern Territory and the Australian Capital Territory, Legal Practitioner Directors of an ILP are still required to ensure that AMS are implemented and maintained.

Since the implementation of the Uniform Law, legal services regulators in New South Wales and Victoria may issue a direction to implement AMS following an audit, examination, or investigation, in which case the firm may be required to comply by implementing and maintaining an AMS and by periodic reporting to the regulator.\(^{31}\)

**Current Proactive Initiatives of the Law Society of Upper Canada**

The Law Society already engages in some proactive regulatory activity. The Spot Audit Program is a quality-assurance initiative that assesses a firm’s compliance with financial record-keeping requirements. The lawyers selected for an audit in 2014 reported extremely high approval ratings for the program; 97 per cent were extremely satisfied with the overall experience.\(^{32}\)

Another example of proactive regulatory activity is the Practice Review Program for lawyers, which involves three different initiatives:

1. **Practice Management Review (PMR):** Lawyers in the first eight years of practice may be referred to the program because of random risk-based selection by the Law Society. The selection reflects the percentage of firms represented in Law Society conduct matters (53 per cent sole practitioners; 26 per cent of firms of between two and five lawyers, etc.). A PMR covers all aspects of practice, including file management, time, client and financial management. In the course of conducting the review, Law Society staff may speak with firm leadership, managing partners, and firm administrators if any issues are uncovered that relate to firm-wide matters.

2. **Re-entry Review:** Lawyers re-entering the private practice of law after a hiatus of five years are required to undergo a review within 12 months from their return to practice as a sole or small firm practitioner.

3. **Focused Practice Review:** Lawyers whose practices are showing significant signs of deterioration, as suggested by increases in complaints or other *indicia*, may be required to participate in such a review.

Paralegals holding a P1 license may also be selected for participation in Practice Audit by random selection.\(^{33}\) Like the PMR for lawyers, the practice audit program is a holistic review and covers all aspects of practice. Unlike PMR, it is not confined to the first eight years of practice.
Lawyers and paralegals have provided very positive feedback about these proactive initiatives. A 2015 report indicated that over 96 per cent of lawyers who underwent a PMR indicated that they found the process to be constructive and helpful to the management of their practice. The positive response from the profession to Spot Audit, Practice Review, and Practice Audit suggests that a more comprehensive framework for proactive regulation would have similar benefits for lawyers and paralegals.

**THE ROLE OF PRACTICE MANAGEMENT PRINCIPLES**

The linchpin of a proactive system is the development of a list of practice management principles that practitioners would be required to implement in their practice. These principles may be developed collaboratively by the regulator and the profession. They might include, for example, the development of competent practice standards, effective, timely and civil communication by the firm, confidentiality, and avoidance of conflict of interest. The principles might address issues that are frequently the subject of complaints, but the principles may also relate to other aspects of the professional practice. (An example would be a commitment to work to improve access to justice).

The Canadian Bar Association (CBA) Ethics and Professional Responsibility Committee has developed an Ethical Practices Self-Evaluation Tool intended to assist Canadian law firms and lawyers to examine the ethical infrastructure that supports their legal practices. The Tool identifies 10 components of a law firm’s ethical infrastructure, and organizes them in three main categories. These categories are:

a. relationship to clients (which includes, for example, client communication and preservation of a client’s property/trust accounting);

b. relationship to students, employees and others (this could include hiring and supervision issues); and

c. relationship to the regulator, third parties and the public generally (this category could include access to justice).

To assist practitioners, the tool explains each objective and provides questions a practitioner may ask when assessing compliance with the objective. The tool provides examples of systems and practices to ensure the objective is met, as well as examples of available resources.

Lawyers and paralegals should have flexibility in demonstrating that they have implemented the principles in their practice. For example, the CBA Ethical Practices Self-Evaluation Tool includes “conflict of interest” as a client-management issue. The CBA Tool suggests that the practitioner should ensure that there are policies and procedures in place with respect to checking for and evaluating conflicts of interest, without prescribing the precise nature of the policy or procedure that would fulfil this requirement. Examples of available resources are provided to which practitioners may wish to refer in developing their own policy, if they do not already have one.
A variety of terms are used to describe these principles. In Nova Scotia, for example, the term “Management-Based System for Ethical Legal Practice” is used. In New South Wales, Australia, the principles are referred to as “Appropriate Management Systems”.

**PARADIGM SHIFT – A CONTINUUM OF REGULATORY RESPONSES**

Currently, if lawyers and paralegals do not comply with Law Society requirements, there is a regulatory response from the Law Society. In the same way, if compliance-based entity regulation were to be implemented, non-compliance with professional standards would result in a response from the Law Society. There would be a continuum of possible responses, and the Law Society would consider remedial measures wherever possible.

For example, if an entity were having difficulty implementing or complying with practice management principles, the Law Society might contact the entity to discuss the reasons for the entity’s non-compliance and to discuss whether its policies and procedures might be improved. This new approach may be a paradigm shift for some practitioners, the entities in which they work, and the Law Society. Another possible response might be a compliance audit similar to the Practice Management Review program mentioned above. The objective of a compliance audit, or review, would be to assist the entity to ensure that it has implemented the practice management principles.

It may be necessary to develop rules of conduct for entities to provide that an entity’s lack of compliance with a principle could lead to investigation and discipline. An entity’s failure to comply with these requirements could lead to a more serious response, including disciplinary action. These consequences might be warranted, for example, where the professional misconduct of a lawyer or paralegal was the result of the entity’s flawed policies, a lack of policies or procedures, or an entity’s failure to adhere to them.

**THE STARTING POINT**

Private practices directly serving the public are most readily the starting point for compliance-based entity regulation. If Convocation approves this form of proactive regulation, there is merit to exploring how this approach might also be applied to other groups such as corporate and in-house counsel, government lawyers; lawyers and paralegals practising in legal clinics, and other practice settings. Practitioners in these settings may have different challenges and some of the Practice Management Principles may not be as relevant or applicable in the same way in those settings as may be in private practice. While entity regulation is most suitable to private practices, proactive regulation may be more generally applicable.

The Task Force has met with other Canadian law societies considering these issues. These discussions suggest that if implemented, there would be an incremental approach to the application of proactive regulation to government lawyers, corporate and other in-house counsel, practitioners in legal clinics, and other settings.
INTRODUCTION TO THE QUESTIONS

A key component of the mission of The Law Society of Upper Canada is to ensure that all persons who practice law or provide legal services in Ontario meet standards of professional competence and conduct. In carrying out this function, the Law Society monitors new developments in the regulatory world, including compliance-based entity regulation.

Consistent with this approach, the Task Force has developed the questions in this document, which are designed to encourage feedback and participation in this project from practitioners and the public. Participation in the Call for Input is an important component in the Law Society’s consideration of this initiative. The Task Force welcomes your input.

Questions for Consideration

A. PRINCIPLES FOR A PRACTICE MANAGEMENT SYSTEM

The Task Force is seeking input on the key components, or principles, for compliance and entity regulation. As explained earlier, the phrase “practice management system” refers to the development of these key components.

A practice management system is also sometimes referred to as an “ethical infrastructure”, a term used to refer to policies, procedures, structures and workplace culture within a law practice that help lawyers fulfil their ethical duties. Professor Amy Salyzyn describes ethical infrastructure as “everything within a law practice that impacts how members of that law practice relate to, or fulfil, the duties owed to clients, the justice system and the public more generally”.

The Law Society of Upper Canada currently requires lawyers selected for Practice Review, as well as paralegals involved in Practice Audit, to complete a detailed Basic Management Checklist (checklist). This document is a tool to be used by practitioners to focus on specific aspects of their practice about which questions will be asked during the Practice Review or Audit. The checklist is returned to the Law Society prior to the attendance date.

Having reviewed principles of compliance and entity regulation that have been developed in other jurisdictions and the Law Society’s checklist, the Task Force considered that the principles may include the following:

1. Practice Management, which refers to active supervision of
   • the practice;
   • practitioners; and
   • staff to ensure competent delivery of legal services;

2. Client Management, which refers to
   • conflicts of interest;
   • client communication; and
• management of client expectations at each stage of a client matter in an effective, timely and courteous way to ensure delivery of quality legal services;

3. **File Management**, which refers to
   • consistent opening of client files;
   • client file documentation; and
   • consistent policies regarding file closure to ensure the physical integrity and confidentiality of the file and to increase efficiency in the handling of client matters;

4. **Financial Management and Sustainability**, which refers to
   • business planning and budgeting;
   • the entity’s management of its finances in accordance with Law Society By-Law 9;
   • adoption of consistent billing practices to ensure that both firm and client needs are met;
   • appropriate consideration of insurance needs; and
   • adoption of business continuity and succession planning/wind-down plans as appropriate.

5. **Professional Management**, which refers to the entity’s support of practitioners in
   • efforts to maintain currency in their chosen practice areas;
   • initiatives to build competence and capacity in new practice areas; and
   • maintenance of collegial relationships within the profession.

6. **Equity, Diversity and Inclusion**, which refers to the entity’s policies regarding matters such as
   • a respectful workplace environment that appropriately accommodates equity, diversity, inclusion, and disabilities;
   • equality of opportunity and respect for diversity and inclusion in recruitment and hiring;
   • equality of opportunity and respect for diversity and inclusion in decision-making regarding advancement; and
   • cultural competency in the delivery of legal services.*

7. **Access to Justice** (the entity plays a role in improving the administration of justice and enhancing access to legal services).

*The Challenges Faced By Racialized Licensees Working Group has been considering equity, diversity and inclusion issues for Racialized Licensees in the legal professions. It is expected that the Working Group will report to Convocation in 2016. In the event that Convocation adopts recommendations in these areas, there may be additional guidance respecting the implementation of this proposed framework.
Question:
Do you have any comments about these proposed principles for the effective management of a legal practice, above?

B. PRACTICE ARRANGEMENTS TO WHICH COMPLIANCE-BASED ENTITY REGULATION MAY APPLY

The questions for consideration below concern whether sole practitioners and small firms would be included in the scope of compliance-based entity regulation, as well as medium and large firms.

As noted earlier, an “entity” could include a firm as well as an individual practitioner. Ontario lawyers and paralegals are currently permitted to practice law or provide legal services through a sole proprietorship, a partnership, a limited liability partnership, a professional corporation, or a multi-disciplinary practice.

The Task Force is considering whether sole practitioners and small firms should be required to establish a practice management system in a similar manner as larger firms or practices, if at all. The version of compliance-based entity regulation that might apply to sole practitioners and small firms might be different from the approach for medium and large firms.

The Task Force’s view is that if compliance-based entity regulation applies to sole practitioners and small firms, it should not impose an undue burden on them and that the Law Society should make resources available to assist all practitioners with compliance systems, irrespective of practice size. Based on the Law Society’s experience with complaints, practice review, and practice audit, it is clear that many practitioners would benefit from assistance in these areas. In designing these resources, it should be borne in mind that different practitioners will have varying needs based on their unique practice circumstances.

The Task Force is aware that many medium and large law firms already have considerable ethical infrastructure in place. These existing systems could likely be adapted to respond to any new regulatory requirements regarding practice management principles for entities. These systems could be integrated into a new regulatory scheme and the further development of a firm’s ethical infrastructure.

Corporate and In-House Legal Departments, Government Legal Departments, Legal Clinics, or Other Practice Settings

Many Ontario lawyers and paralegals practice in corporate and in-house legal departments, government legal departments, legal clinics, and other practice settings.

While the initial focus of compliance-based entity regulation would primarily be on practitioners in private practice, there may be some benefits for practitioners in these corporate and in-house legal departments, government legal departments, legal clinics, and
other settings. These practitioners would be consulted at a later stage regarding the possible application of proactive regulation to them.

**Questions:**

1. Should the Law Society seek to implement compliance-based entity regulation for lawyers and paralegals:
   a. in sole practice?
   b. in a small firm?
   c. in a medium-sized firm?
   d. in a large firm?
   e. in a national or international firm?

2. To ensure that compliance-based entity regulation does not create an additional regulatory burden, what considerations should be kept in mind that would be particularly applicable to a sole practitioner or a small firm?
C. ROLE AND RESPONSIBILITIES OF A DESIGNATED PRACTITIONER

The issue under consideration is whether a lawyer or paralegal should be designated by each entity to have particular regulatory responsibilities.

The Task Force reviewed legislation in Canadian jurisdictions where legal services regulators have statutory authority over firms. These requirements are described below.

a. In Alberta, where its Law Society does not currently have regulatory authority over firms, a “responsible lawyer” with respect to trust accounting is accountable for:
   i. the controls in relation to, and the operation of, all law firm trust accounts and general accounts;
   ii. the accuracy of all reporting requirements of the law firm;
   iii. the accuracy of all filing requirements of the law firm; and
   iv. any of the above that has been designated to another person.39

b. In Manitoba, law firms are required to designate a practising lawyer of the firm who is to receive official communications from its Law Society.

c. In Nova Scotia, the designated lawyer is also responsible for receiving a complaint against the firm and for filing an annual law firm report with the Barristers’ Society, among other things.

The Law Society of Upper Canada does not currently require the designation of a “responsible lawyer” with respect to trust accounting. That said, the Lawyer Annual Report usually asks several questions regarding firm trust funds and trust property, which may be answered by a firm’s managing partner.

In England and Wales, the SRA requires entities to designate a Compliance Officer for Legal Practice (COLP) and a Compliance Officer for Finance and Administration (COFA) to ensure that the entity adheres to statutory and regulatory requirements.40 The COLP supports risk management, and is required to take all reasonable steps to ensure the entity conducts business in accordance with the terms under which it is authorised to work, including compliance with relevant statutory obligations. The COLP is responsible for reporting any material failures with compliance to the regulator.

The COFA is responsible for the overall financial management of the firm. Like the COLP, the COFA is required to ensure that an authorised body, its employees and managers, comply with the SRA Accounts Rules. The COFA must keep a record of any failure to comply, and make the record available to the regulator. The COFA is also required to report material failures to the SRA.41

Another model is found in New South Wales, Australia, where an ILP is required to have at least one “Authorized Principal” (AP). The AP must hold a practicing certificate that enables him or her to supervise others. The Legal Profession Uniform Law (NSW) provides:

34(1) Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that
i. All legal practitioner associates of the law practice comply with their obligations under this Law and the Uniform Rules and other professional obligations; and

ii. The legal services provided by the law practice are provided in accordance with this Law, the Uniform Rules, and other professional obligations.

(2) A failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct.\textsuperscript{42}

In summary, the responsibilities of a designated practitioner in Ontario could include:

a. establishing and maintaining a management system that promotes ethical legal practice;

b. reporting on the entity’s implementation of the practice management principles under “Principles for a Practice Management System”, described earlier in this paper;

c. communicating to the Law Society that the entity has been and remains in compliance with the principles;

d. receiving notification of complaints regarding the conduct of a lawyer, paralegal, or other staff member of the entity, or the entity itself;

e. reporting about entity trust accounting matters as well as ensuring that the firm’s record-keeping is current.

From the point of view of lawyers and paralegals who practice in firms or professional corporations, it would be beneficial if the designated practitioner could be responsible for fulfilling certain regulatory requirements on behalf of all lawyers and paralegals in the entity.

These responsibilities might most appropriately be assumed by a managing partner, depending on the size of the firm.

Questions:

1. In an entity other than a sole practice, who should be the designated practitioner?

2. If an entity already has a managing partner, should the managing partner have these responsibilities?

3. Given the above list, do you have any views about what the responsibilities of the designated practitioner should be?

D. ENTITY REGISTRATION

The Task Force would like to hear your views about whether entities should be required to be registered with the Law Society.

The Law Society could create a public registry of law firms, which would be searchable on the Law Society website. The information to be included in this register could include the elements...
listed later in this document. It could also include any disciplinary history of law firms, the members of the Law Society who practise at the firm, and information regarding pending discipline proceedings against the firm or its members.43

Registration of entities may benefit members of the public, who would be able to search the Law Society database. It might also be more efficient for the Law Society and for the entity, as the Law Society could communicate directly with the designated practitioner regarding certain issues.

Drawbacks of entity registration include the possibility that practitioners might find the administrative requirements onerous. Given that a lawyer or paralegal who practises alone would effectively be the designated practitioner, and is already registered with the Law Society in an individual capacity, a different approach with respect to registration requirements for sole practitioners might well be appropriate.

The information to be provided could include the extent to which the entity has implemented the practice management principles mentioned earlier under “Principles for a Practice Management System”. It could also include:

- the names of all lawyers and paralegals associated with the firm and the nature of their association;
- the location and particulars of all trust accounts and firm bank accounts;
- the names and responsibilities of all employees of the firm, or others, who maintain the accounting records of the firm;
- the name of an official representative designated for the purpose of communicating with the Law Society; and
- the name of the firm “ethics counsel”, if applicable.

**Questions:**

1. Should entities be required to be registered?
2. Should entity registration requirements for sole practitioners and small firms be different?
3. What information should an entity be required to provide, and how often?
4. Are there any challenges that might arise for practitioners in providing this information to the Law Society?

**E. YOUR VIEWS ON COMPLIANCE-BASED ENTITY REGULATION**

This document has outlined some benefits that may result from a proactive approach to regulation. These benefits include:

- improvements to practice management, which would promote and enhance ethical best practices both of the firm itself and the lawyers and paralegals in it;
b. recognition that a firm has a role to play in ensuring ethical conduct of lawyers and paralegals;
c. a reduction in complaints, as a result of a proactive approach;
d. flexibility and autonomy for practitioners and entities to develop internal systems and processes that take into consideration risk, size, practice type, and client base;
e. a renewed focus on practice management, which will better protect the public; and
f. flexibility for the Law Society in responding to issues as they arise, rather than having to create new proscriptive rules.

The Task Force is interested in views about how lawyers and paralegals might apply such a regulatory approach in their practices.

**Questions:**

1. In your view, what are the practical benefits or drawbacks of compliance-based entity regulation?
2. Are there other benefits that you see, beyond those listed above?
3. Are there aspects of compliance-based entity regulation that are particularly appealing to you, or not?
4. What are the key challenges or problems that you foresee with this type of regulatory approach?

Thank you for taking the time to provide your feedback. If you have any other comments that you would like to provide, the Task Force would be pleased to hear from you. The Task Force will carefully consider all responses and greatly appreciates your participation and contribution to this initiative.
1 This point is made by Amy Salyzyn in “What If We Didn’t Wait?: Canadian Law Societies and the Promotion of Ethical Infrastructure in Law Practices”, (2015) 92 Canadian Bar Review, 507 at 608.


3 This point is made in “Innovating Regulation: A Collaboration of the Prairie Law Societies”, November 2015, p. 6. www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf. Section 62(0.1)28 of the Law Society Act, R.S.O. 1990, c. L.8, online at http://www.ontario.ca/laws/statute/90108, provides that Convocation may make by-laws governing the practice of law and the provision of legal services by limited liability partnerships. Convocation also has by-law making authority with respect to the practice of law and the provision of legal services through professional corporations under s. 62(0.1)28.1 of the Act. Convocation has enacted by-law 7 (Business Entities) to provide a regulatory framework for limited liability partnerships and professional corporations. Section 61.0.4(2) currently permits audit, investigation and prosecution of a professional corporation, as well as of individuals. This authority has not been implemented through Law Society by-laws or policy.


7 Ibid.

8 Amy Salyzyn, “What If We Didn’t Wait?”, supra note 1 at 524.

9 Ibid.


13 Ibid.
14 Ibid., p. 7.


16 This initiative, which relates to oversight of clinics in which Ontario-regulated health professionals practice, is described at http://www.ontarioclinicregulation.com/.


18 The Law Society of British Columbia (LSBC) has had statutory authority to investigate a law firm, and to discipline a firm by reprimand, fine, or other order since 2012. Legal Profession Act, S.B.C. 1998, c. 9, online at http://www.bclaws.ca/civix/document/id/complete/statreg/98009_01. The relevant statutory provisions are ss. 11(1) and (3), 26(2), 27(2)(e), 32, 33 and 36, cited in CBA Futures Inquiry: Ethics and Regulatory Issues Team, Final Report, April 1, 2014, p. 14. Further information regarding the LSBC consultation is available at: https://www.lawsociety.bc.ca/newsroom/highlights.cfm#c4153.


24 Further information regarding the NSBS Entity Regulation Steering Committee in particular may be viewed at http://nsbs.org/welcome-entity-regulation-steering-committee.


These 10 areas were: negligence, communications, delay, retainer and billing practices, conflicts of interest, management of records and undertakings, and the management of books and records.


For a description of the Law Society’s Paralegal Practice Audit Program, please see http://www.lsuc.on.ca/paralegal-practice-audit/.


Amy Salyzyn, “What If We Didn’t Wait?: Canadian Law Societies and the Promotion of Ethical Infrastructure in Law Practices”, supra note 1 at 508.

Ibid., p. 513.


The Bar Standards Board is the regulator for Barristers. The SRA is the independent regulatory body of the Law Society of England and Wales.


This is discussed by Adam Dodek in “Regulating Law Firms in Canada”, supra note 21.
X. Report on the Future of Legal Services in the United States

MPF FEATURED WHITE PAPER

REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES

by

ABA’s Commission on the Future of Legal Services

November 18, 2016
REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES

COMMISSION ON THE FUTURE OF LEGAL SERVICES
AMERICAN BAR ASSOCIATION

2016
We dedicate this report . . .

To the estimated 80 percent of the poor, and those of moderate means, without meaningful access to our justice system;

To the legal services lawyers who dedicate their careers to serve those who are less fortunate;

To the thousands of unsung lawyers who provide pro bono service to the public to further the cause of justice for all;

To the judges, public defenders, prosecutors and court personnel who work every day to serve the public in overcrowded courthouses and underfunded court systems; and

To all who seek innovative answers to enhancing access to, and the delivery of, legal services.

ABA Commission on the Future of Legal Services
August 2016
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RECOMMENDATION 2. Courts should consider regulatory innovations in the area of legal services delivery

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2.2. Courts should examine and, if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers.

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2.4. Continued exploration of alternative business structures (ABS) will be useful, and where ABS is allowed, evidence and data regarding the risks and benefits associated with these entities should be developed and assessed.

RECOMMENDATION 3. All members of the legal profession should keep abreast of relevant technologies.

RECOMMENDATION 4. Individuals should have regular legal checkups, and the ABA should create guidelines for lawyers, bar associations, and others who develop and administer such checkups.

RECOMMENDATION 5. Courts should be accessible, user-centric, and welcoming to all litigants, while ensuring fairness, impartiality, and due process

5.1. Physical and virtual access to courts should be expanded.

5.2. Courts should consider streamlining litigation processes through uniform, plain-language forms and, where appropriate, expedited litigation procedures.

5.3 Multilingual written materials should be adopted by courts, and the availability of qualified translators and interpreters should be expanded.

5.4. Court-annexed online dispute resolution systems should be piloted and, as appropriate, expanded.

RECOMMENDATION 6. The ABA should establish a Center for Innovation.

RECOMMENDATION 7. The legal profession should partner with other disciplines and the public for insights about innovating the delivery of legal services

7.1. Increased collaboration with other disciplines can help to improve access to legal services.

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“We must open our minds to innovative approaches and to leveraging technology in order to identify new models to deliver legal services. Those who seek legal assistance expect us to deliver legal services differently. It is our duty to serve the public, and it is our duty to deliver justice, not just to some, but to all.”

William C. Hubbard  
ABA PRESIDENT 2014-15

The American public deserves accessible and affordable legal services, and the legal profession has a special obligation to advance this goal. From 2014 to 2016, the American Bar Association Commission (Commission) on the Future of Legal Services examined various reasons why meaningful access to legal services remains out of reach for too many Americans. The Commission also studied traditional and evolving delivery models for legal services, scrutinized the strengths and weaknesses of the profession and justice system that impact the delivery of legal services, and developed recommendations for ensuring that the next generation of legal services more effectively meets the public’s needs.

The core values of the legal profession guided the Commission as it went about its work. Those values focus, first and foremost, on serving the interests of the public and ensuring justice for all. For this reason, the Commission’s efforts have centered on how consumers perceive the delivery of legal services and how the public can be better served. The Commission’s recommendations reflect this mindset and identify changes that benefit the public, even if those changes cause disruption or discomfort to the profession.

This Report on the Future of Legal Services in the United States documents the Commission’s findings and recommendations. The Commission believes that the recommendations, if implemented, can greatly improve how legal services are delivered and accessed, thus advancing the cause of justice and the rule of law. Through bold action and innovation, universal access to meaningful assistance for essential legal needs is within our collective reach.

Judy Perry Martinez, Chair  
ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES

Andrew Perlman, Vice Chair  
ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES
The ABA Commission on the Future of Legal Services would not have existed without the foresight of William C. Hubbard, ABA President 2014-15. His vision and leadership were essential to creating the Commission and setting its mandate. The Commission also is deeply grateful to Paulette Brown, ABA President 2015-16, and Linda A. Klein, ABA President-Elect, for their support of the Commission’s efforts.

The Commission is grateful to its Chair, Judy Perry Martinez, and Vice Chair, Andrew Perlman, for their skillful leadership; the Reporters, Ben Cooper and Renee Knake; and ABA staff, especially Janet Jackson, Katy Englehart, Angela LaCruise, Larnetta Buck, Art Garwin, Ellyn Rosen, Will Hornsby, and Terry Brooks. Special thanks also go to the Commission’s working group and project team chairs: Karl Camillucci, Elizabeth Chambliss, Tim Elder, Paula Littlewood, Chief Justice Barbara Madsen, Randy Noel, Mike Pellicciotti, Maury Poscover, Dan Rodriguez, James Sandman, Dwight Smith, and Ron Staudt. Allen Clarkson and Sarah McCormick provided invaluable research assistance.
EXECUTIVE SUMMARY

“Just because we cannot see clearly the end of the road, that is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become its victims.”

Robert F. Kennedy, Farewell Statement, Warsaw, Poland
(AS REPORTED IN THE NEW YORK TIMES, JULY 2, 1964)

In August 2014, the Commission on the Future of Legal Services set out to improve the delivery of, and access to, legal services in the United States. The findings and recommendations of the two-year undertaking are contained in this Report on the Future of Legal Services in the United States and are a product of the Commission’s full membership, including commissioners, special advisors, liaisons, reporters, and ABA staff. This is a consensus document that was not authored by a single individual. Rather, the Report represents the expertise and input of the entire Commission, as informed by written comments supplied by the public and the profession, testimony at public hearings and meetings, grassroots events across the country, a national summit on innovation in legal services, webinars, and dozens of presentations on the Commission’s work at which the public’s and profession’s input was sought. The Commission recognizes that portions of this Report may be viewed as controversial by some or not sufficiently bold by others, but the Commission believes that significant change is needed to serve the public’s legal needs in the 21st century.

This Report contains a broad array of recommendations for improving how legal services are delivered and accessed. The Report summarizes what the Commission learned, identifies some of the many projects already underway to address existing problems, and offers recommendations for future actions.

The Executive Summary briefly lists the Commission’s Findings and Recommendations, with greater explanation provided in the pages that follow. Despite the length of this Report, the Commission could not provide exhaustive detail on each finding and recommendation due to the volume of information the Commission reviewed and the breadth of the Commission’s conclusions. The Report includes footnotes and hyperlinks to provide readers with additional detail, and the Commission’s website includes many other resources, such as an online Inventory of Innovations. Readers are encouraged to also view the online version of the Report at ambar.org/ABAFuturesReport, which features interactive videos and other media in addition to the content contained in this written document.
The Commission’s Findings

A. Despite sustained efforts to expand the public’s access to legal services, significant unmet needs persist.

1. Most people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.
   a. Funding of the Legal Services Corporation and other legal aid providers remains insufficient and will continue to be inadequate in the future.
   b. Pro bono alone cannot provide the poor with adequate legal services to address their unmet legal needs.
   c. Efforts targeting legal assistance for moderate-income individuals have not satisfied the need.

2. The public often does not obtain effective assistance with legal problems, either because of insufficient financial resources or a lack of knowledge about when legal problems exist that require resolution through legal representation.

3. The vast number of unrepresented parties in court adversely impacts all litigants, including those who have representation.

4. Many lawyers, especially recent law graduates, are unemployed or underemployed despite the significant unmet need for legal services.

5. The traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.

6. The legal profession’s resistance to change hinders additional innovations.

7. Limited data has impeded efforts to identify and assess the most effective innovations in legal services delivery.

B. Advancements in technology and other innovations continue to change how legal services can be accessed and delivered.

1. Courts, bar associations, law schools, and lawyers are experimenting with innovative methods to assist the public in meeting their needs for legal services.
   a. Courts
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      • Self-Help Centers
      • Online Dispute Resolution
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   d. Lawyers, Law Firms, and General Counsel
      • Alternative Billing
      • Document Assembly and Automation
      • Legal Process Outsourcing
      • Legal Startups
      • Medical-Legal Partnerships
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      • Project Management and Process Improvement
      • Prepaid Legal Services Plans and Insurance Coverage
      • Unbundling of Legal Services

2. New providers of legal services are proliferating and creating additional choices for consumers and lawyers.
C. Public trust and confidence in obtaining justice and in accessing legal services is compromised by bias, discrimination, complexity, and lack of resources.

1. The legal profession does not yet reflect the diversity of the public, especially in positions of leadership and power.

2. Bias—both conscious and unconscious—impedes fairness and justice in the legal system.

3. The complexity of the justice system and the public’s lack of understanding about how it functions undermines the public’s trust and confidence.

4. The criminal justice system is overwhelmed by mass incarceration and over-criminalization coupled with inadequate resources.

5. Federal and state governments have not funded or supported the court system adequately, putting the rule of law at risk.

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RECOMMENDATION 12. The ABA and other bar associations should make the examination of the future of legal services part of their ongoing strategic long-range planning.

Note about terminology used in this Report: The term bar association includes local, state, federal, territorial, and specialty bar associations. The term court includes municipal, state, tribal and federal courts; administrative hearing bodies; arbitration panels; and other non-judicial proceedings. The term legal profession includes bar associations, courts, lawyers, legal services agencies, and law schools.
INTRODUCTION

“It is up to us to demonstrate whether we will be able to adapt the basically sound mechanisms of our systems of law to new conditions.”

Chief Justice Warren Burger
THE POUND CONFERENCE 1976

In 1906, at the Annual Meeting of the American Bar Association, the legal scholar Roscoe Pound presented his renowned speech, “The Causes of Popular Dissatisfaction with the Administration of Justice.” Seventy years later, Chief Justice Warren Burger, standing at the site of Pound’s speech in St. Paul, Minnesota, brought together a historic gathering of jurists and legal scholars to discuss ways to address popular dissatisfaction with the American legal system and to examine how to make the justice system more responsive to the public. The Pound Conference sparked many innovations, including helping to advance the modern alternative dispute resolution movement.

Roscoe Pound and Chief Justice Burger understood that the best way for the profession to continue to resolve society’s conflicts is to lead. Forty years after the Pound Conference, the legal profession is at a critical juncture in responding to new conditions that will determine the future of legal services. Once again, the legal profession must lead.

Access to affordable legal services is critical in a society that depends on the rule of law. Yet legal services are growing more expensive, time-consuming, and complex, making them increasingly out of reach for most Americans. Many who need legal advice cannot afford to hire a lawyer and are forced to either represent themselves or avoid accessing the legal system altogether. Even those who can afford a lawyer often do not use one because they do not recognize that their problems have a legal dimension or because they prefer less expensive alternatives. For those whose legal problems require use of the courts but who cannot afford a lawyer, the persistent and deepening underfunding of the court systems further aggravates the access to justice crisis, as court programs designed to assist these individuals are being cut or not implemented in the first place.

At the same time, technology, globalization, and other forces continue to transform how, why, and by whom legal services are accessed and delivered. Familiar and traditional practice structures are giving way in a marketplace that continues to evolve. New providers are emerging, online and offline, to offer a range of services in dramatically different ways. The legal profession, as the steward of the justice system, has reached an inflection point. Without significant change, the profession cannot ensure that the justice system serves everyone and that the rule of law is preserved. Innovation, and even unconventional thinking, is required.

The justice system is overdue for fresh thinking about formidable challenges. The legal profession’s efforts to address those challenges have
been hindered by resistance to technological changes and other innovations. Now is the time to rethink how the courts and the profession serve the public. The profession must continue to seek adequate funding for core functions of the justice system. The courts must be modernized to ensure easier access. The profession must leverage technology and other innovations to meet the public's legal needs, especially for the underserved. The profession must embrace the idea that, in many circumstances, people other than lawyers can and do help to improve how legal services are delivered and accessed.

The American Bar Association is well positioned to lead this effort. The ABA can inspire innovation, suggest new models for regulating legal services, encourage new methods for delivering legal services and educating lawyers, and foster the development of financially viable approaches to delivering legal services that more effectively meet the public's needs.

To advance these essential goals, in August 2014, then-ABA President William C. Hubbard established the Commission on the Future of Legal Services. Comprised of prominent lawyers from a wide range of practice settings, judges, academics, and other professionals with varied perspectives on how legal services are delivered and accessed in the United States, the Commission's charge included the following tasks:

- Conduct a series of community-based grassroots meetings;
- Convene a national summit designed to encourage bar leaders, judges, court personnel, practitioners, businesses, clients, technologists, and innovators to share their visions for more efficient and effective ways to deliver legal services;
- Seek information at the Commission's public meetings and solicit comments from the legal profession and public;
- Analyze and synthesize the insights and ideas gleaned from this process;
- Establish internal working groups to assess new models for accessing and delivering legal services; and
- Examine and, as appropriate, propose new approaches to legal services delivery that are not constrained by traditional models and are rooted in the essential values of protecting the public, enhancing diversity and inclusion, and pursuing justice for all.

This Report summarizes the Commission's efforts in taking on this charge. Part I sets forth the Commission's Findings on the current realities about the delivery of, and the public's access to, legal services. Part II describes the Commission's Recommendations. These Findings and Recommendations are the Commission's; they are not policies of the ABA or its House of Delegates unless noted. Rather, this Report is designed to encourage thoughtful review of the status quo and spur changes that are in the public's interest.
PART I. THE DELIVERY OF LEGAL SERVICES IN THE UNITED STATES: THE COMMISSION’S FINDINGS

“As leaders in our society, lawyers have a responsibility to uphold the rule of law. When nearly half of all young people do not believe our justice system is fair, we have fallen short of our responsibility. Lawyers must use the incredible power given them by their law license to effectuate positive change. We must keep in mind what Charles Hamilton Houston taught us, ‘a lawyer is either a social engineer or a parasite on society.’ We must be social engineers and change the perception of our justice system. Maintenance of the rule of law requires it.”

Paulette Brown
ABA PRESIDENT 2015–16

During its first year, the Commission sought to learn as much as possible about the American public’s challenges in accessing legal services. Several state and local bar associations were simultaneously engaged in a similar effort. More began to engage in their own processes in response to the Commission’s grassroots meetings and events, which were held in over 70 locations. The efforts of these bar associations informed the Commission’s work, and a list of state and local bar association efforts is contained in the Appendix.

The Commission sought input from lawyers, judges, clients, academics, the public, and thought-leaders from other disciplines. This input included: (1) grassroots meetings; (2) the Commission’s National Summit on Innovation in Legal Services convened at Stanford Law School in May 2015; (3) more than 250 comments submitted by members of the legal profession and the public in response to multiple issues papers released by the Commission; (4) testimony at hearings conducted at ABA Midyear and Annual Meetings; (5) a series of webinars delivered by experts on emerging issues in legal services delivery; (6) a public opinion and focus group survey conducted in partnership with the National Center for State Courts; (7) sixteen white papers by subject matter experts that assess existing research on legal services delivery and identify additional research needs; and (8) ABA leaders, counsel, and staff. The Commission drew upon the expertise of its members, reporters, special advisors, and liaisons, which included...
state and federal judges and administrative law judges; practicing attorneys from solo, mid-sized, and large law firms; academics; experts on innovation in legal services; and leaders from national organizations, such as the Legal Services Corporation, National Conference of Chief Justices, Federal Judicial Center, American Bar Foundation, National Bar Association, Hispanic National Bar Association, National Asian Pacific American Bar Association, National Native American Bar Association, and representatives from the disability legal community. The Commission also drew upon dialogues with leaders from foreign jurisdictions undertaking futures initiatives. Further detail about the Commission’s extensive efforts to gather information on the public’s legal needs can be found in the Appendix and on the Commission’s website.

The Commission’s Findings, which are based upon this extensive outreach, research, and study, are described below with some, but not exhaustive, detail. The Report conveys as concisely as possible the essence of the Commission’s Findings and uses footnotes and hyperlinks to direct readers to more detailed information.

The Findings

A. Despite sustained efforts to expand the public’s access to legal services, significant unmet needs persist.

Over the past century, numerous calls for greater access to legal services have been made. In response, a wealth of initiatives, many highly successful, have aimed to address the public’s legal needs. Lawyers in various settings have undertaken these efforts. Some lawyers have dedicated their careers to full-time service of people who need legal assistance and cannot afford a lawyer. Other lawyers contribute pro bono hours in their local communities and even outside their home jurisdictions. They respond to emergency legal needs in times of disaster or simply assist someone who asks for help and cannot afford legal assistance. These lawyers can be found in every possible practice setting, including solo practices, law firms of all sizes, and corporate legal departments.

The Legal Services Corporation (LSC)—the independent nonprofit established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans—has been a beacon of justice for the underserved. Despite its unrelenting work on behalf of the poor, inadequate funding remains a barrier to helping every poor person with a legal need. Moreover, these efforts do not reach millions of individuals of moderate means who have legal problems and cannot afford legal solutions. Longstanding efforts, such as group and pre-paid legal plans, pro bono projects, and similar endeavors, have helped to address some of these issues, but significant gaps remain.

State supreme courts have played a key leadership role as well. The courts often collaborate with bar associations and other stakeholders, most recently in establishing access to justice commissions, which have made a measurable difference in the lives of many people.

The Commission applauds these and many other similar efforts. They have helped to ensure that more people are able to address their essential legal needs through meaningful access to legal services. Much work, however, remains to be done.

1. Most people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.

The need for basic civil legal assistance for individuals living at or below the poverty level is vast and cannot be overstated. According to the most
recent data from the U.S. Census Bureau, 63 million people—one in five Americans—met financial requirements for services provided by the LSC.10 The LSC provides funding to 134 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. Territories. In 2016, income eligibility for LSC-funded legal aid—125 percent of the federal poverty guideline—is $14,850 for an individual and $30,375 for a family of four.11 Yet, the funding made available to LSC by Congress accommodates only a small fraction of people who need legal services. As a result, in some jurisdictions, more than eighty percent of litigants in poverty are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases.12

Contrary to what many might expect, lack of basic civil legal assistance is not limited to the poor. Numerous studies show that the majority of moderate-income individuals do not receive the legal help they need. Many of the studies documenting civil legal needs in the United States are “decades old, but conservative estimates based on their reports suggest as many as half of American households are experiencing at least one significant civil justice situation at any given time.”13 Scholars estimate that “[o]ver four-fifths of the legal needs of the poor and a majority of the needs of middle-income Americans remain unmet.”14 Moreover, moderate-income individuals often have even fewer options than the poor because they do not meet the qualifications to receive legal aid.

One study indicated that “well over 100 million Americans [are] living with civil justice problems, many involving what the American Bar Association has termed ‘basic human needs.’”15 The ABA defines “basic human needs” cases as including matters related to shelter (for example, eviction proceedings), sustenance (for example, “denials of or termination of government payments or benefits”), safety (for example, “proceedings to obtain or enforce restraining orders”), health (for example, claims to Medicare, Medicaid, or private insurance for “access to appropriate health care for treatment of significant health problems”), and child custody.16 These problems “are experienced across the population, by rich and poor, young and old, men and women, all racial groups, all religions.”17 Other examples of such needs include matters involving employment, housing, relationship dissolution, bankruptcy/consumer debt, immigration, and education.

In 2006, the ABA House of Delegates adopted Resolution 112A, encouraging legislatures to “provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake.”18 Although there has been some modest progress in this area (for example, in 2016, Connecticut passed a civil right to counsel bill to create a task force with the specific purpose of examining access to counsel in civil matters19) much work remains to be done.

Recent statistics illustrate the dire need for help with civil legal needs:

- Massachusetts: Civil legal aid programs turned away sixty-four percent of eligible low-income people in 2013, a fourteen percent increase from 2006, and nearly 33,000 low-income residents were denied legal representation in life-essential matters involving eviction, foreclosure, and family law, including cases of child abuse and domestic violence.20
- Michigan: From 2000 to 2013, the number of people qualified for free legal aid increased by fifty-three percent to over 2 million people.21
- New York: In 2014, 1.8 million litigants in civil matters did not have representation for matters involving housing, family, access to health care and education, and subsistence income.22
- Utah: In 2014, ninety-eight percent of the defendants in 66,717 debt collection cases were unrepresented, whereas ninety-six percent of the plaintiffs had a lawyer. In the same year, ninety-seven percent of the defendants in 7,770 eviction cases defended themselves,
and in only twelve percent of 14,088 divorce cases did both sides have a lawyer.  

- Washington: In 2015, seventy percent of low-income households faced a significant civil legal issue within the past year, but three-fourths did not seek or could not obtain legal assistance.

Additional challenges exist in the criminal arena. Although most criminal defendants have a constitutional right to counsel, public defense counsel in many jurisdictions are under-resourced and over-worked.

To better understand the public’s unmet need for legal services, the Commission not only examined existing research and studies, but also conducted an independent survey. In collaboration with the National Center for State Courts (NCSC), the Commission held two focus group studies and undertook a national public opinion survey on access to legal services (the “ABA/NCSC Survey 2015”). The focus groups and poll were designed to provide more insight into public attitudes and concerns about access to legal services, and to obtain input not only from the legal profession, but also from consumers of legal services. As discussed more fully below, the ABA/NCSC Survey 2015 further evidences significant unmet legal needs.

a. Funding of the Legal Services Corporation and other legal aid providers remains insufficient and will continue to be inadequate in the future.

Congress has never fully funded the LSC to adequately address the civil legal needs of people with low incomes. In recent years, the LSC budget has been especially compromised, with Congressional appropriations decreasing from $420 million in 2010 to $365 million in 2014 at the very time that needs were increasing. Had LSC’s funding kept pace with inflation compared to appropriations in the mid-1990’s, the current annual funding would be more than $650 million. Estimates suggest that full funding for LSC to address all unmet legal needs of those living in poverty would require an appropriation far exceeding $650 million. Even if Congress were to fully fund the LSC to provide the necessary legal services to all who meet income eligibility requirements, a significant need remains for moderate-income individuals who are not eligible for LSC-funded programs. Full funding also would not address congressional restrictions on the use of LSC funds to support certain types of cases or clients.

Although the LSC network is the largest source of funding for civil legal aid, funding also exists at the state level from governments and private sources. Unfortunately, funding varies considerably by state, so the public’s access to basic services is uneven. It has been observed that “geography is destiny” in that the legal “services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need, but rather by where they happen to live” and whether funding has been allocated to their particular need. Moreover, even in the most generous jurisdictions, state governments allocate insufficient resources to ensure meaningful access to legal services for all who need them. At the same time, there have been significant declines in another key funding source for state-specific funding for civil legal services: the Interest on Lawyers Trust Accounts (IOLTA), programs in all 50 states and the District of Columbia, which are meant to fund civil legal aid programs with the interest generated from client funds held by lawyers. For example, in Massachusetts alone, the economic downturn reduced IOLTA funding from $31.8 million in 2007 to an estimated $4.5 million in 2015.

b. Pro bono alone cannot provide the poor with adequate legal services to address their unmet legal needs.

The ABA’s 2013 Report on the Pro Bono Work of America’s Lawyers documents “the legal profession’s longstanding and ongoing commitment to pro bono legal services as a core value.” Approximately eighty percent of the attorneys surveyed report providing at least some pro bono service, with an average of approximately seventy hours per year for those who do so. For example, many
solo practitioners and small firm lawyers regularly engage in pro bono and “low bono” efforts in their communities. Paralegals also make significant contributions to pro bono work.\textsuperscript{32} Many large law firms encourage pro bono volunteerism and initiatives,\textsuperscript{33} such as the tentatively-titled ABA Legal Answers,\textsuperscript{34} a national pro bono web service based upon the successful Tennessee Online Pro Bono website. More recently, corporate legal departments have become more active in delivering pro bono legal services, in part because of useful regulatory changes that enable such efforts.\textsuperscript{35} Even with the profession’s deep commitment to pro bono and further innovations, pro bono work alone will not resolve the tremendous need for civil legal representation. Data shows that annually “U.S. lawyers would have to increase their pro bono efforts … to over nine hundred hours each to provide some measure of assistance to all households with legal needs.”\textsuperscript{36}

c. Efforts targeting legal assistance for moderate-income individuals have not satisfied the need.

Numerous programs and providers across the country offer legal assistance to moderate-income individuals via a wide variety of delivery models. The ABA Standing Committee on the Delivery of Legal Services maintains a list of nearly 100, which is growing.\textsuperscript{37} The delivery models range from offering legal services in cafés, coffee houses, and courts to targeting special needs, such as eviction, medical issues, and wills. Even so, while many of these efforts have had success, the need for legal assistance for moderate income individuals remains significant.

2. The public often does not obtain effective assistance with legal problems, either because of insufficient financial resources or a lack of knowledge about when legal problems exist that require resolution through legal representation.

Individuals of all income levels often do not recognize when they have a legal need, and even when they do, they frequently do not seek legal assistance. The report Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study,\textsuperscript{38} published in 2014, details the scope and nature of civil justice issues that people confront. This study found that forty-six percent of people are likely to address their problems themselves, sixteen percent of people do nothing, and sixteen percent get help from family or friends.\textsuperscript{39} Only fifteen percent sought formal help, and only sixteen percent even considered consulting a lawyer.\textsuperscript{40} As the study reported: “these are troubles that emerge ‘at the intersection of civil law and everyday adversity,’ involving work, finances, insurance, pensions, wages, benefits, shelter, and the care of young children and dependent adults, among other core matters.”\textsuperscript{41} When asked why they do not seek out a lawyer, most individuals reply that they “do not think of their justice problems as legal” and do not recognize their problems as having legal solutions.\textsuperscript{42} Although the study did not delve into the severity of the legal problems people confront and left open the question of how many would benefit from formal assistance (including from a lawyer), the research does demonstrate what some experts refer to as a latent legal market—that is, a market for legal services that is currently untapped.\textsuperscript{43}

Research also showed the limitations of current efforts to reach out to those with legal needs.
Certain populations are particularly vulnerable when faced with legal problems, especially the poor, people with limited physical and mental abilities, the elderly, immigrants and others with limited English language skills, people living in rural communities, and victims of domestic and sexual violence. Many people with limited financial resources do not have access to legal representation, which adversely affects their views of law, citizenship, and civic engagement. Similarly, all individuals without proficiency in English have difficulty navigating the justice system unless they have adequate access to interpreters and related resources.

Cost also can be a major barrier, although the available evidence on this issue is somewhat contradictory. Concrete data and research studies on the actual costs of routine legal services are difficult to find, but at least one reveals that many services may actually be affordable for middle-income families. Nevertheless, in the ABA/NCSC Survey 2015, “financial cost was the single most common factor cited for not seeking legal services when facing a challenge.” Financial cost included not only direct financial cost but also indirect economic costs, such as time away from work or the difficulty of making special arrangements for childcare. Beyond this, focus group respondents also noted the costs of “a slow-moving legal process and inexplicable delays,” which left them with a “sense of disrespect … as supposed customers of the legal system.” While the Accessing Justice Study concluded that “Americans do not typically perceive cost as a barrier to action when considering how to respond to their own civil justice situations” they do perceive “cost as a barrier in the abstract for at least some people.” Notably, nearly sixty percent of respondents agreed with the statement: “lawyers are not affordable for people on low incomes.” Moreover, a majority of respondents in the ABA/NCSC 2015 Survey indicated they would prefer to handle a problem themselves. According to the ABA Self-Help Center Census, 3.7 million people turn to self-help centers annually. Another reason individuals may not turn to lawyers is a lack of trust.

In short, evidence suggests that:

- Civil legal needs are common and widespread.
- Many legal needs involve “bread-and-butter issues” that are at the core of contemporary life, affecting livelihood, shelter, or the care and custody of dependents.
- People who are vulnerable or disadvantaged often report more of these civil legal needs and a greater incidence of adverse outcomes.
- Most civil justice situations will never involve contact with a lawyer or a court.
- The most important reasons that people do not take their civil legal needs to lawyers or courts are:
  - they do not think the issues are legal or do not believe that the law offers a solution; and
  - they often believe that they understand their situations and are taking appropriate actions.
- The cost of legal services or court processes affects how people address their civil legal needs.

3. The vast number of unrepresented parties in court adversely impacts all litigants, including those who have representation.

The unmet need for legal services adversely impacts all users of the justice system, particularly in state courts. The Conference of Chief Justices has reported that large numbers of unrepresented litigants clog the courts, consume the time of court personnel, increase the legal fees of opposing parties due to disruptions and delays, increase the number of cases that advance to litigation, and result in cases decided on technical errors rather than the merits. These problems affect all litigants and are exacerbated by a lack of uniform and reliable forms.
4. Many lawyers, especially recent law graduates, are unemployed or under-employed despite the significant unmet need for legal services.

As ABA Past President James Silkenat observed in 2013 in establishing the Legal Access Job Corps Task Force to place recent law graduates in underserved communities, “Our nation is facing a paradox involving access to justice. On the one hand, too many people with low and moderate incomes cannot find or afford a lawyer to defend their legal interests, no matter how urgent the issue. On the other hand, too many law graduates in recent years have found it difficult to gain the practical experience they need to enter practice effectively.” The New York Times reported that “forty-three percent of all 2013 law school graduates did not have long-term full-time legal jobs nine months after graduation.” The Commission found that the paradox noted by Silkenat continues, notwithstanding Legal Access Jobs Corps and similar efforts by state bars and others. Data from the U.S. Bureau of Labor Statistics indicate that unemployment for recent law graduates remains significantly higher compared to the national average across other labor categories.

5. The traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.

Experts on the legal services marketplace identify the traditional law practice business model as a major obstacle to increasing access to legal services. The traditional model is built upon individualized, one-on-one lawyering, through solo and law firm practices that bill for services on an hourly basis. The billable hour model, which enables lawyers to earn more money if they spend more time on a matter, arguably provides less of an incentive to develop more efficient delivery methods than other ways to charge for services (for example, flat fees). This model also does not easily allow for innovations in scalability, branding, marketing, and technology that are found in most industries.

Some have argued that broad-reaching restrictions on the unauthorized practice of law, which limit who can offer legal services, also have adverse effects on the delivery of legal services. Although many legal problems require a full-service lawyer, others do not. The Commission found examples of providers other than lawyers who are delivering cost-effective and competent legal help.

Some have argued that the prohibition on partnership and co-ownership/investment with nonlawyers is also inhibiting useful innovations. Jurisdictions outside the United States are experimenting with new forms of alternative business structures (ABS) in an effort to fuel innovation in the delivery of legal services. In the United States, only two jurisdictions permit forms of ABS: the District of Columbia and Washington State. Although D.C. permits nonlawyer ownership, very few ABS firms have organized there because of the restrictions on ABS outside of D.C. Nonlawyer ownership in Washington State is limited to Limited License Legal Technicians (LLLT), who may own a minority interest in law firms. Outside of the United States, more jurisdictions permit ABS. Australia, England and Wales, Scotland, Italy, Spain, Denmark, Germany, the Netherlands, Poland, Spain, Belgium, Singapore, New Zealand and some Canadian provinces permit ABS in one form or another.
6. The legal profession’s resistance to change hinders additional innovations.

“The legal profession tends to look inward and backward when faced with crisis and uncertainty,” wrote one scholar in documenting the American legal profession’s historical resistance to change. This fact extends back to the early 1900s, even when other industries and society as a whole were in the midst of a significant transformation. As Henry P. Chandler observed in the early 1930s:

I am by no means blind to the failings of the legal profession. … I know that we are often too conservative. We don’t realize that the world is changing. We don’t sufficiently look ahead. Instead of trying to help in so shaping changes that they accomplish benefits with a minimum of disturbance, we often stand stubbornly for the maintenance of methods that have been outworn.

Chandler’s observation mirrors Karl Llewellyn’s 1938 critique of the profession: “Specialized work, mass-production, cheapened production, advertising and selling—finding the customer who does not know he wants it, and making him want it: these are the characteristics of the age. Not, yet, of the Bar.” Of course, this same critique was true at the turn of the 20th century, when Roscoe Pound famously described how the legal profession’s resistance to change directly contributed to the public’s dissatisfaction with the justice system in his speech, “The Causes of Popular Dissatisfaction with the Administration of Justice.”

The legal profession continues to resist change, not only to the public’s detriment but also its own. During the Commission’s public hearings and the ABA House of Delegates floor debate on Model Regulatory Objectives for the Provision of Legal Services, as well as breakout sessions at the National Summit on Innovation in Legal Services and grassroots legal futures meetings across the country, the Commission repeatedly heard similar remarks about the profession’s delayed adoption of, if not outright resistance to, innovations in technology, systems process improvement, and other developments that could benefit consumers of legal service but would affect traditional ways of delivering legal services. A 2016 study examining the state of the legal market observed: “At least since the onset of the recession in 2008, law firm clients have increasingly demanded more efficiency, predictability, and cost effectiveness in the delivery of the legal services they purchase. In the main, however, law firms have been slow to respond to these demands, often addressing specific problems when raised by their clients but failing to become proactive in implementing the changes needed to genuinely meet their clients’ overall concerns.” Consequently, the study reported, “clients have chosen to ‘vote with their feet’ by reducing the volume of work referred to outside counsel and by finding other more efficient and cost effective ways of meeting their legal needs.”

This resistance to change is seen outside law firms as well. Some regulators of the legal profession have been hesitant to explore whether to allow new business models or limited licensing programs. Legal aid providers sometimes resist adoption of document automation and instead continue to adhere narrowly to the one-lawyer/one-client model. Courts at all levels, plagued by ongoing cuts to their funding, sometimes decline to review possible improvements, because the review and potential implementation of such improvements might risk further dilution of already scarce resources.
7. Limited data have impeded efforts to identify and assess the most effective innovations in legal services delivery.

“Ongoing, systematic research ... is an essential component of improving the quality and availability” of legal services. Yet, systematic research on the current delivery of legal services—especially services for “ordinary individuals”—is strikingly limited. Given the rapid pace of change fueled by technology and consumer demands for efficiency, it is impossible for the ABA and other bar associations to explore every potential innovation in the delivery of legal services. As observed by the National Legal Aid and Defender Association, in the absence of “hard evidence regarding which delivery initiatives actually meet the needs of the people we are trying to serve, the ability to address the nation’s huge justice gap will be seriously hampered.”

Fortunately, academic and federal governmental interest in “access to justice” research is increasing, with coordinated efforts to set priorities and develop research standards in the field. Increasingly, researchers are also collaborating with legal services providers to assess existing services and guide innovation. The Commission’s fact-finding has benefitted enormously from these efforts. The Commission strongly supports “evidence-based” assessment of both new and existing forms of legal services delivery, as is apparent from its recommendations.

B. Advancements in technology and other innovations continue to change how legal services can be accessed and delivered.

Technology has disrupted and transformed virtually every service area, including travel, banking, and stock trading. The legal services industry, by contrast, has not yet fully harnessed the power of technology to improve the delivery of, and access to, legal services. The impact of technology elsewhere has led academics and experts on the legal profession to conclude that the profession is “at the cusp of a disruption: a transformative shift that will likely change the practice of law in the United States for the foreseeable future, if not forever.” This is a transformation with “profound impacts on not just the legal profession, but also on clients as well as the broader society.”

In short, lawyers will deliver legal services in new ways, and these changes will create unique opportunities to “improve access to justice in communities not traditionally served by lawyers and the law” and to offer better value to clients who regularly use lawyers.

Technological change has not been evenly distributed. Technology, machine learning, artificial intelligence, and system process improvements are making some types of legal services more accessible and reducing (sometimes even eliminating) the cost of those services. For example, electronic tools for document review can decrease the cost of legal services by reducing the time and money spent on the discovery process. Document automation is cutting the cost of legal services by using pre-existing data to assemble a new document. Machine learning has not only revolutionized electronic discovery, legal research, and document generation, but it also is used to support brief and memoranda generation and predict legal outcomes.

There is a lively debate about cognitive computing and how it might change the delivery of legal services. As documented by the Legal Services Corporation’s Report of the Summit on the Use of Technology to Expand Access to Justice and the United Kingdom Civil Justice Council Online Dispute Resolution Report for Low Value Civil Claims, technology also

“Lawyers lag behind other professions in transforming the delivery of our services to better meet clients’ needs. It’s time for aggressive, intentional, and proactive innovation.”

Marty Smith
FOUNDER/DIRECTOR, METAJURE
SEATTLE, WASHINGTON
affords extraordinary opportunities to expand the way legal services are delivered and accessed in addressing access to justice issues. The LSC has provided significant impetus for the expanded use of technology in providing legal help to the poor. Many state and local civil legal aid organizations, using special technology grants from LSC (and sometimes on their own initiative and with funds procured from state sources), have developed web-based or mobile applications that provide a vast array of resources, such as legal information and guidance, automated forms, assistance with locating a lawyer to provide limited-scope services, and other innovations. These tools are intended for the poor, but because of the reach of the internet and mobile technology, the tools are generally available to and often used by others as well. The civil legal aid community has been a significant leader in developing technology-based legal tools for the masses, in addition to for-profit technology startups.

The Commission considered the impact of technology across many aspects of the legal profession, including courts, bar associations, law schools, and beyond.

1. Courts, bar associations, law schools, and lawyers are experimenting with innovative methods to assist the public in meeting their needs for legal services.

As noted earlier, there remains considerable resistance to change in many parts of the legal industry. At the same time, however, an increasing number of courts, bar associations, law schools, lawyers, and others are experimenting in important ways.

a. Courts

Courts are innovating in various ways. Examples include the following:

- REMOTE ACCESS TECHNOLOGY: Courts are developing and employing technology to make some services available remotely, such as document filing, docket/record searches, document preparation, and similar services. For example, remote-access courthouse kiosks can be instrumental in providing access to those who face geographic limitations. In Arizona, such a kiosk was placed north of the Grand Canyon so that constituents could access the court system instead of driving 7.5 hours to reach the closest courthouse. Similarly, mobile technology can facilitate access for litigants. Judge Ann Aiken, Chief Judge of the Oregon Federal District Court, uses mobile technology with teams of prosecutors, judges, public defenders, and probation officers to provide round-the-clock support to individuals returning to society after incarceration.

- SELF-HELP CENTERS: Self-help centers inside of courthouses also are common, with more than 500 centers across the U.S. These self-help centers provide users with various services, including live assistance, pro bono and other referrals, document support, web-based information, and telephone assistance.

- ONLINE DISPUTE RESOLUTION: Online dispute resolution (ODR) is regularly used in the private sector to help businesses and individuals resolve civil matters without the need for court proceedings or court appearances, and there is increasing interest in creating court-annexed ODR systems. Some courts are already employing ODR outside the U.S.: Rechtwijzer 2.0, Online Problem-Solving Dispute Resolution for Divorce (Dutch Legal Aid Board, Netherlands) and Civil Resolution Tribunal, Online Solution Explorer for Small Claims and Condominium Disputes (British Columbia Ministry of Justice, Canada). England and Wales recently proposed an online court. Some observers predict that “in time, most dispute resolution processes will likely migrate online.”

- JUDICIALLY-AUTHORIZED-AND-REGULATED LEGAL SERVICES PROVIDERS: A growing number of U.S. jurisdictions have authorized Legal Services Providers (LSPs) other than lawyers to help address the unmet need for legal services.
services, and additional jurisdictions are considering doing so. As the Washington Supreme Court observed in implementing the Limited Practice Rule for Limited License Legal Technicians (LLLTs), “There are people who need only limited levels of assistance that can be provided by nonlawyers.” The Commission studied and considered six examples of already-existing LSPs:

**Federally-Authorized LSPs.** There is a wide range of legislatively authorized LSPs serving in federal courts and agencies. For example, bankruptcy petition preparers assist debtors in filing necessary legal paperwork in the United States Bankruptcy Court. Bankruptcy petition preparers are only permitted to populate forms; additional services may constitute the unauthorized practice of law. Notably, “research on lay specialists who provide legal representation in bankruptcy and administrative agency hearings finds that they generally perform as well or better than attorneys.”

Other examples of federal agencies using the services of those who would fall under the umbrella of LSPs include the Department of Justice (DOJ), the Department of Homeland Security (DHS), the Equal Employment Opportunity Commission (EEOC), the Internal Revenue Service (IRS), the Patent and Trademark Office (PTO), and the Social Security Administration (SSA). Both the Board of Immigration Appeals, within DOJ, and U.S. Citizenship and Immigration Services, within DHS, permit accredited representatives who are not licensed lawyers to represent individuals in immigration proceedings. Individuals who are not licensed to practice law may represent claimants before the EEOC in mediations, although they are not entitled to fees if an adverse finding is made against the employer. Several types of professionals in addition to lawyers are authorized to practice before the IRS subject to special regulations, including certified public accountants, enrolled agents, enrolled retirement plan agents, low income taxpayer clinic student interns, and unenrolled return preparers. Patent agents are authorized to practice before the PTO on a limited basis— for preparing and filing patent applications (and amendments to applications) as well as rendering opinions as to the patentability of inventions. The SSA permits individuals who are not licensed to practice law to represent claimants. Representatives may obtain information from the claimant’s file, assist in obtaining medical records to support a claim, accompany a claimant to interviews/conferences/hearings, request reconsideration of SSA determinations, and assist in the questioning of witnesses at SSA hearings as well as receive copies of SSA determinations.

**Courthouse Navigators (New York, Arizona).** New York’s judicially created limited-scope courthouse navigator pilot program, launched in 2014, prepares “college students, law students and other persons deemed appropriate … to assist unrepresented litigants, who are appearing” in housing court in non-payment, civil, and debt proceedings. Courthouse navigators are not permitted to give legal advice and do not give out legal information except with the approval of the Chief Administrative Judge of the Courts. The duties of courthouse navigators include using computers located in the courthouse to retrieve information, researching information about the law, collecting documentation needed for individual cases, and responding to a judge’s or court attorney’s questions about the case. Courthouse navigators are not permitted to provide legal advice, file any documents with the court with the exception of court-approved “do-it-yourself” documents, hold themselves out as representing the litigant, conduct
negotiations with opposing counsel, or address the court on behalf of the litigant, unless to provide factual information at the court’s discretion.”106 The program is volunteer-based and operates under the supervision of a court navigator program coordinator. The New York Courthouse Navigator Program entails three programs, each with its own structure and supervising entity.107 The courthouse navigators volunteer through either the New York State Unified Court System’s Access to Justice Program, the University Settlement Program, or the Housing Court Answers program, which all have supervisors who are lawyers.108

The main goals of the program are to help self-represented litigants “have a productive court experience through offering non-legal support” and to give people (often students) practical experience as well as an opportunity to help people in need, make new contacts, and interact with lawyers and judges.109 In 2014, a total of 301 navigators were trained to provide services through 14 training meetings.110 The Housing Court Navigators contributed about 3,400 pro bono hours to the program and helped approximately 2,000 unrepresented tenants and landlords, and the Civil Court Navigators assisted over 1,300 litigants.111

The success of the court navigator pilot program led to proposed legislation expanding the role of nonlawyers both in the services provided and the scope of cases covered. The new legislation would establish two new programs: Housing Court Advocates and Consumer Court Advocates. These programs would be implemented and overseen by the judiciary, providing limited free services to unrepresented individuals living at or below 200 percent of the federal poverty level.112 Attorneys would be required to supervise specially-trained nonlawyer “advocates” to offer similar services as courthouse navigators as well as “advice, counsel, or other assistance in the preparation of an order to show cause to vacate a default judgment, prevent an eviction, or restore an action or proceeding to the calendar,” to “negotiate with a party or his or her counsel or representative the terms of any stipulation order to be entered into,” and to “address the Court on behalf of any such person.”113 Another initiative from New York is Legal Hand, a program designed “to reach people at storefront locations in their neighborhoods, staffed with nonlawyer volunteers who provide free legal information, assistance, and referrals to help low-income individuals with issues that affect their lives in areas such as housing, family, immigration, divorce and benefits, and prevent problems from turning into legal actions.”114 Supported by a $1 million grant from an anonymous donor, the “facilities, which are visible from the street and welcoming, are open during regular business hours, with weekend and evening hours as well.”115 The first three locations are in

New York Housing Court Navigators

- **3,400** pro bono hours contributed
- **2,000** unrepresented tenants and landlords helped
Crown Heights, Brownsville, and South Jamaica.

Arizona launched a similar court navigator pilot initiative in 2015 to address its family law representation crisis. In over eighty percent of family court disputes in Arizona, individuals are faced with the challenge of representing themselves. According to Arizona’s 2015 Commission on Access to Justice Report, the program will “help guide the self-represented litigant in efficiently completing the family court process.” The court will train and supervise undergraduates from Arizona State University to serve in this role. Specifically, the program will use court-trained and lawyer-supervised college students in a series of dedicated workshops to provide information and hands-on assistance in completing necessary filings and other paperwork, and to help guide the self-represented litigant in efficiently completing the family court process. The courthouse navigators will not be permitted to provide legal advice at any point during the process. The Arizona court system is in the process of redesigning its existing Self-help Center and is applying for an AmeriCorps grant to create the Court Navigator Program.

Courthouse Facilitators (California, Washington State). Courthouse facilitators provide unrepresented individuals with information about court procedures and legal forms in family law cases. In California, the Judicial Council administers the program by “providing funds to these court-based offices, which are staffed by licensed attorneys.” The California Family Code mandates that a licensed lawyer with expertise in litigation or arbitration in the area of family law work with the family law facilitator to oversee the work of the facilitator and to deal with matters that require a licensed attorney throughout the process. Courthouse facilitators are governed by the California Family Code, which established an office for facilitators in over 58 counties in California. California’s Advisory Committee on Providing Access and Fairness has been given the task of implementing a plan to give greater courthouse access to litigants who cannot obtain representation. Courthouse facilitators are one of the options for litigants without such representation. While courthouse facilitators are not permitted to provide legal advice, they help to refer unrepresented clients to legal, social services, and alternative dispute resolution resources. More than 345,000 individuals visit the family law facilitators’ offices throughout California each year.

Washington State has an analogous program established by the Washington Supreme Court, with oversight from the Family Courthouse Facilitator Advisory Committee. The Committee is charged with establishing minimum qualifications and administering continuing training requirements for courthouse facilitators. During 2007, facilitators statewide conducted approximately
57,000 customer sessions and made 108,000 customer contacts. The vast majority of customers using the facilitator program report being very satisfied with the services they receive. Nine out of ten customers agree that they feel more knowledgeable and prepared immediately after a visit with a facilitator, and eighty-two percent say they have more trust and confidence in the courts. Facilitator-assisted litigants report more positive court experiences, are more satisfied with court proceedings, outcomes, and choice of representation, and have more trust and confidence in the courts than unassisted self-represented litigants. Moreover, nearly all judicial officers and administrators associated with a facilitator program indicate that the program has a positive impact on self-represented litigants, improves access to justice and the quality of justice, and increases court efficiency.

The biggest challenges facing facilitator programs include program funding, managing self-represented litigants’ needs for legal advice, and ongoing facilitator training.

Limited Practice Officers (Washington State). The Washington Supreme Court authorizes certification of limited practice officers to select and complete real estate closing documents. The Limited Practice Board was created to oversee the administration of limited practice officers and ensure that officers comply with the Limited Practice Rule, APR 12. Limited practice officers are not permitted to provide legal advice or representation.

Limited License Legal Technicians (Washington State). The Limited License Legal Technician (LLLT) is authorized and regulated by the Washington Supreme Court and is “the first independent paraprofessional in the United States that is licensed to provide some legal advice.” To become an LLLT, one must complete an educational program including community college coursework as well as law school level courses specific to the particular practice area education. Prior to licensure, the prospective LLLTs must complete “3,000 hours of work under the supervision of a licensed attorney; they must pass three exams prior to licensure (including a professional responsibility exam); and they must carry malpractice insurance.” The first LLLTs are licensed in the area of family law. LLLTs are subject to rules of professional conduct almost identical to those that apply to lawyers, and a disciplinary system that mirrors that for lawyers applies to them.

Document Preparers (Arizona, California, and Nevada). The California legislature implemented a legal documentation assistant (LDA) program in 2000, providing the public with “an experienced professional who is authorized to prepare legal documents” and to assist “self-help clients” to “handle their own legal matters without the cost of an attorney.” Uncontested divorces, bankruptcies, and wills are examples of areas in which California’s LDAs are permitted to work. These LDAs are not permitted to give legal advice or represent a client in the courtroom. They often have knowledge, professional experience, and education similar to that of paralegals. The program includes minimum educational and competency requirements.

The Arizona Supreme Court adopted a certification program for legal document preparers in 2003. Arizona mandates that all certified LDAs satisfy minimum education and testing requirements as well as attend a minimum of ten hours of approved continuing education each year. Moreover, the Arizona Code of Judicial Administration regulates LDAs in Arizona, and Arizona provides a list that is available to the public of LDAs.
who have violated the Arizona Code of Judicial Administration.\textsuperscript{150} In these instances, the LDAs have had their certificates either revoked or suspended.\textsuperscript{151}

Since March 2014, Nevada offers a similar legal document preparer program.\textsuperscript{152} Like California, the Nevada program is legislatively authorized, but it does not include a minimum educational or competency component. Nevada requires that all legal document preparers be registered with the Secretary of State.\textsuperscript{153} Nevada also has a process for consumers to file complaints and provides a list of suspended and revoked licenses.\textsuperscript{154}

In addition, a number of U.S. jurisdictions are contemplating the adoption of LSP programs. For example, in February 2015, the Oregon Legal Technicians Task Force recommended to the Oregon State Bar Board of Governors that “it consider the general concept of a limited license for legal technicians as one component of the BOG’s overall strategy for increasing access to justice.”\textsuperscript{155} In 2013, the California State Bar Board Committee on Regulation, Admission, and Discipline Oversight created a working group that recommended that California offer limited licenses to practice law without the supervision of an attorney. Specifically, the Board recommended that the license cover “discrete, technical, limited scope of law activities in non-complicated legal matters in 1) creditor/debtor law; 2) family law; 3) landlord/tenant law; 4) immigration law.”\textsuperscript{156} The State Bar of California’s Civil Justice Strategies Task Force is conducting further study. In 2015, the Utah Supreme Court gave preliminary approval to authorize licensed paralegal practitioners to provide legal services in discrete areas, such as custody, divorce, name change, eviction, and debt collection.\textsuperscript{157} In reaching this conclusion, the Task Force observed:

> We recognize the value of a lawyer representing a client in litigation, or advising a client about options, or counseling a client on a course of action. We recognize the valuable services that lawyers provide to their clients every day, in and out of court. But the data show that, even after years of effort with pro bono and low bono programs, a large number of people do not have a lawyer to help them. The data also show that the demand is focused on the areas where the law intersects everyday life, creating a “civil justice situation.” The people facing these situations need correct information and advice. They need … an alternative source for that assistance.\textsuperscript{158}

Minnesota recently made a similar recommendation,\textsuperscript{159} and other states, including Colorado,\textsuperscript{160} Connecticut,\textsuperscript{161} Florida,\textsuperscript{162} Michigan,\textsuperscript{163} and New Mexico,\textsuperscript{164} are exploring whether to define and expand who can render legal and law-related services.

A useful, albeit not perfect, comparison to those LSP categories cataloged above can be found in the delivery of medical services. Healthcare is now delivered not only by licensed doctors, but also by an increasing array of licensed and regulated providers, such as nurse practitioners, physicians’ assistants, and pharmacists. The “medical profession and nurse practitioners [are] a poignant example of less costly service providers who have become a more widely used, professionalized, and respected component of the health care market.”\textsuperscript{165} These providers supplement the work performed by doctors, but do not replace doctors. Similarly, LSPs are not meant to replace lawyers or reduce their employment opportunities, just as nurse practitioners, physician’s assistants, pharmacists and phlebotomists are not meant to replace doctors. LSPs are intended to fill gaps where lawyers have demonstrably not satisfied existing needs. A number of scholars\textsuperscript{166} and regulators\textsuperscript{167} predict that LSPs will improve access to legal services by offering assistance to those in need at a lower cost than lawyers.

Additional court-based innovations are described in the Inventory of Innovations found on the Commission’s website.

b. Bar Associations

State, local, and specialty bar associations across the country are innovating in various ways. Examples include the following:
• ONLINE LEGAL RESOURCE CENTERS AND LAWYER REFERRAL INNOVATIONS Bar associations have continued to operate lawyer referral services that offer a public-service oriented source of guidance to moderate income consumers who do not know how to locate a qualified lawyer. These bar association lawyer referral services are expanding their online offerings. Another online innovation from bar associations is the creation of public directories and marketplaces for the public to find needed legal help. Many bar associations offer modest-means panels, where individuals meeting income requirements are matched with lawyers at fixed or reduced hourly rates for representation in matters that include bankruptcy, family law/domestic relations issues, landlord-tenant disputes, or simple wills.

The ABA and other bar associations have devoted substantial time and energy to evaluating and recommending various tools, especially technology-driven innovations and systems process improvements, to enhance the delivery of legal services. For example, the ABA Blueprint Project “is a coalition dedicated to improving access to legal services through changes in policies, procedures, and systems designs.” Similarly, the ABA Law Practice Division’s Legal Technology Resource Center has long helped lawyers innovate by providing “legal technology guidance to ABA members through various outlets including a technology blog, publications, monthly webinars and its extensive website.”

• ACCESS TO JUSTICE AND FUTURE OF LEGAL SERVICES ENDEAVORS Numerous state and specialty bar associations have engaged in grassroots efforts through task forces and commissions devoted to access to justice and the future of legal services. Nearly every state has engaged in an access to justice/legal needs study in the past decade. “Access to Justice Commissions” now exist in thirty-nine states and have been created by the relevant state supreme court or through the efforts of bar leaders or others. These commissions are typically collaborative entities that bring together courts, the bar, civil legal aid providers, and other stakeholders in an effort to remove barriers to civil justice for low-income and disadvantaged people. These efforts have produced many useful reforms, including expanded resources for civil legal aid programs, uniform court forms, improvements in services for self-represented litigants, and other innovations.

Additional bar association innovations are described in the Inventory of Innovations found on the Commission’s website.

c. Law Schools: Curriculum and Incubators

Many law schools are now educating law students about innovation in legal services delivery. For example, a number of law schools now offer courses on e-discovery, outcome prediction, legal project management, process improvement, virtual lawyering, and document automation. This effort is consistent with the recommendations from the ABA Task Force on Legal Education that law schools should offer more technology training, experiential learning, and the development of practice-related competencies. Other legal education innovations include incubators to provide recent law students and graduates with an opportunity to provide legal services to low and moderate-income clients. Some incubators focus mainly on delivery of legal services to those in need while others require their recent law

“Our law schools must provide students with tools to innovate boldly and therefore to reimagine the structures and possibilities of legal services in the new millennium.”

Daniel B. Rodriguez
HAROLD WASHINGTON PROFESSOR AND DEAN
NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW
CHICAGO, IL
graduates to engage in rigorous innovation. More than thirty-five schools now offer this sort of post-graduate incubator experience, and most law schools offer clinical opportunities for students to gain practical, hands-on training.

Additional law school innovations are described in the Inventory of Innovations found on the Commission’s website.

d. Lawyers, Law Firms, and General Counsel

Many other innovations, both technology-driven and process-driven, have transformed the delivery of legal services over the past fifteen years, and new possibilities emerge on a near-daily basis. Some innovations affect only certain segments of the market; for example, legal process outsourcing and electronic discovery typically affect corporate and organizational clients. Others have changed how lawyers calendar and docket, manage and store case files, conduct legal research and discovery, communicate with clients and opposing counsel, and bill their time. Some innovations shape all levels of the legal services marketplace, such as expert system tools, which help consumers of legal services work through complicated legal issues using branching questions and answers, and mobile applications, which enhance accessibility for individual consumers with personal legal needs (for example, the creation of a power of attorney). Creative partnerships between services providers also fuel innovations. A number of examples are highlighted here, and additional examples are described in the Inventory of Innovations found on the Commission’s website.

- ALTERNATIVE BILLING Business and organizational clients increasingly demand that their law firms look at alternatives to hourly billing as a way of reflecting the value of legal services. Since the 1960s, the predominant way that law firms have charged for their work has been through the use of billable hours. In recent years, however, consumers have become aware of and started to more regularly demand an alternative fee arrangement (AFA). These AFAs include fixed pricing for discreet services, flat fees, contingency fees, other fee arrangements tied to matter-related outcomes, and hybrids of AFA and traditional hourly billing. As another example of innovation in billing practices, some firms use enticements, for example consultations for $1 and $2 per minute. In a recent Altman Weil survey of large and midsize law firms, ninety-three percent of firms reported that they use AFA billing. Of these firms, one hundred percent of large firms, measured by 500 or more lawyers, reported that they use some form of non-hourly based billing while eighty-eight percent of firms with 50-99 lawyers use non-hourly billing. Nearly a third of firms reported that their usage of non-hourly based billing was based on proactive behavior, while sixty-eight percent used AFAs in response to client requests. The traditional billable hour can create significant buyer apprehension about the ultimate total cost that may be imposed for personal legal services, an amount often unknowable at the outset. Reducing uncertainty in price, essential to overcoming buyer reluctance, is a key feature of alternative billing practices. One example of an effort to do so is SmartLaw Flat Fee Legal Service, introduced by the Los Angeles County Bar Association in
SmartLaw “connect[s] consumers with qualified attorneys who can help them handle uncontested divorces, small business formation and trademark registration.” Fees are set at $800 for an uncontested divorce or LLC business formation, and $500 for trademark registration.

**DOCUMENT ASSEMBLY AND AUTOMATION**

Document assembly tools automate the creation of oft-used legal documents, such as wills, leases, contracts, and client engagement letters. These tools decrease the amount of lawyer-time involved in preparing documents, thus increasing the efficiency of a lawyer’s practice, or in some cases, allowing individuals to create legal documents without the assistance of a lawyer. A 2009 survey by the ABA on legal technology adoption indicated that thirty-four percent of respondents used document assembly software, an increase from thirty percent in the previous year. Many legal aid offices also use document assembly software to serve clients. For example, A2J Author, a joint project between Chicago-Kent College of Law and the Center for Computer-Assisted Legal Instruction, has been used to reach nearly two million legal aid clients across the country to conduct automated interviews and generate legal documents.

**LEGAL PROCESS OUTSOURCING**

Legal process outsourcers (LPOs) are reducing the cost of legal services, especially for business and organizational clients, while putting pressure on the traditional law firm business model. Legal process outsourcing involves the performance of discrete legal projects or tasks by typically less expensive third party vendors. The LPO industry is currently valued at one billion dollars in revenue per year. LPOs often are based in countries overseas or in smaller, less expensive U.S. markets. LPOs initially offered transcription, word processing, and other routine tasks, including paralegal services. Over time, LPOs have expanded to offer more substantive tasks, such as patent applications, e-discovery, contract management, compliance, and legal research for a fraction of the price typically charged by law firms. One benefit for law firms is that their lawyers spend more time on higher value-added activities rather than on routine tasks (that is, they are more likely to be practicing “at the top of their licenses”).

**LEGAL STARTUPS**

The concept of “legal startup” has been defined as “a newly formed organization providing innovative products or services to improve legal service delivery.” The legal-tech startup industry, essentially nonexistent a decade ago, is developing, although little data exists to accurately assess the impact of legal startups. As one rough measure, in 2009, fifteen legal startups appeared on AngelList, a website for startups and their angel investors. In 2016, over 400 legal startups (and perhaps as many as 1,000) were in existence. Financial investment into legal startups, perhaps, is another measure—in 2013, it was reported that $458 million had been invested in legal startups. Legal startups have tapped into a number of market segments:

1. Business to consumer, including small businesses—for example, finding lawyers, lawyer ratings, and lawyer matching; do-it-yourself legal tools; law for small transactions, such as a simple contract; form documents; document automation/assembly; dispute avoidance/management; collaborative law; and litigation finance.

2. Business to business—this includes many of the items listed under business to consumer as well as legal supply chain management; billing data analytics; legal temp services and contract lawyers; legal process outsourcing; compliance; contract management; risk management; and online dispute resolution.

3. Business to lawyer/law firm/legal departments—this includes many of the items listed in the above categories as well as lawyer marketing, legal research, crowdsourcing, analytics, legal education and...
training, law practice management, client intake/conflicts, time/billing, virtual legal team tools, lawyer recruiting, project management, knowledge management, e-discovery tools, vendor marketplaces, and trial/transactional tools.\textsuperscript{201}

- **MEDICAL-LEGAL PARTNERSHIPS** Medical-legal partnerships (MLPs) involve “hospitals and health centers that partner with civil legal aid resources in their community to: (1) train staff at the hospitals and health centers about how to identify health-harming legal needs; (2) treat health-harming legal needs through a variety of legal interventions; (3) transform clinic practice to treat both medical and social issues that affect a person’s health and well-being; and (4) improve population health by using combined health and legal tools to address widespread social problems, such as housing conditions, that negatively affect a population’s health and well-being.”\textsuperscript{202} MLPs currently operate at 276 hospitals and health centers in 38 states, “providing direct legal services to patients; training and education to healthcare providers; and a platform for systemic advocacy.”\textsuperscript{203} Examples of partners collaborating to offer MLPs include bar associations, civil legal aid agencies, law schools, pro bono law agencies, hospitals, health centers, medical schools, and residency programs.\textsuperscript{204}

- **ARTIFICIAL INTELLIGENCE** Artificial intelligence is impacting the way legal services are delivered and will continue to do so as technology advances. Ross Intelligence is an example of how artificial intelligence can be used to improve the delivery of legal services. Ross is powered by IBM Watson, which is a machine learning system that famously beat a Jeopardy game show champion, and helps lawyers conduct research.\textsuperscript{205} According to its creators, “Ross Intelligence is an AI legal researcher that allows lawyers to do legal research more efficiently, in a fraction of the time. It does that by harnessing the power of natural language processing and machine learning to understand what lawyers are looking for when conducting their research, then get smarter each time to bring back better results. It grows alongside our lawyers.”\textsuperscript{206}

- **MOBILE APPLICATIONS** Mobile applications (“apps”) are making legal services more accessible and affordable, both for lawyers engaged in the practice of law and for the public in need of legal help. Apps already in the marketplace help lawyers find substitute counsel,\textsuperscript{207} conduct legal research,\textsuperscript{208} and much more.\textsuperscript{209} With regard to personal legal services, mobile technology tools “for immigrants, the indigent, those who face arrest and the lawyers who help them have been popping up with increasing frequency.”\textsuperscript{210} As one scholar observed: “Apps in this area not only give everyday people resources to solve their legal problems—they educate people about the law and empower them. In the end, we may end up with a more educated citizenry that can engage meaningfully in the political process.”\textsuperscript{211} Individuals who desire more efficient and affordable legal assistance also use mobile apps. For example, one app allows users to create, sign, and send legally binding contracts from a smartphone, for free.\textsuperscript{212} The legal app marketplace, however, can be fragile. For example, one popular app
for addressing parking tickets received venture capital funding and accolades yet also has been blocked by some municipalities.\textsuperscript{213} Consumers can benefit from the convenience and affordability of these services, but also should be aware that the legal help received via a mobile app is not necessarily an effective substitute in many circumstances for legal help from an attorney.

- **NONPROFITS** Nonprofit organizations are another source of innovation, and they are often focused on delivering legal services to moderate-income households. For example, "the DC Affordable Law Firm was created in 2015 as a 501(c)(3) tax-exempt charitable entity by Georgetown University Law Center and two major law firms, DLA Piper and Arten Fox, with a mission to serve Washington DC residents who do not qualify for free legal aid and cannot afford standard hourly rates charged by lawyers."\textsuperscript{214} Similarly, Open Legal Services is a "nonprofit law firm for clients who earn too much to qualify for free/pro bono legal services, but also earn too little to afford a traditional private firm."\textsuperscript{215} Open Legal Services offers legal representation in family law and criminal law matters. The Chicago Bar Foundation uses an incubator model in its Justice Entrepreneurs Project, which helps "newer lawyers to start innovative, socially conscious law practices in the Chicago area that provide affordable services to low and moderate-income people."\textsuperscript{216}

- **PROCUREMENT EFFICIENCIES TO LOWER COSTS** Companies with significant legal spending increasingly use procurement professionals to manage legal costs.\textsuperscript{217} Although precise data is not available, industry observers estimate that "two-thirds of the Fortune 500, as well as an increasing number of multinational companies, have dedicated legal procurement professionals."\textsuperscript{218} Procurement professionals are "stepping into a role that many lawyers aren’t trained in—namely, making well-informed purchasing decisions and negotiating with and managing the work performed by outside service providers," such as LPOs.\textsuperscript{219} As a result, these procurement professionals are creating pressures for additional innovation in the delivery of corporate legal services. In-house lawyers also are becoming more adept at procurement, negotiating, and supply chain management skills so that they can best manage the procurement of legal services for their clients.

- **PROJECT MANAGEMENT AND PROCESS IMPROVEMENT** Project management and process improvement are used by law firms as tools for improving efficiency in the delivery of legal services. One notable example is SeyfarthLean, developed by the law firm Seyfarth Shaw by combining Lean Six Sigma process improvement with project management and technology solutions.\textsuperscript{220} Lean Six Sigma is a process methodology designed to improve productivity and profitability by reducing waste.\textsuperscript{221} Legal project management involves more thoroughly defining the engagement at the outset, planning it, evaluating it, and closing it at the end, and can be applied across the board to all types of firms and legal matters.\textsuperscript{222} It is estimated that "[i]n many large law firms today, write-offs that are attributable to a lack of project management are typically costing in excess of 10 million dollars per year."\textsuperscript{223} Legal project management and process improvement eliminates these write-offs and also can lead to other efficiencies.

- **PREPAID LEGAL SERVICES PLANS AND INSURANCE COVERAGE** Group and prepaid legal services plans provide an efficient mechanism for matching clients in need of services with lawyers.\textsuperscript{224} Group legal plans create panels of lawyers with expertise in various areas and match them with plan member clients.\textsuperscript{225} Clients find a lawyer with the appropriate skills on the panel and, within the limits of the plan, receive the legal services they need.\textsuperscript{226} Lawyers often can establish a relationship with a client, and that same client may return to the lawyer to obtain different services that are at the lawyer’s normal rate and that are not covered under the group or
Many lawyers are turning to prepaid legal services plans to supplement their work, if not their entire practices. Clients pay a pre-established amount of money and in return are provided with needed legal services at no additional cost. Examples of prepaid legal services include, but are not limited to, review of simple legal documents, preparation of a simple will, and short letters or phone calls made by a lawyer to an adverse party. Legal insurance similarly can provide more affordable legal services while also helping individuals recognize when their problems have legal solutions.

• UNBUNDLING OF LEGAL SERVICES Many practitioners have used unbundling of legal services to reduce the cost of legal services. “Unbundling” refers to the practice of breaking legal representation into separate and distinct tasks, with “an agreement between the client and the lawyer to limit the scope of services that the lawyer renders.” A range of activities can be offered as unbundled services: advice, research, document drafting, negotiation, or court appearances. Unbundling can benefit clients, courts, and lawyers. Clients are served by unbundling because they can pay for specific, discrete legal services and avoid expenses from unnecessary or unwanted legal work. Lawyers may benefit from an increased number of clients because some consumers are willing or able to purchase a lawyer’s services only if those services are offered in an unbundled fashion. Courts may also benefit from the unbundling of legal services because fewer litigants appear in court without having sought at least some assistance from a lawyer. Not every legal problem is appropriate for unbundling, but limited-scope representation can be beneficial in many cases.

2. New providers of legal services are proliferating and creating additional choices for consumers and lawyers.

Consumers of legal services—both the public and lawyers themselves—are encountering new types of providers. These providers offer a range of services, including “automated legal document assembly for consumers, law firms, and corporate counsel; expert systems that address legal issues through a series of branching questions and answers; electronic discovery; legal process outsourcing; legal process insourcing and design; legal project management and process improvement; knowledge management; online dispute resolution; data analytics; and many others.”

U.S. Census data evaluated in one recent study indicated that, since 1998, law office employment has actually shrunk while “all other legal services” have grown eight and a half percent annually and 140 percent over the whole period. Another report from 2014 discussed the explosion of the “Online Legal Services Industry,” which the report defined as virtual law firms and legal service companies that deliver bundled and unbundled documents and services. Significantly, this industry did not exist a decade ago, but as of 2014, it was valued by one source at approximately $4.1 billion. This segment has grown at an annualized rate of nearly eleven percent over the previous five years and is projected to grow nearly eight percent to $5.9 billion by 2019.

Other sources also reveal the rapid growth in the number of nontraditional legal services providers. In 2012, legal service technology companies received $66 million in outside investments, but by 2013, that figure was $458 million. The explosion in the number of these entities appears to be a response to marketplace demands for new approaches to solving legal problems. Indeed,
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many consumers are choosing these nontraditional legal services providers over traditional law firms or are using these legal services providers to access law firm services.

A 2015 study identified several new categories of legal services delivery providers: (1) secondment firms, where lawyers work on a temporary or part-time basis in a client organization; (2) companies combining legal advice with general business advice that is typical of management consulting firms; (3) “accordion companies,” providing networks of trained, experienced lawyers to fill short-term law firm staffing needs; (4) virtual law practices and companies where attorneys primarily work from home to save on overhead expenses; and (5) law firms and companies offering tailored, specialty services with unique fee arrangements or delivery models. According to the study, forty-four of these non-traditional providers operate in the U.S. or Canada, ranging in size and length of existence. One company, operating for more than a decade, has fourteen offices globally and over 1,200 employees.

Individual consumers’ demands also are evolving. The public wants easy access to do-it-yourself tools, including tools that provide access to statutes and cases relevant to their legal problems. The public also wants simple services that are understandable and deliverable via mobile devices on demand.

C. Public trust and confidence in obtaining justice and in accessing legal services is compromised by bias, discrimination, complexity, and lack of resources.

1. The legal profession does not yet reflect the diversity of the public, especially in positions of leadership and power.

Goal III of the ABA’s mission includes promotion of full and equal participation in the ABA, the legal profession, and the justice system by all persons as well as the elimination of bias in the legal profession and the justice system. Several ABA entities are engaged in important efforts to advance this goal, including the Commission on Disability Rights, the Center for Racial and Ethnic Diversity, the Commission on Women in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Task Force on Gender Equity.

The United States is demographically diverse and becoming more so. The U.S. Census Bureau predicts that by 2020, “more than half of the nation’s children are expected to be part of a minority race or ethnic group.” While the legal profession has become more diverse, it does not reflect the diversity of the American public as a whole. This is especially true in positions of leadership and power in the profession.
Lawyer demographics are instructive. The number of licensed lawyers in 2015 was 1,300,705, sixty-five percent male and thirty-five percent female; eighty-eight percent white and twelve percent minorities. By comparison, the total population of the United States as of 2015 was 321,418,820, seventy-seven percent white and twenty-three percent minorities. The percentage of minorities in the total population is nearly double the percentage of licensed lawyers. Similarly, while approximately thirteen percent of the public includes persons with disabilities, they represent less than one half of one percent of attorneys working in law firms.

Law students are more demographically representative of the U.S. population. Women make up almost forty-eight percent of all law students, with minorities totaling twenty-eight percent. That said, studies show that women and minorities are more likely to leave the practice of law over time. As a result, fewer women and minorities are in positions of power within the legal profession. Consider that in 2015, ninety-two percent of law firm equity partners were white, with only nineteen percent of those partners being women. Overall, only slightly more than seven percent of equity partners are minorities, and two and a half percent are minority women. Women represent twenty-one percent of female general counsel in the Fortune 500, thirty percent of law school deans, and thirty-four percent of tenured law school professors.

Women comprise thirty-five percent of the judges serving on a federal court of appeals, and thirty-three percent of federal district court judges, although there remain six federal district courts where there has never been a female judge; only seven percent of federal appeals court judges are minority women, and there are currently seven federal courts of appeals with no active minority woman judge. As for women and minorities serving as judges for state courts, twenty-six percent of state court judges are women while just over eleven percent of state court judges are minorities. The salaries of women in the legal profession lag significantly behind men. A 2014 study revealed that women lawyers and judges earn about eighty-two percent of the salaries of men in the same positions.

2. Bias—both conscious and unconscious—impedes fairness and justice in the legal system.

“For the legal profession, understanding implicit bias and ways to de-bias one's approach to law-related issues and decisions is critical to a fair and representative perception and reality of access to justice and equity.” It is difficult to define the problem of implicit bias with precision, but as one scholar explained:

We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is
frail—such as the elderly—we will not raise our guard. If we think that another category is foreign—such as Asians—we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term “implicit bias” includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities.269

Implicit or unconscious bias contributes to injustice, and this injustice in turn causes the public to mistrust the legal system.270 The National Center for State Courts indicated that implicit bias may be a source for the “widespread” and enduring “public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts” even in the face of “substantial work by state courts to address issues of racial and ethnic fairness.”271

Over the years, the ABA has implemented tools, such as the Building Community Trust course, to educate its members and external audiences on cultural competency and implicit bias.272 To further address these issues, 2015-16 ABA President Paulette Brown created the ABA Diversity and Inclusion 360 Commission to formulate methods, policy, standards and practices to advance diversity and inclusion over the next decade.273 At the recommendation of the 360 Commission, the ABA House of Delegates adopted Resolution 107 in 2016 to encourage courts and bar associations with mandatory or minimum continuing legal education (MCLE) requirements to modify their rules to:

1. include as a separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias; and

2. require a designated minimum number of hours for this separate credit without increasing the total number of required MCLE hours and without changing the criteria for MCLE credit.

The Resolution further encourages the ABA through its Goal III and other entities to assist in the development and creation of continuing legal education programs addressing diversity and inclusion. The work of the ABA Diversity and Inclusion 360 Commission is a critical component of reestablishing the public’s trust.

3. The complexity of the justice system and the public’s lack of understanding about how it functions undermines the public’s trust and confidence.

Many Americans lack basic knowledge about the justice system. A common complaint among unrepresented litigants “when navigating the court system is difficulty reading and understanding the forms due to confusing and complex language.”274 Other challenges include “the complexity of the legal system, lack of knowledge, language and comprehension difficulties, lack of uniformity from court to court, and the sheer intimidation of the process.”275

Judge Fern A. Fischer, Deputy Chief Administrative Judge, NYC Courts and Director of the NYS Courts Access to Justice Program, testified in 2011 about the complexities facing individuals in the justice system:

Most individuals would not attempt to play a sport, play a game, take an exam, or fill out an important application without knowing the rules and instructions. Indeed, we give people clear rules or instructions on how to complete these tasks. But, we often do not always provide unrepresented litigants the rules, instructions and necessary tools when they are attempting to navigate the courts. In our adversarial sys-
tem, the information, rules and forms unrepresented litigants need to be successful on their case are often not available or accessible. We often hide the ball necessary to play the game. It is time to stop hiding the ball, so the game is fair. …

In order to achieve a major step forward in access to justice, standardization and simplification of forms and procedures is an effort we must embrace and get done. … Recently, when preparing a DIY program for minor name changes my staff learned that depending on the county a family resided in, the family may be charged one fee for changing the names of all the children in the family or in other counties a fee will be charged for each child. In some counties the fee depended on who was at the counter at the time. In some counties three copies of the forms were required. In other counties less than three copies are required. Some counties required a petition others did not. …

Justice should not be more expensive or complicated depending on which county you reside. Moreover, justice should not be stymied by obstacles we can remove.276

The complexity of the justice system, coupled with a lack of knowledge about how to navigate it, undermines the public’s trust and confidence.277 The Commission found evidence in many areas of “the need for procedural and systemic reform, such as the adoption of plain language forms for court actions and the simplification of procedures in high-need areas such as family law, immigration, and consumer debt.”278 Research also suggests “the need to improve courts’ treatment of pro se litigants and adherence to statutory burdens of proof even in the absence of lawyers.”279 A 2015 meta-analysis of extant research on lawyers’ impact on case outcomes found that lawyers make the biggest difference in high-volume settings in which cases are typically “treated perfunctorily or in an ad hoc fashion by judges, hearing officers and clerks.”280 In such contexts, “the presence of lawyers may improve case outcomes simply by encouraging court personnel to follow the rules.”281

When litigants, represented or not, are forced to endure long delays in court proceedings due to clogged dockets and inefficiencies driven by jurisdiction or even courtroom specific processes, a lack of uniform and reliable forms, or lack of court personnel and resources, their employers, also suffer, particularly small businesses. Harms include absent days from work, tardiness, and employees’ preoccupation with complex court procedures, rules, and processes.

4. The criminal justice system is overwhelmed by mass incarceration and over-criminalization coupled with inadequate resources.

In 1963, the U.S. Supreme Court established in Gideon v. Wainwright that all states, counties, and local jurisdictions must provide representation for criminal defendants unable to afford a private attorney.282 Nevertheless, as recognized by the U.S. Department of Justice, even with “the significant progress that has been made over 50 years after the decision, the promise of Gideon remains unfulfilled.”283 There are many contributing factors. Federal and state studies evidence inadequate funding and other resources available to lawyers and others responsible for defending the accused.284 For example, Louisiana has the highest number of incarcerated citizens, yet their public defender system is extremely underfunded and in a state of crisis: “Without sufficient resources necessary to provide the constitutionally guaranteed right to counsel for the more than 240,000 cases represented by public defenders each year, many districts will be required to begin restriction of services and potentially grinding the entire criminal justice system to a halt.”285 Due to the lack of funding, district offices must stop accepting new cases to prevent attorney caseloads from rising to the threat of ineffective assistance of counsel.286 When public defender services are restricted, cases are waitlisted, threatening public safety, jeopardizing justice for crime victims, and delaying court dockets.287 Consider the burden in Louisiana alone for the year of 2013: 247,828 total cases, comprised of 93,384 adult felonies and 109,175 adult misdemeanors.288 Of those 247,828
cases, over eighty-five percent of defendants charged with a criminal offense in Louisiana were represented by the public defender system. 289

Providing competent counsel is the best means of ensuring the proper operation of the constitutional safeguards designed to protect the innocent from unfair punishment, including death. 290 For most poor criminal defendants, “who are disproportionately members of communities of color,” the only access to legal representation is through the public defender system and, where “public defender services are inadequate, the accused poor will likely be deprived of constitutional procedural protections.” 291

The United States leads the world in incarceration rates, with more than two million people in jail or prison. 292 Although the current system of imprisonment is based on crime prevention, control, and punishment, this results in an overbalance toward punishment. 293 As a consequence, the U.S. “imprison[s] offenders, particularly nonviolent offenders, in number and length that are out of proportion to the rest of the world, largely as a result of the broad use of mandatory minimum sentences.” 294 Lengthy sentences and over-incarceration are burdening an already inadequately funded criminal justice system. Recommendations have been made to shift funding “from support for unnecessary, and unnecessarily lengthy, incarceration to proactive and preventative strategies for gang and drug offenses and for alternatives to incarcerations for reentry.” 295 “Justice systems – traditionally funded primarily from a jurisdiction’s general tax revenues – have come to rely increasingly on funds generated from the collection of fines and fees,” to sustain their budgets and, in some instances, have become “revenue centers that pay for even a jurisdiction’s non-justice-related government operations.” 296 As one example, the U.S. Department of Justice recently cited “the practices of the Ferguson, Missouri police department and municipal courts” in its investigation into police abuse. 297 The example of “Ferguson is not unique; similar problems exist throughout the country.” 298 There is often too little accountability and insufficient effort to assure that justice prevails in jails and prisons and too little effort made to coordinate re-entry and prison resources to better assist individuals in successful re-entry efforts. The pervasive lack of legal assistance with municipal and traffic violations has led to the abusive use of arrest warrants and fines in poor communities. 299

The excesses in the criminal justice system have (1) had a disproportionate effect on minority communities; (2) imposed multiple collateral consequences on those convicted of offenses, making it difficult for them to return to their communities and find jobs and housing and to obtain education and training; and (3) made the rule of law and the promise of equal justice meaningless concepts in some communities. In July 2015, then-ABA President William C. Hubbard and NAACP Legal Defense and Educational Fund President and Director-Counsel Sherrilyn Ifill issued a joint statement in which they pointed out the following:

Given the history of implicit and explicit racial bias and discrimination in this country, there has long been a strained relationship between the African-American community and law enforcement. But with video cameras and extensive news coverage bringing images and stories of violent encounters between (mostly white) law enforcement officers and (almost exclusively African-American and Latino) unarmed
individuals into American homes, it is not surprising that the absence of criminal charges in many of these cases has caused so many people to doubt the ability of the criminal justice system to treat individuals fairly, impartially and without regard to their race.

That impression is reinforced by the statistics on race in the criminal justice system. With approximately 5 percent of the world’s population, the United States has approximately 25 percent of the world’s jail and prison population. Some two-thirds of those incarcerated are persons of color. While crime rates may vary by neighborhood and class, it is difficult to believe that racial disparities in arrest, prosecution, conviction and incarceration rates are unaffected by attitudes and biases regarding race.

And, to the extent that doubts remain, the U.S. Department of Justice’s recent investigation of law enforcement practices in Ferguson, Missouri, should put them to rest. In Ferguson, the Justice Department found that the dramatically different rates at which African-American and white individuals in Ferguson were stopped, searched, cited, arrested and subjected to the use of force could not be explained by chance or differences in the rates at which African-American and white individuals violated the law. These disparities can be explained at least in part by taking into account racial bias.300

5. Federal and state governments have not funded or supported the court system adequately, putting the rule of law at risk.

According to the World Justice Project Rule of Law Index, the United States legal system ranks in the bottom half (13 out of 24) of North American and Western European countries.301 The U.S. ranks highly on most aspects of the rule of law, except for one: access and affordability.302 The Commission believes it is critical to the rule of law that the courts be accessible, understandable, and welcoming to all litigants. The profession must look for “user-driven solutions”303—that is, responses with a focus upon the experience of the consumers of the legal system.

The nation’s civil courts, surviving in a co-equal branch of government, are at a crossroads, threatened by legislative budget cuts, diminution of services, and a growing sense that most Americans are not served by the justice system.304 The budget cuts dramatically affect the justice system and result in reduced availability or elimination of court self-help services as well as other cost-saving measures, while compromising the ability of the courts to adequately serve the public.305

Part I of this Report provided a high-level overview of the Commission’s Findings. For more detail on the vast array of information reviewed, considered, debated, and discussed by the Commission, please visit the publicly available Commission website at [ambar.org/abafutures](http://ambar.org/abafutures) to find all written testimony and comments; video clips of hearing testimony, webinars, and the 2015 National Summit on Innovation in Legal Services; links to grassroots meetings and materials; an Inventory of Innovations collected from across the country and around the world; and other resources.

Part II provides the Commission’s Recommendations to enhance the public’s access to and the delivery of legal services in the 21st century.
PART II. THE DELIVERY OF LEGAL SERVICES IN THE UNITED STATES: THE COMMISSION’S RECOMMENDATIONS

“It is neither easy nor comfortable to embrace innovation, but we must do so—now. As lawyers, we have so much to offer to those who need help, but millions cannot access our services. This has to change, and we must drive that change. If we want to make justice for all a reality, we need to listen to different perspectives and open ourselves to new approaches and ideas, all while following our core value of protecting the public.”

Linda A. Klein
ABA PRESIDENT-ELECT 2015-16

As demonstrated in Part I, the American public faces significant, unmet legal needs. Although various efforts have improved the delivery of legal services and made those services more accessible for some, much work remains to be done. The Commission offers the following recommendations in order to build on past efforts and ensure that everyone has meaningful assistance for essential legal needs.

Recommendation 1.
The legal profession should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer.

The goal of justice for all remains elusive. The Commission recommends that the ABA, other bar associations, and individual members of the legal profession assist and implement the 2015 resolution by the Conference of Chief Justices and Conference of State Court Administrators to “support the aspirational goal of 100 percent access to effective assistance for essential civil legal needs and urge their members to provide leadership in achieving that goal and to work with their Access
In order to reach that goal, the Commission recommends that jurisdictions aspire to the following principles in an effort to address the crisis in access to justice for underserved populations.

**Principles for Access to Legal Services for the Underserved**

- Legal representation should be provided as a matter of right at public expense to low-income persons in adversarial proceedings in those categories of proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.

- Coordination and collaboration among service providers, the courts, the bar, client communities, government agencies and other stakeholders should occur systematically to support and facilitate access to justice for all.

- Legal representation should be competently and effectively provided, offered independently of the appointing authority, and free from conflicts of interest.

- Adequate compensation and funding should be provided to those who deliver legal services to ensure effective and competent representation.

- Court proceedings should be accessible, understandable, and welcoming to unrepresented litigants.

- Courts should adopt standardized, uniform, plain-language forms for all proceedings in which a significant number of litigants are unrepresented.

- Courts should ensure that all litigants have some form of effective assistance in addressing significant legal needs. A full range of services should be provided in all forums, and should be uniformly available throughout each state.

- Courts should examine and, if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers.

- Courts should adopt technologies that promote access for unrepresented litigants.

Furthermore, the recommendations contained in the Legal Services Corporation’s *Report of the Summit on the Use of Technology to Expand Access to Justice* provide important mechanisms for using technology to support the goal of justice for all. In particular, the Commission recommends implementation of the following strategies identified in the LSC Report:

- Creating in each state a unified “legal portal” that, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process.

- Deploying sophisticated document assembly applications to support the creation of legal documents by service providers and by litigants themselves and linking the document creation process to the delivery of legal information and limited scope legal representation.

- Taking advantage of mobile technologies to reach more persons more effectively.

- Applying business process/analysis to all access to justice activities to make them as efficient as possible.

- Developing “expert systems” to assist lawyers and other services providers.
The LSC Report observed: “Technology can and must play a vital role in transforming service delivery so that all poor people in the United States with an essential civil legal need obtain some form of effective assistance.” At a minimum, the public should have access to a “website accessible through computers, tablets, or smartphones that provides sophisticated but easily understandable information on legal rights and responsibilities, legal remedies, and forms and procedures for pursuing those remedies.” The ABA should collaborate with the LSC and other interested entities to pursue the implementation of the recommendations set out in the LSC’s Report of the Summit on the Use of Technology to Expand Access to Justice.

**Recommendation 2.**

**Courts should consider regulatory innovations in the area of legal services delivery.**

2.1. Courts should consider adopting the ABA Model Regulatory Objectives for the Provision of Legal Services.

Various regulatory innovations have been adopted in the U.S. and around the world with the stated objective of improving the delivery of legal services. The Commission believes that, as U.S. courts consider these innovations, they should look to the ABA Model Regulatory Objectives for the Provision of Legal Services for guidance. Regulatory objectives are common in other countries and offer principled guidance when regulators consider whether reforms are desirable and, if so, what form such changes might take. In February 2016, the ABA House of Delegates officially adopted the Commission’s proposed Model Regulatory Objectives. In doing so, the House of Delegates recognized “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.”

ABA Model Regulatory Objectives for the Provision of Legal Services

- A. Protection of the public
- B. Advancement of the administration of justice and the rule of law
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
- E. Delivery of affordable and accessible legal services
- F. Efficient, competent, and ethical delivery of legal services
- G. Protection of privileged and confidential information
- H. Independence of professional judgment
- I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

The ABA Model Regulatory Objectives offer courts much-needed guidance as they consider how to regulate the practice of law in the 21st century.
Regulatory objectives are a useful initial step to guide supreme courts and bar authorities when they assess their existing regulatory framework and any other regulations they may choose to develop concerning legal services providers. The Commission believes that the articulation of regulatory objectives serves many valuable purposes. One article cites five such benefits:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation]. Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.312

Regulatory objectives differ from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the “legal profession.”313 By contrast, regulatory objectives are intended to cover the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the ABA Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of lawyer conduct rules, the core values offer only limited, although still essential, guidance in the context of regulating the legal profession. The more holistic set of regulatory objectives can offer U.S. jurisdictions clearer guidance than the core values typically provide.314

The Commission encourages courts and bar authorities to use the ABA Model Regulatory Objectives when considering the most effective way for legal services to be delivered to the public. A number of jurisdictions are already engaging in this inquiry. For example, at least one U.S. jurisdiction (Colorado) has adopted a new preamble to its rules governing the practice of law that is intended to serve a function similar to the ABA Model Regulatory Objectives for the Provision of Legal Services.315 The Utah Supreme Court Task Force to Examine Limited Legal Licensing used the ABA Model as a reference in considering limited-scope licensure.316 Relatedly, the Conference of Chief Justices passed a resolution encouraging courts to consider the ABA Model Regulatory Objectives.317 In addition, the development and adoption of regulatory objectives with broad application has become increasingly common around the world. In adopting these ABA Model Regulatory Objectives for the Provision of Legal Services, the ABA joins jurisdictions outside the U.S. that have adopted them in the past decade or have proposals pending, including Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces.318

2.2. Courts should examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers.

The Commission supports efforts by state supreme courts to examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers (LSPs). Examples
of such LSPs include federally authorized legal services providers and other authorized providers at the state level, such as courthouse navigators and housing and consumer court advocates in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; courthouse advocates in New Hampshire; and document preparers in Arizona, California, and Nevada. In some jurisdictions, where courts have authorized these types of LSPs, these individuals are required to work under the supervision of a lawyer; in other instances, courts, in the exercise of their discretion, have authorized these LSPs to work independently. In each instance, the LSPs were created and authorized to facilitate greater access to legal services and the justice system, with steps implemented to protect the public through training, exams, certification, or similar mechanisms.

The Commission does not endorse the authorization of LSPs in any particular situation or any particular category of these LSPs. Jurisdictions examining the creation of a new LSP program might consider ways to harmonize their approaches with other jurisdictions that already have adopted similar types of LSPs to assure greater uniformity among jurisdictions as to how they approach LSPs. Jurisdictions also should look to others to learn from their experiences, particularly in light of the lack of robust data readily available in some states on the effectiveness of judicially-authorized-and-regulated LSPs in closing the access to legal services or justice gap. The Commission urges that the ABA Model Regulatory Objectives guide any judicial examination of this subject.

2.3. States should explore how legal services are delivered by entities that employ new technologies and internet-based platforms and then assess the benefits and risks to the public associated with those services.

An increasingly wide array of entities that employ new technologies and internet-based platforms are providing legal services directly to the public without the oversight of the courts or judicial regulatory authorities. Some of these legal services provider (LSP) entities deliver services that are not otherwise available. Other LSP entities provide services that are available, but provide them at a lower cost. The Commission believes that, in many instances, these innovative LSP entities have positively contributed to the accessibility of legal services.

Some have suggested that new regulatory structures should be created to govern LSPs that offer services to the public. The Commission encourages caution in developing any such structures. One benefit of the existing and limited regulatory environment is that it has nurtured innovation and allowed many new and useful LSP entities to emerge. The unnecessary regulation of new kinds of LSP entities could chill additional innovation, because potential entrants into the market may be less inclined to develop a new service if the regulatory regime is unduly restrictive or requires unnecessarily expensive forms of compliance.

On the other hand, narrowly tailored regulation may be necessary in some instances to protect the public. Moreover, some existing and potential LSP entities currently face uncertainty about whether they are engaged in the unauthorized practice of law, the definition of which in most jurisdictions has not kept up with the new realities of a technology-based service world. In these cases, the establishment of new regulatory structures may spur innovation by giving entities express authority to operate and a clear roadmap for compliance. By expressly setting out how LSP entities of a particular type can comply with appropriate regulations, potential new entrants may be more inclined to develop new services that ultimately help the consuming public.

The Commission recommends that, before adopting any new regulations to govern LSP entities, states study the LSPs that are operating in their legal marketplace, collect data on the extent to which these LSPs are benefiting or harming the public, and determine whether adequate safeguards against harm already exist under current law (for example, consumer protections laws).
When conducting this study, input should be sought from a broad array of constituencies, including the public and the types of entities that would be governed by any possible new regulatory structures. In all cases, the touchstone for considering new regulations should be public protection as articulated in the ABA Model Regulatory Objectives for the Provision of Legal Services.

The Commission recognizes that the collection of data and crafting of regulations comes with challenges and opportunities. For example, the services offered by LSP entities are constantly changing, and any regulatory scheme must be flexible enough to address emerging technologies while not impeding the development of new ideas. Regulators also may have difficulty offering precise definitions of the kinds of LSP entities they are regulating. Regulators also will have to decide whether they want to regulate all entities that provide a particular kind of service to the public or whether exceptions may be warranted, such as for non-profit and governmental entities that offer services. Although these issues are complicated, the Commission believes that careful study and data-driven analysis can ensure that innovation is encouraged at the same time that the public is adequately protected. The profession’s capacity for research and data-driven assessment will only become more important as the pace and diversity of innovation in legal services delivery increases.

2.4. Continued exploration of alternative business structures (ABS) will be useful, and where ABS is allowed, evidence and data regarding the risks and benefits associated with these entities should be developed and assessed.

As part of conducting a comprehensive assessment of the future of the legal profession, the Commission undertook a robust examination of alternative business structures (ABS). The Commission studied the limited development of ABS within the United States as well as the extensive growth of ABS outside the United States. The Commission paid particular attention to empirical studies of ABS that have been undertaken since 2013, when the ABA Commission on Ethics 20/20 completed its review of ABS and decided not to propose any policy changes regarding ABS.

The Commission on the Future of Legal Services released an Issues Paper that identified the potential risks and benefits of ABS as well as the available evidence from the empirical studies. In response, the Commission received some comments that advocated for the expansion of ABS in the United States or the further study of the subject. The majority of comments, however, reflected strong opposition to ABS, and some criticized the Commission for even examining the subject in light of existing ABA policy opposing ABS. These comments are archived at https://perma.cc/5T7J-XKT8. Many of the comments opposing ABS focused on the commenters’ belief that ABS poses a threat to the legal profession’s “core values,” particularly to the lawyer’s ability to exercise independent professional judgment and remain loyal to the client. Specifically, opponents of ABS fear that nonlawyer owners will force lawyers to focus on profit and the bottom line to the detriment of clients and lawyers’ professional values. Critics also argued that there is no proof that ABS has made any measurable impact on improving access to legal services in those jurisdictions that permit ABS.

The Commission’s views were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers’ ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that “the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised.” Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS. At the same time, the Commission also found little reported evidence that ABS has had any material impact on improving access to legal services.

The Commission believes that continued exploration of ABS will be useful and that, where ABS
is used, additional evidence and data should be collected and the risks and benefits of ABS should be further assessed. The Commission urges the ABA to engage in an organized and centralized effort to collect ABS-related information and data, which should include information and data compiled at the jurisdictional level. To assist this effort, jurisdictions that permit ABS should seek to compile relevant data on this subject as well. By creating a centralized repository for this information and data, the ABA can continue to perform a vital and longstanding function: ensuring that deliberations on a subject of import to the profession are fact-based, thorough, and professional.

Recommendation 3.

All members of the legal profession should keep abreast of relevant technologies.

Rule 1.1, Comment [8] of the ABA Model Rules of Professional Conduct provides that, in order for lawyers to maintain professional competence, they must “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” To help lawyers satisfy this professional obligation, bar associations should offer continuing legal education on technology and educate their members through website content, e-newsletters, bar journal articles, meeting panels and speakers, technology mentoring programs, and other means. The Florida Bar Board of Governors, for example, has approved a mandatory technology-based continuing legal education requirement. When developing competence in this area, lawyers should pay particular attention to technology that improves access to the delivery of legal services and makes those services more affordable to the public.

Law students also should graduate with this obligation firmly in mind. To achieve this goal, an increasing number of law schools include legal technology as part of the curriculum—a development that the Commission endorses as essential. The ABA Legal Technology Resource Center stands as a model for how technology resources and expertise can be made available to bar association members.

Recommendation 4.

Individuals should have regular legal checkups, and the ABA should create guidelines for lawyers, bar associations, and others who develop and administer such checkups.

Legal checkups are an underused resource to help solve individuals’ problems and expand access to legal services. Many people with civil justice problems do not recognize that they have needs that require, or would be best addressed by, legal solutions. Regular legal checkups would help to...
inform people of their legal needs and to identify needed legal assistance, which may take various forms.\textsuperscript{330}

Legal checkups are analogous to medical check-ups. Sometimes a person is aware of a problem, as indicated by an overt symptom, such as fever or pain (indicating a medical problem) or receipt of a summons or complaint (indicating a legal problem). At other times, medical and legal issues are only discovered after using a diagnostic tool. As Professor Rebecca Sandefur’s research has shown, many individuals fail to recognize when they have a legal problem, and even when they do, they fail to seek legal assistance.\textsuperscript{331}

Legal checkups are not new. Beginning in the 1950s, Louis M. Brown, a practitioner and law professor, wrote extensively about “preventive law,” the client-centric idea that lawyers should employ prophylactic measures to forestall legal problems, and he developed the idea of legal checkups. Bar associations and other organizations have periodically promoted legal checkups, but many early initiatives have fallen into disuse. Some legal checkups are available online, but apart from some notable exceptions,\textsuperscript{332} few take advantage of expert system technology to create branching inquiries that enable people to quickly and efficiently consider a range of issues.

The Commission believes that all individuals should have legal checkups on a periodic basis, especially when major life events occur (for example, marriage, divorce, the birth of a child). Additionally, lawyers, bar associations, and others should be encouraged to develop and administer legal checkups for the benefit of the public and should determine what consumers most want and need from a legal checkup.\textsuperscript{333}

To protect the public and increase access to legal services, legal checkups should meet certain basic standards. As a starting point, the Commission recommends that the ABA adopt guidelines for legal checkups that are consistent with the following:\textsuperscript{334}

\textbf{Proposed ABA Guidelines for Legal Checkups}

\textbf{Preamble:} The purpose of legal checkups is to empower people by helping them identify their unmet legal needs and make informed decisions about how best to address them. Legal checkups should be easy for individuals to use, and the results should be easy to understand.

1. \textbf{Ease of Understanding:} Legal checkups should be designed using plain language so that people who do not have legal training can easily understand the language used. Any words that are not easily understandable by someone without legal training should be defined and explained using plain language.

2. \textbf{Candor and Transparency:} The promotion, distribution, and content of legal checkups must not be false, misleading, or deceptive.

3. \textbf{Substantive Quality:} Legal checkups should be created by or in consultation with individuals who are competent in the applicable law that the checkup addresses.

4. \textbf{Communication:} Legal checkup providers should clearly communicate to users that the quality and effectiveness of the checkup depends on the users providing full and accurate information.

5. \textbf{Limits of the Checkup:} Legal checkup providers should give users conspicuous notice that a legal checkup is primarily designed to identify legal issues, not to solve them, and is not a substitute for legal advice.

6. \textbf{Resources:} If a legal checkup identifies legal needs, it should direct the user to appropriate resources, such as lawyer referral services, legal self-help services, social services, government entities, or practitioners. Users should be informed that they are not obligated to use the services of any particular resource or service provider.

7. \textbf{Affordability:} Legal checkups should be available free of charge or at low cost to
people of limited or modest means. If providers charge for legal checkups, the price should be commensurate with the user’s ability to pay and clearly disclosed in advance.

8. Accessibility:
   a. To the extent feasible, legal checkups should be accessible to all users, including people who do not speak English and people with disabilities.
   b. Legal checkups should be available to the public in a wide variety of venues (for example, public libraries, domestic violence shelters, social services offices, membership organizations, etc.).
   c. Web-based legal checkups should be available on a wide variety of electronic platforms, including mobile platforms.
   d. The content of legal checkups, and their terms of use and privacy policies, should be accessible, written in plain language, and easy to navigate.

9. Jurisdiction: Where legal checkups are state-specific, the provider should identify the relevant state law. Where legal checkups are not state-specific, but implicate state law, the provider should indicate that not all content may apply in the user’s state.

10. Compliance with Law: The development and administration of legal checkups must comply with all applicable law, including laws and rules regarding the unauthorized practice of law.

11. Privacy and Security of Personal Information: Providers of legal checkups—whether web- or paper-based—should take appropriate steps to protect users’ personal information from unauthorized access, use, and disclosure. Providers should not disclose such information, or use it for any purpose, apart from the purpose of providing the legal checkup, without the user’s express authorization, except as required by law or court order.

12. Provider Information: Legal checkups should include the provider’s contact information (e.g., name, address, and email address) and all relevant information about the provider’s identity, including legal name.

13. Dating of Material: The legal checkup should include a prominent notice of the date on which the legal checkup was last updated.

Recommendation 5.

Courts should be accessible, user-centric, and welcoming to all litigants, while ensuring fairness, impartiality, and due process.

5.1. Physical and virtual access to courts should be expanded.

Courts should make efforts to accommodate the schedules of litigants with employment or family obligations, including remaining open for some functions during at least some evening and weekend hours. Accessibility of physical courthouses, courtrooms, and administrative hearing rooms should be expanded. This includes structural and technological accommodations that permit all citizens to use the courts equally and that meet and, where possible, exceed legal requirements regarding physical accessibility.

Courts also should consider whether the physical presence of litigants, witnesses, lawyers, experts, and jurors is necessary for hearings, trials, and other proceedings or whether remote participation through technology is feasible with-
out jeopardizing litigant rights or the ability of lawyers to represent their clients. Technologies should be adopted to aid lawyers with limitations on abilities to better serve their clients and promote greater accessibility for experts, jurors, and witnesses with limitations on abilities. Courts should use current and developing communication technologies, with appropriate security in place, to make available by remote access document filing, docket/record searches, and other similar services. Remote, real-time access to legal proceedings also should be explored. Courthouse facilities should be welcoming by design, and court personnel should be welcoming in attitude and demeanor. Courthouses exist to serve the public, and people should not feel intimidated or unwelcome in the pursuit of justice.

The Commission also recommends an increase in the range of locations for the public to pursue legal assistance and resolve disputes. For example, it may be helpful to co-locate brick-and-mortar legal resource centers in community facilities frequently accessed by the public, such as post offices, public libraries and law libraries, community centers, and retail settings. The concept of providing greater availability of services is similar to the expanded availability of flu shots in retail drugstores.

5.2. Courts should consider streamlining litigation processes through uniform, plain-language forms and, where appropriate, expedited litigation procedures.

The Commission recommends the development of national and statewide uniform court forms and procedures in appropriate areas so that individuals can more readily obtain proper documents from centralized sources and independently (or, where appropriate, with assistance) achieve their legal objectives. Simplified forms and procedures should provide straightforward, plain-English notifications, instructions, paperwork, and explanatory materials to guide members of the public through their dealings with the courts. Court rules, forms, and procedures should be as uniform as possible throughout the state to enhance the efficient and fair administration of justice. Litigants should be permitted to operate under the same rules and file the same forms in every court within a state. The number of forms required for a particular proceeding should not be unduly burdensome; as just one example, in New York State an uncontested divorce requires between twelve and twenty-one forms depending on the jurisdiction. Even twelve forms are too many. A primary value served by all rules and procedures should be efficiency in resolving disputes and finding the best use of party, attorney, and court resources.

The ABA, the National Center for State Courts, the Conference of Chief Justices, and the Conference of State Court Administrators should collaborate to create a National Commission on Uniform Court Forms, similar to the National Conference of Commissioners on Uniform State Laws. The purpose of the Commission would be to generate model forms to be used by both represented and unrepresented litigants on a multi-state basis in ways that create consistency and accommodate simplified technological document preparation.

The Commission also recommends implementation of expedited litigation, where appropriate. For example, in 2013 “the Texas legislature mandated the Texas Supreme Court to adopt rules to lower the cost of discovery and expedite certain trials through the civil justice system” where the amount in controversy does not exceed $100,000. Similarly, courts in Arizona, California, Nevada, New York, Oregon, South Carolina, and Utah have adopted expedited processes for the purposes of either “streamlining the pretrial process to allow litigants to proceed to trial at lower cost” or “streamlining the trial itself, which indirectly affects the pretrial process,” thus reducing expenses and time invested by litigants to resolve their disputes.

5.3. Multilingual written materials should be adopted by courts, and the availability of qualified translators and interpreters should be expanded.

To ensure access to justice for all, bar associations and courts should implement systems and pro-
cesses to assure that people who face language barriers are not at a disadvantage when using legal processes. As Judge Irving R. Kaufman wrote nearly 50 years ago, court interpreting services are important “[n]ot only for the sake of effective cross examination … but as a matter of simple humaneness…” \[339\] The importance of these services has only grown: a 2014 study concluded that interpreters were needed in more than 325,000 judicial proceedings in 119 different languages annually.\[340\] At a minimum, courts should comply with, if not exceed, the ABA Standards for Language Access in Courts, adopted as policy in 2012.\[341\] These Standards contain a detailed explanation of when interpreters and other language access assistance are constitutionally or statutorily required in state or federal courts. In addition, all written materials, documentation, brochures, forms, websites, and other information sources should strive to eliminate or significantly reduce language barriers.

Given the costs of in-person, individualized services necessary for qualified translators, it might be possible to use technology to facilitate remote interpreter services. For example, one court system in Florida, which was highlighted at an innovation showcase during the ABA National Summit on Innovation in Legal Services, developed a mechanism for virtual remote interpreting.\[342\]

5.4. Court-annexed online dispute resolution systems should be piloted and, as appropriate, expanded.

As a tool to prevent the escalation of conflicts, alternative dispute resolution (ADR) represents an important means for improving access to the legal system. ADR is an area of legal services that has for decades been devoted to reducing costs, increasing efficiency, and improving results for participants in the legal system. By several measures, ADR outperforms litigation.\[343\] Because ADR techniques reduce the time and costs involved in resolving conflict, such techniques can be used to provide greater access to the legal system, especially for the poor, the middle class, and small businesses. The term ADR also encompasses court programs, community mediation, and restorative justice. What began years ago as an exploration of alternatives to litigation has become pervasive and grown to the point that it is no longer the alternative, but a mainstay of legal services. The future of legal services likely will see greater growth in all of these areas.

Online dispute resolution (ODR) has been used in the private sector as a form of ADR to help businesses and individuals resolve civil matters without the need for court proceedings or court appearances. A court-annexed ODR system would help relieve the overburdened court system and facilitate judicial efficiency, as well as preserve the constitutional and traditional role of the courts in dispute resolution, at a time when ODR systems are increasingly privatized. By harnessing technology, ODR holds the promise of delivering even greater efficiency in conflict resolution than traditional ADR does, thereby offering even greater access to justice.\[344\]
Recommendation 6.

The ABA should establish a Center for Innovation.

Innovation is an ongoing process that requires sustained effort and resources as well as a culture that is open to change. To sustain and cultivate future innovation, the ABA should establish a Center for Innovation. The purpose of the proposed Center is to position the ABA as a leader and architect of the profession’s efforts to increase access to legal services and improve the delivery of, and access to, those services to the public through innovative programs and initiatives. Drawing on the expertise of the National Center for State Courts, Legal Services Corporation, Federal Judicial Center, and Conference of Chief Justices, along with law schools, state, local and specialty bars and the judiciary, the Center will seek vital input from and collaboration with technologists, innovators, consumers of legal services, and those in public policy, to develop new projects, programming, and other resources to help drive innovation in the delivery of legal services.

As has been demonstrated in other industries and professions that have been disrupted by advances in technology, problems cannot be addressed by relying on existing practices. Industries as diverse as consulting, medicine, and personal finance have invested in research and development laboratories to create new service offerings and substantially improve client relationships. Lawyers must do the same, and the Innovation Center can play an active role in these efforts.

The Innovation Center would be responsible for proactively and comprehensively encouraging, supporting, and driving innovation in the legal profession and justice system. The Center could serve a variety of functions, including the following:

- Providing materials and guidance to futures commissions organized by state and specialty bar associations;
- Serving as a resource for ABA members by producing educational programming for lawyers on how to improve the delivery of, and access to, legal services through both new technologies and new processes;
- Maintaining a comprehensive inventory and evaluation of the innovation efforts taking place within the ABA and in the broader legal services community, nationally and internationally; and
- Operating a program of innovation fellowships to provide fellows in residence with the opportunity to work with a range of other professionals, such as technologists, entrepreneurs, and design professionals to create delivery models that enhance the justice system.

The Center should be sufficiently funded to enable the experimentation, examination, and assessment of creative delivery methods that advance access to civil legal services, reform the criminal justice system, and effectively advance diversity and inclusion throughout the justice system in the United States.
Recommendation 7.

The legal profession should partner with other disciplines and the public for insights about innovating the delivery of legal services.

“The National Summit on Innovation in Legal Services in May 2015 underscored the importance of looking beyond the legal profession for guidance on how lawyers can improve client service. Other disciplines are far ahead of ours in their measurement of consumer needs and in their design of user-focused solutions to meet those needs.”

James J. Sandman
President
Legal Services Corporation
Washington, DC

7.1. Increased collaboration with other disciplines can help to improve access to legal services.

Other disciplines and professions have important insights to share on improving access to and the delivery of legal services. For example, at the ABA National Summit on Innovation in Legal Services held at Stanford in May 2015, Richard Barton, founder of Expedia and Zillow, described the transformative power of technology-enabled user reviews in the travel and real estate industries. He predicted that it is only a matter of time before online ratings and digital marketing become the dominant way for individuals to find a lawyer. Similarly, others spoke about the importance of incorporating engineering, information economics, and design-thinking into the development of new delivery models and technology tools for the public to access legal services. Indeed, such tools are already driving important changes to how the public accesses some kinds of legal services.

History tells us that the most important innovations—the innovations that disrupt and transform an industry, bring down the cost of goods and services, and ultimately help the public—are not created by incumbents alone. Rather, they are created with the assistance of outsiders who bring fresh perspectives and new approaches. The Commission believes that lawyers will achieve greater innovation and increased efficiencies if they embrace interdisciplinary collaborations and work closely with people from other fields.

7.2. Law schools and bar associations, including the ABA, should offer more continuing legal education and other opportunities for lawyers to study entrepreneurship, innovation, the business and economics of law practice, and other relevant disciplines.

Experts on the use of technology in legal services delivery have emphasized the importance of providing lawyers with new skills and knowledge: “Training in law practice management and law practice technology is a critical solution that will further align the skills that law students must have upon graduation with the employment needs of a radically changing legal market.” With the legal market changing dramatically, lawyers today “more than any generation of lawyers … will have to be entrepreneurs rather than employees working for somebody else.” Moreover, lawyers who learn entrepreneurial skills can help solve the justice gap. With millions of people needing legal representation and thousands of lawyers unemployed or underemployed, students with this training can “create better delivery models that match appropriately qualified lawyers with the clients who need them.”

Interdisciplinary knowledge is also critical in the criminal realm. Because many individuals who commit criminal acts suffer from mental illness, defense lawyers will provide better representation
to their clients if they understand those issues. Thus, the Commission endorses ABA Standard for Criminal Justice 7-1.3, which calls on law schools to “provide the opportunity for all students ... to become familiar with the issues involved in mental health and mental retardation law and mental health and mental retardation professional participation in the criminal process.” Further, “bar associations, law schools, and other organizations having responsibility for providing continuing legal education should develop and regularly conduct programs offering advanced instruction on mental health and mental retardation law and mental retardation professional participation in the criminal process.”

**Recommendation 8.**

The legal profession should adopt methods, policies, standards, and practices to best advance diversity and inclusion.

The legal profession should reflect the diversity of American society. To achieve this goal, law schools, lawyers, and courts should establish pipeline programs and other diversity-focused recruitment initiatives. They must also ensure equal access and treatment of all persons regardless of age, gender, sex, national origin, race, religion, ethnicity, sexual orientation, gender identity, physical or learning disabilities, and cultural differences.

ABA President 2015-16 Paulette Brown’s Diversity and Inclusion 360 Commission is engaged in important work to advance these and related goals, and it is the obligation of the entire profession to undertake similar efforts. The Commission encourages courts and bar associations to comply with ABA Resolution 107, which calls for mandatory continuing legal education (MCLE) requirements to include programs on diversity and inclusion in the legal profession. While forty-five states currently have MCLE, only two—California and Minnesota—have already adopted programming that satisfies this recommendation.

The legal profession must ensure that the justice system in all of its parts, including law enforcement, strives to operate free of bias, both explicit and implicit. To underscore this goal, the legal profession should consider incorporating unconscious bias and diversity sensitivity training into bar associations, law schools, law practices, courts, and other organizations concerned with the delivery of legal services. Recommended tools for engaging in this training and other resources can be found on the ABA Diversity and Inclusion 360 Commission’s website.
Recommendation 9.

The criminal justice system should be reformed.

While reform to the criminal justice system was not a central focus of the Commission’s charge, the Commission recognized the profound and pervasive impact that the criminal justice system has on individuals, the rule of law, and the public’s perception of the administration of justice, both civil and criminal. The Commission notes that, although deserving and important calls for reform have been made over the years, considerable work remains to be done. The Commission highlights and urges several reforms that would make much-needed progress.

9.1. The Commission endorses reforms proposed by the ABA Justice Kennedy Commission and others.

In 2004, the ABA Justice Kennedy Commission submitted a Resolution (approved by the House of Delegates) that urged “states, territories, and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration.” The Resolution recommended that lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses, and alternatives to incarceration should be available for offenders who pose minimal risk to the community and appear likely to benefit from rehabilitation efforts. The Resolution sets out a series of recommended actions, which the Commission endorses, including:

- Repealing mandatory minimum sentences;
- Providing for guided discretion in sentencing, consistent with Blakely v. Washington, while allowing courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence;
- Requiring sentencing courts to state the reason for increasing or reducing a sentence, and allowing appellate review of such sentences;
- Considering diversion programs for less serious offenses, and studying the cost effectiveness of treatment programs for substance abuse and mental illness;
- Giving greater authority and resources to an agency responsible for monitoring the sentencing system;
- Developing graduated sanctions for violations of probation and parole; and
- Having Congress give greater latitude to the United States Sentencing Commission in developing and monitoring guidelines, and to reinstate a more deferential standard of appellate review of sentences.

The House of Delegates approved another ABA Justice Kennedy Commission Resolution urging: (1) state, territorial and federal governments to establish standards and a process to permit prisoners to request a reduction of their sentences in exceptional circumstances; (2) expanded use of the federal statute permitting reduction of sentences for “extraordinary and compelling reasons;” (3) the United States Sentencing Commission to develop guidance for courts relating to the use of this statute; and (4) the expanded use of executive clemency to reduce sentences, and of processes by which persons who have served their sentences may request a pardon, restoration of legal rights, and relief from collateral disabilities. The Commission similarly endorses these recommended reforms.

In April–July 2015, the ABA and the NAACP Legal Defense Fund held a series of conversations aimed at ridding the criminal justice system of the vestiges of racism that, taken together, threaten the promise of equal justice. Bringing together representatives of law enforcement, prosecutors, the judiciary, public defenders and others integrally
involved in the system, the group examined key factors leading to the inherent threats of a lack of confidence and bias, both explicit and unconscious, in the justice system.

Following those meetings, a Joint Statement was issued, endorsed by the ABA Board of Governors, that states in part:

In Ferguson (MO), the Justice Department found that the dramatically different rates at which African-American and White individuals in Ferguson were stopped, searched, cited, arrested, and subjected to the use of force could not be explained by chance or differences in the rates at which African-American and White individuals violated the law. These disparities can be explained at least in part by taking into account racial bias. Given these realities, it is not only time for a careful look at what caused the current crisis, but also time to initiate an affirmative effort to eradicate implied or perceived racial bias—in all of its forms—from the criminal justice system.356

The statement went on to recommend a wide range of actions, such as better data collection and disclosure, implicit bias training, more diversity in prosecutors’ and law enforcement offices, greater stakeholder dialogue and increased accountability. The Commission supports these recommendations as well.

9.2. Administrative fines and fees should be adjusted to avoid a disproportionate impact on the poor and to avoid incarceration due to nonpayment of fines and Fees.

The Commission supports the recent efforts by the U.S. Department of Justice to reform harmful and unlawful practices related to the assessment and enforcement of fines and fees.357 The Commission endorses the following DOJ principles:

• Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination ...

and establishing that the failure to pay was willful;

• Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

• Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

• Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

• Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

• Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

• Courts must safeguard against unconstitutional practices by court staff and private contractors.358

Another important initiative in this area is the recent creation of the National Task Force on Fines, Fees, and Bail Practices, which was formed with the support of the State Justice Institute in 2016 by the Conference of Chief Justices and the Conference of State Court Administrators.359 The Task Force seeks to address the ongoing impact that court fines, fees and bail practices have on communities, especially the economically disadvantaged, across the United States.

9.3. Courts should encourage the creation of programs to provide training and mentoring for those who are incarcerated with a goal of easing re-entry into society as productive and law-abiding citizens.

A growing consensus has emerged that new solutions are needed for overcrowded prisons. One way to safely reduce prison populations is
to develop new and innovative rehabilitation methods. The Boston Reentry Initiative is one such program. The goal of the program is to help "adult offenders who pose the greatest risk of committing violent crimes when released from jail transition back to their neighborhoods." This community partnership "brings together law enforcement, social service agencies, and religious institutions to start working with inmates while they are still incarcerated." The program has worked: "Harvard researchers found that participants had a re-arrest rate 30 percent lower than that of a matched comparison group."

Another example is a re-entry program started by the Honorable Laurie A. White and the Honorable Arthur Hunter, criminal court judges in New Orleans. Judge White and Judge Hunter created the Orleans Parish Re-entry Program to facilitate mentoring and job-skills training conducted by life-sentenced inmates for felony convicted inmates who will re-enter society. The program has been implemented, at no cost to the taxpayers, in Louisiana’s maximum-security prison. Participating re-entry inmates must obtain their GED and undergo drug treatment and pre-release programming in order to receive a reduced sentence on their felony convictions. The mentors are trained to teach the newer inmates in job skills to ready them for careers, such as automotive mechanic or electrician, and live with the re-entry program inmates in special housing units so that they can mentor them and give them the skills and confidence they need to successfully re-enter society.

Elected state prosecutors have taken the lead in many jurisdictions to develop re-entry and diversion programs and to measure the success of their offices by the extent they promote overall community safety rather than by the number of convictions they can muster. After resisting the concept of re-entry for many years, the DOJ has followed the lead of these state prosecutors and has established a re-entry program as part of every U.S. Attorney office.

9.4. Minor offenses should be decriminalized to help alleviate racial discrepancies and over-incarceration.

A growing consensus has emerged that one way to fix the overcrowded prison system and alleviate racial discrepancies is to reclassify minor offenses so that they do not constitute criminal behavior. This will relieve burdens on prosecutors, courts, and defense systems. The Department of Justice recently acknowledged this problem in its report on Ferguson, Missouri. Among its many findings, the DOJ concluded that the abusive use of arrest warrants and fines in poor communities has been facilitated and increased as a consequence of the pervasive lack of legal assistance with municipal and traffic violations.

The Commission commends the efforts of The Pew Charitable Trusts on these issues related to over-criminalization of conduct. Through its Public Safety Performance Project, Pew – in partnership with the DOJ’s Bureau of Justice Assistance, the Council of State Governments Justice Center, the Crime and Justice Initiative, the Vera Institute of Justice, and other organizations – have helped thirty-one states engage in reform of their sentencing and corrections policies since 2007. For example, in 2014, with Pew providing intensive technical assistance, Mississippi adopted sweeping sentencing and corrections reforms. The reforms aim to refocus prison space on violent and career criminals, strengthen community supervision, and ensure certainty and clarity in sentencing. Among other improvements, the reforms increase access to prison alternatives, including specialty courts, raise the felony theft threshold, and expand parole eligibility for nonviolent offenders. The reforms are projected to avert prison growth and save the state $266 million through 2024.
9.5. Public defender offices must be funded at levels that ensure appropriate caseloads.

Crushing caseloads are perhaps the most vexing problem facing public defense in the United States. When attorneys are saddled with hundreds or thousands of cases, core legal tasks—investigation, legal research, and client communication—are quickly jettisoned. As a result, clients who have a right to effective, ethical counsel receive only nominal representation.

In *Gideon v. Wainwright*, the United States Supreme Court held that the Sixth Amendment requires states to appoint counsel to indigent felony defendants. The Supreme Court later emphasized that “the right to counsel is the right to the effective assistance of counsel.” Additionally, the ABA Model Rules of Professional Conduct require competent and diligent representation.

The problem is that even the most skilled attorneys cannot deliver effective, competent, and diligent representation when representing hundreds or thousands of clients per year. In Rhode Island, the average caseload is over 1,700 cases per year; in Upstate New York, one attorney represented over 2,200 clients; and in Illinois, a public defender handled 4,000 cases during the course of a year. For too long, ethical and constitutional requirements have been not been met under the weight of grossly excessive workloads.

The profession should not stand by while defendants—many innocent—suffer. The Commission encourages bold innovations to improve public defense workloads. ABA workload studies, such as those in Missouri, Tennessee, Rhode Island, Colorado, and Louisiana, are just the first step. The ABA and other bar associations also must support lobbying, education, and, where necessary, litigation, to ensure that lawyers have the resources that they need to comply with their ethical and constitutional duties.

**Recommendation 10.**

**Resources should be vastly expanded to support long-standing efforts that have proven successful in addressing the public’s unmet needs for legal services.**

10.1. Legal aid and pro bono efforts must be expanded, fully funded, and better promoted.

The ABA should continue to support the full funding of the Legal Services Corporation and should lead efforts to maintain and increase the resources of civil legal aid societies. The ABA should encourage the maintenance and development of effective programs to provide pro bono representation and other affordable sources of professional legal services for low-income citizens. Courts should adopt rules that encourage pro bono representation by lawyers, such as emeritus rules, CLE credit for service, reporting obligations, court processes that prioritize service and minimize time required for pro bono lawyers/cases, and other measures that provide access and address legal needs.

Existing pro bono and modest means offerings and programs should be better-promoted and marketed to those in need of legal representation. One example of consumer-centric delivery of services is One Justice’s “Justice Bus Project,” which “recruits, trains and transports law student and attorney volunteers to provide much-needed legal clinics in rural, isolated, and underserved areas of California.” Efforts to provide free, online training to pro bono attorneys, such as California’s Pro Bono Training Institute (made possible by the LSC’s Pro Bono Innovation Fund), should be
Adequate compensation and funding should be provided to those who deliver legal services to low-income populations to ensure effective and competent representation.

Moreover, the ABA should work in partnership with appropriate public and private entities to increase the availability of affordable legal services to the whole public without regard to income. Legal aid and pro bono programs that are means-tested should take steps to assist those who are not income-qualified in finding a lawyer or other appropriate legal services provider who may be able to provide assistance. Resources may include bar association referral services, modest means panels, lawyer incubators, practitioners who provide unbundled legal services and other legal services providers.

10.2. Public education about how to access legal services should be widely offered by the ABA, bar associations, courts, lawyers, legal services providers, and law schools.

The Commission recommends the continuation and expansion of the role of the ABA and other bar associations in helping the public understand when a problem can be resolved within the legal system and about avenues for effective resolution of problems that have a legal dimension. Bar associations and courts should make public education materials available (in all current media formats) to explain court procedures and frequently encountered legal issues; these materials should be in clear, non-technical language. These entities also should reach out to local and statewide news media to build relationships, improve the quality of law-related journalism, and enhance editorial understanding of issues facing the courts. Courts should develop simple legal instructional materials, including sample pleadings and forms designed for use by people who do not have legal training and make them available at court facilities and via online and other remote access technologies. In addition to printed materials, self-help videos and online tutorials that can be accessed at any time from a home computer or public access terminal should also be explored.

The public also needs greater information about the distinction between legal representation by a lawyer, a licensed or certified legal services provider, and an unregulated legal services provider. This information could be provided, for example, through a public education campaign or informational disclaimers. Bar associations and entrepreneurs should collaborate to explore the possibilities of public education about legal services through the use of online games, which would embed access to legal resources within the gaming programs. The ABA Blueprint Project, for example, recommends using gamification to increase the public’s awareness about legal services.
Recommendation 11.

Outcomes derived from any established or new models for the delivery of legal services must be measured to evaluate effectiveness in fulfilling regulatory objectives.

There is an unfortunate lack of empirical evidence about the effectiveness of various legal innovations that have been undertaken around the country. As a result, it is often difficult for bar associations, courts, law schools, and individual lawyers to know how to best use limited resources when seeking to implement innovations. To ensure that successful innovations are replicated and unsuccessful innovations are not, it is important to begin collecting and sharing relevant data about existing and future efforts. Law schools, bar foundations and research entities should collaborate to measure the outcomes, impact, and effectiveness of ongoing and emerging models of delivering legal services, and identify potential improvements to those models.

The Commission identified many existing innovations in its Findings that have had apparent success in enhancing access to and the delivery of legal services. The Commission encourages further study via data and metrics about the impact of these innovations on how legal services are delivered and accessed. As appropriate, these innovations should be expanded and promoted widely.

The Commission is heartened by recent efforts to engage in needed analysis, such as the Roles Beyond Lawyers Project—jointly supported by the American Bar Foundation, the National Center for State Courts, and the Public Welfare Foundation. For example, the Project’s researchers have developed conceptual frameworks for both designing and evaluating programs in which people who are not fully qualified lawyers are providing assistance to the public on matters that were traditionally provided only by lawyers. The frameworks are accessible to jurisdictions seeking to design new programs and to those seeking to evaluate the efficacy and sustainability of programs currently in operation.

“Rigorous, grounded research is essential to ensure that new—and existing—forms of service meet regulatory objectives.”

Elizabeth Chambliss
Professor of Law and Director, Nelson Mullins Riley & Scarborough Center on Professionalism, University of South Carolina School of Law
Columbia, SC
Recommendation 12.

The ABA and other bar associations should make the examination of the future of legal services part of their ongoing strategic long-range planning.

The nature of a report on the future of legal services inevitably means that it soon will become out-of-date. As such, the Commission recommends that the ABA and other bar associations make the examination of the future of legal services part of their ongoing strategic long-range planning. The Commission also recommends that all bar associations engage in futures efforts of their own, similar in nature to the grassroots meetings held across the country over the past two years and the National Summit on Innovation in Legal Services. A toolkit to facilitate futures meetings, task forces, and summits is available on the Commission’s website, along with examples from various states.375

“We are going to have to continue this conversation because I guarantee you that many of the things we think are innovative today, this time next year will already be obsolete.”

The Hon. Lora Livingston
261st Civil District Court, Travis County, Texas
CONCLUSION

“The future is literally in our hands to mold as we like. But we cannot wait until tomorrow. Tomorrow is now.”

Eleanor Roosevelt

The Commission’s Report on the Future of Legal Services in the United States sets forth an ambitious agenda for improving how legal services are delivered and accessed in the 21st century. As noted at the outset of this Report, some may view the Commission’s recommendations as too controversial, and others may view the recommendations as insufficiently bold. What is clear, however, is that the solutions will require the efforts of all stakeholders in order to implement the recommendations contained in this Report. Of course, many of the recommendations will need to be revisited as new ideas, data, and information become available. In the meantime, the Commission calls for the implementation of this Report’s recommendations. The future is in our hands, and the time to act is now.
APPENDIX 1. RESOLUTION 105 AND REPORT ON ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES, ADOPTED FEBRUARY 2016

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 8, 2016

RESOLUTION

RESOLVED, That the American Bar Association adopts the ABA Model Regulatory Objectives for the Provision of Legal Services, dated February, 2016.

ABA Model Regulatory Objectives for the Provision of Legal Services

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

FURTHER RESOLVED, That the American Bar Association urges that each state’s highest court, and those of each territory and tribe, be guided by the ABA Model Regulatory Objectives for the Provision of Legal Services when they assess the court’s existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers.

FURTHER RESOLVED, 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.
Background on the Development of ABA Model Regulatory Objectives for the Provision of Legal Services

The American Bar Association’s Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services. As one part of its work, the Commission engaged in extensive research about regulatory innovations in the U.S. and abroad. The Commission found that U.S. jurisdictions are considering the adoption of regulatory objectives to serve as a framework for the development of standards in response to a changing legal profession and legal services landscape. Moreover, numerous countries already have adopted their own regulatory objectives.

The Commission concluded that the development of regulatory objectives is a useful initial step to guide supreme courts and bar authorities when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal services providers. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

This Report discusses why the Commission urges the House of Delegates to adopt the accompanying Resolution.

The Purpose of Model Regulatory Objectives for the Provision of Legal Services

The Commission believes that the articulation of regulatory objectives serves many valuable purposes. One recent article cites five such benefits:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation]. Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.

In addition to these benefits, the Commission believes Model Regulatory Objectives for the Provision of Legal Services will be useful to guide the regulation of an increasingly wide array of already existing and possible future legal services providers. The legal landscape is changing at an

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1 Additional information about the Commission, including descriptions of the Commission’s six working groups, can be found on the Commission’s website as well as in the Commission’s November 3, 2014 issues paper. That paper generated more than 60 comments.


3 As noted by the ABA Standing Committee on Paralegals in
unprecedented rate. In 2012, investors put $66 million dollars into legal service technology companies. By 2013, that figure was $458 million. One source indicates that there are well over a thousand legal tech startup companies currently in existence. Given that these services are already being offered to the public, the Model Regulatory Objectives for the Provision of Legal Services will serve as a useful tool for state supreme courts as they consider how to respond to these changes.

A number of U.S. jurisdictions have articulated specific regulatory objectives for the lawyer disciplinary function. At least one U.S. jurisdiction (Colorado) is considering the adoption of regulatory objectives that are intended to have broader application similar to the proposed ABA Model Regulatory Objectives for the Provision of Legal Services. In addition, the development and adoption of regulatory objectives with broad applicability has become increasingly common around the world. Nearly two dozen jurisdictions outside the U.S. have adopted them in the past decade or have proposals pending. Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces are examples.

These Model Regulatory Objectives for the Provision of Legal Services are intended to stand on their own. Regulators should be able to identify the goals they seek to achieve through existing and new regulations. Having explicit regulatory objectives ensures credibility and transparency, thus enhancing public trust as well as the confidence of those who are regulated.

From the outset, the Commission has been transparent about the broad array of issues it is studying and evaluating, including those legal services developments that are viewed by some as controversial, threatening, or undesirable (e.g., alternative business structures). The adoption of this resolution does not abrogate in any manner existing ABA policy prohibiting non-lawyer ownership of law firms or the core values adopted by the House of Delegates. It also does not predetermine or even imply a position on other similar subjects. If and when any other issues come to the floor of the House of Delegates, the Association can and should have a full and informed debate about them.

The Commission intends for these Model Regulatory Objectives for the Provision of Legal Services to have more credibility. It seems to me that this is in everyone's interest.

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1. Its comments to the Commission, paralegals already assist in the accomplishment of many of the Commission's proposed Regulatory Objectives.


3. https://angel.co/legal

4. For example, in Arizona “the stated objectives of disciplinary proceedings are: (1) maintenance of the integrity of the profession in the eyes of the public, (2) protection of the public from unethical or incompetent lawyers, and (3) deterrence of other lawyers from engaging in illegal or unprofessional conduct.” In re Murray, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988). In addition, the Court views “discipline as assisting, if possible, in the rehabilitation of an errant lawyer.” In re Hoover, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987). California Business & Professions Code Section 6001.1 states that “[t]he protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” The Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) adopted the following: “The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action.”

5. A Supreme Court of Colorado Advisory Committee is currently developing, for adoption by the Court, “Regulatory Objectives of the Supreme Court of Colorado.”


7. As Professor Laurel Terry states in comments she submitted in response to the Commission’s circulation of a draft of these Regulatory Objectives, if “a regulator can say what it is trying to achieve, its response to a particular issue – whatever that response is – should be more thoughtful and should have more credibility. It seems to me that this is in everyone’s interest.”
to be used by supreme courts and their regulatory agencies. As noted in the Further Resolved Clause of this Resolution, the Objectives are offered as a guide to supreme courts. They can serve as such for new regulations and the interpretation of existing regulations, even in the absence of formal adoption. As with any ABA model, a supreme court may choose which, if any, provisions to be guided by, and which, if any, to adopt.

Although regulatory objectives have been adopted by legislatures of other countries due to the manner in which their governments operate, they are equally useful in the context of the judicially-based system of legal services regulation in the U.S., which has been long supported by the ABA.

Regulatory objectives can serve a purpose that is similar to the Preamble to the Model Rules of Professional Conduct. In jurisdictions that have formally adopted the Preamble, the Rules provide mandatory authority, and the Preamble offers guidance regarding the foundation of the black letter law and the context within which the Rules operate. In much the same way, regulatory objectives are intended to offer guidance to U.S. jurisdictions with regard to the foundation of existing legal services regulations (e.g., unauthorized practice restrictions) and the purpose of and context within which any new regulations should be developed and enforced in the legal services context.

**Relationship to the Legal Profession’s Core Values**

Regulatory objectives are different from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the “legal profession.” By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide.

The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.

Further, the Commission recognizes that, in addition to civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct, advancement of appropriate preventive or wellness programs for providers independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice; and the lawyer’s duty to promote access to justice.

**Notes:**

10 See ABA House of Delegates Recommendation 10F (adopted July 11, 2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html. This recommendation lists the following as among the core values of the legal profession: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty competently to exercise
of legal services is important. Such programs not only help improve service as well as providers' well-being, but they also assist providers in avoiding actions that could lead to civil claims or disciplinary matters.

Recommended ABA Model Regulatory Objectives for the Provision of Legal Services

The Commission developed the Model Regulatory Objectives for the Provision of Legal Services by drawing on the expertise of its own members, discussing multiple drafts of regulatory objectives at Commission meetings, reviewing regulatory objectives in nearly two dozen jurisdictions, and reading the work of several scholars and resource experts. The Commission also sought input and incorporated suggestions from individuals and other entities, including the ABA Standing Committee on Professional Discipline and the ABA Standing Committee on Ethics and Professional Responsibility.

Respectfully submitted,

Judy Perry Martinez, Chair
Andrew Perlman, Vice-Chair
Commission on the Future of Legal Services
February 2016

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12 The Commission includes representatives from the judiciary and regulatory bodies, academics, and practitioners.
1. Working Groups

The Commission organized its efforts around a number of different subject areas and engaged in extensive study and fact-finding before developing recommendations. Shortly after its creation, the Commission arranged itself into six working groups:

- **DATA ON LEGAL SERVICES DELIVERY.** This working group has assessed the availability of current, reliable data on the delivery of legal services, such as data on the public’s legal needs, the extent to which those needs are being addressed, and the ways in which legal and law-related services are being delivered; identified areas where additional data would be useful; and considered ways to make existing data more readily accessible to practitioners, regulators, and the public.

- **DISPUTE RESOLUTION.** This working group has assessed innovations in dispute resolution. Examples include innovations in: (a) court processes, such as streamlined procedures for more efficient dispute resolution, the creation of family, drug and other specialized courts, the availability of online filing and video appearances, and the effective and efficient use of interpreters; (b) delivery mechanisms, such as kiosks and court information centers; (c) criminal justice, such as veterans’ courts and cross-innovations in dispute resolution between civil and criminal courts; (d) alternative dispute resolution, including online dispute resolution services; and (e) administrative and related tribunals.

- **PREVENTIVE LAW, TRANSACTIONS, AND OTHER LAW-RELATED COUNSELING.** This working group has assessed innovations in the delivery of legal and law-related services that do not involve courts or other forms of dispute resolution, such as contract drafting, wills, trademarks, and incorporation of businesses.

- **ACCESS SOLUTIONS FOR THE UNDERSERVED.** This working group has assessed innovations that facilitate access to legal services for underserved communities.

- **BLUE SKY.** This working group has assessed innovations that do not necessarily fit within the other working groups, but could improve how legal services are delivered and accessed, such as innovations developed in other professions to improve effectiveness and efficiency, collaborations with other professions, and leveraging technology to improve the public’s access to law-related information.

- **REGULATORY OPPORTUNITIES.** This working group studied existing regulatory innovations, assessing developments in this area, and recommending regulatory innovations most likely to improve the delivery of, and the public’s access to, competent and affordable legal services.

The Working Groups met regularly, either in-person or via teleconference. Each group gathered and assessed relevant literature on challenges and opportunities; engaged with members of the bar, ABA entities, and the public; read comments submitted to the Commission in response to a series of issues papers; listened to and analyzed testimony at public hearings from the bar and beyond; participated in and learned from the National Summit on Innovation in Legal Services as well as thought-leader webinars and state-based grassroots meetings and futures presentations; and developed preliminary recommendations for consideration by the full Commission.
2. Hearings

At public hearings during the American Bar Association Midyear Meeting in Houston, Texas (February 2015) and the ABA Annual Meeting in Chicago (August 2015), and at a roundtable discussion ABA Midyear meeting in San Diego (February 2016), the Commission heard from numerous individuals who represented a range of interests, including practicing lawyers, legal services providers, the judiciary, ABA entities, state bar associations, members of the public, and the Department of Justice. The testimony from the public hearings is available for public review on the Commission website, http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services/Testimonials.html, archived at https://perma.cc/3T6T-PR3F.

2015 ABA Midyear Meeting Hearing Schedule | Houston, TX

- Chas Rampenthal, General Counsel, LegalZoom
- Alice Mine, Chair, ABA Standing Committee on Specialization
- Honorable Rick Teitelman, Supreme Court of Missouri
- Bruce Meyerson, ABA Dispute Resolution Section HOD Representative, and Nancy Greenwald, ABA Dispute Resolution Section Membership Chair
- Andrew Schpak, Chair, ABA Young Lawyers Division
- Mark Britton, CEO, Avvo, Inc.
- David English, Chair, ABA Commission on Law and Aging
- Sands McKinley, McKinley Irvin
- Honorable Scott Bales, Chief Justice, Arizona Supreme Court
- Ken Grady, CEO, SeyfarthLean Consulting
- Patricia Salkin, Dean and Professor of Law, Touro College
- Buck Lewis, Past President, Tennessee Bar Association
- Lisa Foster, Director, Access to Justice Initiative, U.S. Department of Justice
- Holly M. Riccio, President, American Association of Law Libraries

2015 ABA Annual Meeting Hearing Schedule | Chicago, IL

- Tom Bolt, Incoming Chair, ABA Law Practice Division
- Miguel Keberlein, Supervising Attorney for the Legal Assistance Foundation of Chicago’s Immigration and Workers Rights Practice Group
- Christopher A. Zampogna, Immediate Past President, BADC (voluntary bar of DC)
- Charles Jones, Client, First Defense Legal Aid
- Fred Headon, Past President, Canadian Bar Association
- Bob Hirshon, Special Advisor, ABA Standing Committee on the Delivery of Legal Services
- Melissa Birks, Client, Justice Entrepreneurs Project/Chicago Bar Foundation (incubator project)
- Nichayette Vil, Client, Group and Prepaid Legal Services
- Larry Fox, Partner, Biddle & Reath, LLP; Crawford Lecturer, Yale Law School
- Blake Morant, President, American Association of Law Schools
3. Issues Papers and Solicitation of Comments

The Commission released the following issues papers to solicit feedback from ABA entities, practicing attorneys, legal services providers, national advocacy organizations, law professors, and individuals:

A. Issues Paper on the Future of Legal Services, November 2014
B. Issues Paper on New Categories of Legal Services Providers, October 2015
C. Issues Paper on Legal Checkups, March 2016
D. Issues Paper on Unregulated LSP Entities, March 2016

All issues papers and submitted comments are available for review on the Commission’s website.

4. Grassroots Meetings and Futures Presentations

Grassroots meetings and futures presentations were an integral component of the Commission’s information gathering process. Designed as action-oriented endeavors, the ABA served as a catalyst for local conversations and innovations to create new avenues for access to legal services for all and open doors to new career opportunities for current and future lawyers. These grassroots meetings involved bar leadership, the judiciary and court personnel, local practitioners, local businesses and clients, along with innovation experts to help envision new ways to solve existing blocks to delivery of legal services in the community. Participants in each grassroots meeting were charged with identifying specific areas in their communities where innovation is needed to cultivate more effective and affordable ways to deliver legal services. To help facilitate the grassroots meetings, the Commission produced a grassroots toolkit that includes sample agendas, possible invitation lists and letters, briefing papers on issues for discussion, moderator and facilitator guides, background and resource materials for posting to local bar websites, and data collection forms and formats.

More than 70 grassroots meetings and futures presentations have been held; a listing follows:

2014

• Grassroots Meeting, St. Louis, MO (April 21, 2014)
• Duke University School of Law (Webinar), (June 23, 2014)
• Conference of Chief Justices Annual Roundtable Discussion, White Sulphur Springs, WV (July 21, 2014)
• ABA Section Officers’ Mini-Futures Conference, Chicago, IL (September 12, 2014)
• Washington State Bar Association (Webinar), (October 1, 2014)

• Paris Eliades, President, New Jersey State Bar Association
• Lee Difilippo, Equal Justice Law Office
• Andrew Gresch, Slater & Gordon
• Keith McLennon, Chair, ABA Standing Committee on Group & Prepaid Legal Services, and former Chair, ABA Solo, Small Firm and General Practice Division
• Aaron Sohaski, Chair, ABA Law Student Division
• ABA Young Lawyers Division Fall Conference, Portland, OR (October 11, 2014)

• ABA Center for Professional Responsibility Mini-Futures Conference, Chicago, IL (October 24, 2014)

• State Bar of Michigan, The Future of Legal Services: Changes and Challenges in the Legal Profession, Lansing, MI (November 10, 2014)

• ABA Board of Governors’ Program Committee Access Discussion, Charleston, SC (November 13, 2014)

2015

• Conference of Chief Justices Professionalism and Confidence of the Bar Committee, San Antonio, TX (January 26, 2015)

• ABA Board of Governors’ Preventive Law Discussion, Houston, TX (February 6, 2015)

• National Conference of Bar Presidents Panel Presentation/Roundtables, Houston, TX (February 7, 2015)

• Chicago Bar Association’s Futures Fair Expo, Chicago, IL (February 20, 2015)

• American College of Trial Lawyers Futures Presentation, Miami Beach, FL (February 28, 2015 - March 1, 2015)

• ABA Bar Leadership Institute, Chicago, IL (March 11, 2015)

• Sarasota Bar Association Futures Presentation, Sarasota, FL (March 26, 2015)

• New York State Bar Association Futures Presentation, Albany, NY (March 28, 2015)

• Arizona Grassroots Meeting: Future of Delivery of Legal Services in Arizona, Tempe, AZ (April 3, 2015)

• ABA Standing Committee on Public Education Futures Presentation, Chicago, IL (April 10, 2015)

• ABA Business Law Section Council Meeting Futures Presentation, San Francisco, CA (April 18, 2015)

• Ohio State Bar Association, Access to Justice Summit, Sandusky, OH (April 30, 2015)

• Beverly Hills Bar Association Futures Presentation, Beverly Hills, CA (May 1, 2015)

• State Bar of Montana Board of Trustees Annual Meeting for Long Range Planning, Fairmont, MT (May 15-16, 2015)

• ALI Annual Meeting Futures Presentation, Washington, DC (May 17-20, 2015)

• Future of the Delivery of Legal Services in North Carolina, Cary, NC (May 27, 2015)

• National Conference on Professional Responsibility Futures Presentation, Denver, CO (May 28, 2015)

• ABA Board of Governors Blue Sky Innovation Discussion, Washington, DC (June 5, 2015)

• Louisiana State Bar Association Futures Presentation, Sandestin, FL (June 8, 2015)

• Annual Florida Bar Convocation Futures Presentation, Boca Raton, FL (June 23, 2015)

• Collaborative Bar Leadership Academy Futures Presentation, Minneapolis, MN (June 25-27, 2015)

• Australian Bar Association Conference Futures Presentation, Boston, MA (July 8, 2015)

• Conference of Chief Justices Professionalism and Confidence of the Bar Committee, Omaha, NE, (July 27, 2015)

• National Organization of Bar Counsel Futures Presentation, Chicago, IL (July 30, 2015)

• Fifth Annual Forum on Judicial Independence: Courts As Leaders - Learning from Ferguson, Chicago, IL (July 31, 2015)

• National Conference of Bar Presidents Futures Presentation, Chicago, IL (August 1, 2015)
• National Conference on Client-centric Legal Services Futures Presentation, Denver, CO (August 14-15, 2015)

• Ohio State Judicial Conference Futures Presentation, Columbus, OH (September 3, 2015)

• ABA Diversity Center Meeting Futures Presentation, Chicago, IL (September 19, 2015)

• USDC Northern District of Oregon Federal Judges Futures Presentation, Portland, OR (October 2, 2015)

• New England Bar Association Panel Discussion, Newport, RI (October 2-3, 2015)

• Missouri Bar/Missouri Judicial Conference Panel Discussion, St. Louis, MO (October 8, 2015)

• College of Law Practice Management Futures Conference, Chicago, IL (October 8-9, 2015)

• ABA Section of International Law Panel Discussion, Montreal, Canada (October 21, 2015)

• ABA Center for Professional Responsibility Fall Leadership Conference Futures Presentation, Chicago, IL (October 23, 2015)

• State Bar of Michigan Annual Justice Initiatives Summit Futures Presentation, Lansing, MI (October 28, 2015)

• National Asian Pacific American Bar Association Board of Governors Meeting, New Orleans, LA (November 4, 2015)

• NLADA Annual Meeting Futures Presentation, New Orleans, LA (November 4-7, 2015)

• New Jersey State Bar Association Board of Trustees Meeting, New Orleans, LA (November 5, 2015)

• Making Justice Accessible Symposium - American Academy of Arts and Sciences, Somerville, MA (November 11-12, 2015)

• National Association of Bar Executives’ State Regulatory Workshop Futures Presentation, Portland, OR (November 12, 2015)

• ABA Standing Committee on Bar Activities and Services Regulatory Issues Presentation, Chicago, IL (November 14, 2015)

• North Carolina Commission on the Administration of Law and Justice Futures Presentation, Raleigh, NC (December 1, 2015)

2016

• AALS Annual Meeting Futures Presentation, New York, NY (January 6-10, 2016)

• Winter Bench Bar Meeting of the Washington County Bar Association Futures Presentation, Canonsburg, PA (January 22, 2016)

• Conference of Chief Justices Professionalism Committee Presentation, Monterey, CA (February 1, 2016)

• ABA Judicial Division Lawyers Conference and National Conference of Administrative Law Judges Futures Presentation, San Diego, CA (February 5, 2016)

• National Conference of Bar Presidents Futures Panel Discussion/Regulatory Issues, San Diego, CA (February 6, 2016)

• Louisiana State Bar, New Orleans, LA (February 25-26, 2016)

• New Hampshire Bar Association’s Midyear Meeting, Manchester, NH (March 4, 2016)

• ABA Tech Show, Chicago, IL (March 17-18, 2016)

• Western States Bar Conference Futures Program, San Diego, CA (March 31, 2016)

• The Future is Now Legal Services 2016 Conference, Illinois Supreme Court Commission on Professionalism, Chicago, IL (April 6, 2016)

• Maryland State Bar Association’s Planning Conference - Futures Presentation, Columbia, MD (April 8, 2016)
• ABA Section of International Law Spring Meeting Futures Panel Discussion, New York, NY (April 12-15, 2016)


• ABA Standing Committee on Public Education Meeting, Chicago, IL (April 15-16, 2016)

• National Conference on Professional Responsibility Futures Presentation, Philadelphia, PA (June 3, 2016)

• Alabama State Bar Futures Presentation, Sandestin, FL (June 24, 2016)

In addition to participating in the grassroots meetings across the country, the chair, vice chair, and other commissioners appeared before over 35 ABA entities at the Houston 2015 Midyear Meeting, over 50 entities at the Chicago 2015 Annual Meeting, and over 75 entities at the San Diego 2016 Midyear Meeting.

5. Commission Webinars

The Commission sponsored monthly webinars on topics relevant to the Commission’s mission for both members of the Commission and the ABA Board of Governors. The webinar topics have included:

• The Emerging Legal Ecosystem (Professor William Henderson, Indiana Law);

• Multi-pathing the Delivery of Legal Services for the 79% (Will Hornsby, ABA);

• 21st Century Technology and 19th Century Law Practice: The Coming Clash (Michael Mills, Neota Logic);

• A Conversation on the Task Force to Expand Access to Civil Service in New York (Helaine Barnett, Chair of the NY Permanent Commission on Access to Justice, and Chief Judge Jonathan Lippman);

• It’s the Client, Stupid (Susan Hackett, Executive Leadership, LLC);

• Innovation in Legal Education (Dean Dan Rodriguez, Northwestern Law);

• A2J Author and the Future of the Delivery of Legal Services (John Mayer, CALI);

• Regulating the Future Delivery of Legal Services (Professor Gillian Hadfield, USC Law, and Larry Fox, Drinker Biddle & Reath).

Recordings of webinars are publicly available on the Commission’s website.

6. Communications

The Commission maintains a public website that serves to enhance communication with ABA membership and the public about the Commission’s work and that provides a source of information about the future of legal services. This information includes the grassroots toolkit for bar associations, documents related to the Commission’s work, comments received by the Commission, and links to view recordings of Commission hearings, the National Summit on Innovation in Legal Services, and webinars.
7. Commission White Papers

The Commission sought to compile relevant, existing data on the delivery of legal services and to make this information more readily accessible to practitioners, regulators, and the public, while at the same time identifying new areas for study. To this end, the Commission oversaw the creation of sixteen white papers authored by leading scholars and experts on the future of legal services, published in Volume 67 of the South Carolina Law Review, Winter 2016. The white papers are listed below, and can be accessed in full on the Commission’s website. Collectively, these papers identify a futures research agenda to further expand access to and the delivery of legal services in the 21st century.

- William C. Hubbard & Judy Perry Martinez; Foreword
- Elizabeth Chambliss, Renee Newman Knake, & Robert L. Nelson; Introduction: What We Know and Need to Know About the State of “Access to Justice” Research
- Raymond Brescia; What We Know and Need to Know About Disruptive Innovation
- Tonya Brito, David J. Pate, Daanika Gordon, & Amanda Ward; What We Know and Need to Know About Civil Gideon
- Deborah Thompson Eisenberg; What We Know and Need to Know About Alternative Dispute Resolution
- April Faith Slaker; What We Know and Need to Know About Pro Bono Legal Services
- D. James Greiner; What We Know and Need to Know About Intake by Legal Services Providers
- Elinor R. Jordan; What We Know and Need to Know About Immigration and Access to Justice
- Ethan Katsh & Colin Rule; What We Know and Need to Know About Online Dispute Resolution
- Stephanie Kimbro; What We Know and Need to Know About Gamification Online Engagement
- Bharath Krishnamurthy, Sharena Hagins, Ellen Lawton, & Megan Sandel; What We Know and Need to Know About Medical-Legal Partnerships
- Daniel W. Linna, Jr.; What We Know and Need to Know About Legal Startups
- Paul Lippe; What We Know and Need to Know About Watson, Esq.
- Deborah L. Rhode; What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers
- Rebecca L. Sandefur; What We Know and Need to Know About Community Legal Needs
- Carole Silver; What We Know and Need to Know About Global Lawyer Regulation
- Silvia Hodges Silverstein; What We Know and Need to Know About Legal Procurement
- John Christian Waites & Fred Rooney; What We Know and Need to Know About Law School Incubators

8. Additional Resources

As the Commission conducted grassroots meetings and futures presentations across the country, held hearings, and received public comments, numerous already-existing innovations designed to enhance access to legal services were identified. These innovations are inventoried on the Commission’s website. The Commission also conducted a study in partnership with the National Center for State Courts that included a public opinion survey and two focus groups to better understand the public’s perception about access to and the delivery of legal services. A synopsis of the study is available on the Commission’s website.
The National Summit on Innovation in Legal Services was convened in partnership with Stanford Law School on May 2-4, 2015. The purpose of the Summit was to challenge thought-leaders from within and outside the legal profession to develop action plans for ensuring access to justice for all. The more than 200 invited attendees included more than a dozen chief justices of state supreme courts, members of the state and federal bench, as well as bar leaders, lawyers from diverse practice settings, innovators, academics, non-governmental organization leaders, new entrants in legal services, and law students. Significantly, many attendees were experts and activists from diverse fields outside of the legal profession including medicine, engineering and information technology. Many of the attendees were chosen to speak on various topics at the Summit about the public’s need for legal services ranging from the current state of access to justice issues in the United States, innovation, legal education, and overall regulatory reform.

During the Summit, teams of participants broke out into different groups to discuss challenges facing access to legal services, resources, consumer knowledge, complexity of law, technology, fear of change, implementation, and education of the public. The breakout teams were split into different topics: access solutions for the underserved, blue sky innovation, dispute resolution, preventive law, and regulatory opportunities. Each team identified the challenges and brainstormed potential opportunities for enhancing access to and the delivery of legal services as summarized below. The Commission did not take a formal position on the ideas presented unless otherwise noted.

Summary of Overall Challenges Identified

1. Meaningful access (language, geography, time, client capacity)
2. Resources (lack of data on legal needs/quality metrics/etc.; insufficient funding)
3. Consumer knowledge/outreach (identifying lawyers as solution to problems; quality control)
4. Unnecessary complexity of law (law-thick world; lawyer language not people language)
5. Technology (adoption, understanding, trust)
6. Fear of change
7. Implementation (buy-in by the profession and the public)
8. Education of public
Summary of Potential Opportunities

Access Solutions for the Underserved

1. Community based legal resource centers (libraries, retail, etc. during night/weekend hours)
2. Standardized legal forms across all jurisdictions
3. Increased government funding for court technology
4. Triage via an online portal that allows people to pose a question and figure out if it's a legal issue or not (trained social worker answering questions)
5. Pop-up devices/advertisements online
6. Develop open platform for app development to serve legal needs
7. Legal insurance
8. Faith-based initiatives
9. Online dispute resolution
10. Uniform, nation-wide hotline that supports crisis management/triage and provides referrals
11. Incubator programs for new attorneys
12. “Participatory Defense”—support for defendant families to help defense lawyer (almost become a part of the defense)
13. Mandatory pro bono or CLE credit for pro bono
14. Improved E-filing system
15. Gamification

Dispute Resolution

1. Multilanguage online forms; unbundled services
2. Digitized documents at creation (including court opinions)
3. Online dispute resolution model outside of court system as first step
4. Judge White’s apprenticeship program
5. Expedited proceedings for disputes under $100k
6. Online legal help
7. Civics education
8. Courthouse kiosks; video/remote courts

Preventive Law

1. Broader range of legal services providers
2. ABS-type model, with client-focused delivery
3. Permit nonlawyers but hold to same standards
4. Bar associations increase marketing and education of consumers
5. Co-locate services with libraries, senior centers, churches, medicine

Blue Sky Innovations

1. Civil Gideon
2. ABA Technology Innovation Grants (creating a venture fund to fuel innovation projects)
3. Universal online legal triage platform
4. Online clearinghouse for legal innovation ideas
5. Specialized court dockets
6. Future of Legal Services taught in all law schools
7. Public private partnerships (e.g. revamp PACER)
8. Limit unauthorized practice of law enforcement
9. Visual maps for law
10. Informal dispute resolution
11. Mobile technology for legal services
6. Help profession identify multidisciplinary experts needed to design/implement tech solutions
7. Expand law school curriculum to include other disciplines
8. Annual legal checkups

**Regulatory Opportunities**

1. Liberalize lawyer regulation to permit equity sharing with nonlawyers to compensate/incentivize tech and innovation
2. Permit fee splitting to allow for innovative revenue sharing and lead generation
3. Permit LLLT-type programs
4. Permit practice across jurisdictions, especially for pro bono, etc.
5. Liberalize advertising rules for innovative delivery and marketing
6. Implement outcome based regulation with consumer protection focus
7. Assure adequate funding for regulatory bodies
8. Uniform bar exam
9. Regulatory guidelines/objectives for jurisdictions to follow as they experiment
10. Consider 2-year legal education with third-year apprenticeship (CLE for practicing attorneys)

Additional information about the Summit, including the full agenda and list of speakers, can be found on the Commission’s website.
The Commission commends the tremendous work by state and local bar associations on access to justice and the future of legal services. Listed below are many examples of these efforts, and the Commission encourages similar endeavors in the future.

- **Alabama Access to Justice Commission, 2003**

- **Alabama State Bar Future of the Profession in Alabama Task Force**

- **Alaska Fairness and Access Commission**

- **Arizona Commission on Access to Justice, 2014**

- **Arkansas Access to Justice Commission, 2003**

- **Boston Task Force on the Future of the Profession – Final Report**

- **California Commission on Access to Justice, 1996**
  [http://cc.calbar.ca.gov/CommitteesCommissions/Special/AccessstoJustice.aspx](http://cc.calbar.ca.gov/CommitteesCommissions/Special/AccessstoJustice.aspx), archived at [https://perma.cc/Y77T-8YZT](https://perma.cc/Y77T-8YZT)

- **Colorado Access to Justice Commission, 2003**

- **Connecticut Judicial Branch Access to Justice Commission, 2011**

- **Delaware Access to Justice Commission, 2014**

- **District of Columbia Access to Justice Commission, 2005**

- **Florida Commission on Access to Civil Justice**

- **Georgia Access to Justice, Standing Committee**
  [https://www.gabar.org/committeesprogramssections/committees/](https://www.gabar.org/committeesprogramssections/committees/), archived at [https://perma.cc/8HL8-V9P2](https://perma.cc/8HL8-V9P2)

- **Hawaii Access to Justice Commission**

- **Idaho Access to Justice Campaign**
• Illinois Supreme Court Access to Justice Commission, 2012

• Illinois State Bar Task Force on the Future of Legal Services, 2014

• Indiana Commission to Expand Access to Civil Legal Services, 2013
  http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_in_5_final_plan.authcheckdam.pdf, archived at https://perma.cc/EG2L-9UZX

• Indiana State Bar Future of the Provision of Legal Services Committee, 2016

• Iowa Access to Justice Committee
  http://www.iowabar.org/Login.aspx, archived at https://perma.cc/B5UX-Z5ZJ

• Kansas Supreme Court Access to Justice Committee, 2010

• Kentucky Access to Justice Commission, 2010

• Louisiana Access to Justice Commission, 2015

• Maine Justice Action Group, 1995

• Maryland Access to Justice Commission, 2008

• Massachusetts Access to Justice Commission, 2004
  http://www.massa2j.org/a2jwp/, archived at https://perma.cc/6JWF-TSFL

• 21st Century Law Practice Task Force, State Bar of Michigan, 2015
  http://www.michbar.org/generalinfo/futurelaw, archived at https://perma.cc/6BF3-CPF7

• Legal Assistance to the Disadvantaged Committee

• Mississippi Access to Justice Commission, 2006
  http://www.msatjc.org/, archived at https://perma.cc/C4YS-ZJ74

• Missouri Legal Services Commission, 2000

• Montana Access to Justice Commission, 2012

• Nebraska Equal Access to Justice Committee, 2002

• Nevada Access to Justice Commission, 2006

• New Hampshire Access to Justice Commission, 2007
  http://www.courts.state.nh.us/access/, archived at https://perma.cc/GQ7T-9ZXU

• New Mexico Commission on Access to Justice, 2006

• New York Permanent Commission on Access to Justice, 2010
• New York State Courts Access to Justice Program

• North Carolina Equal Access to Justice Commission, 2005
  http://ncequalaccesstojustice.org/, archived at https://perma.cc/B8F7-S7HA

• North Dakota Access to Justice Commission

• Ohio Task Force on Access to Justice
  https://www.supremecourt.ohio.gov/Boards/accessJustice/default.asp, archived at https://perma.cc/7D5J-9SSF

• Oklahoma Access to Justice Commission, 2014

• Oregon Access to Justice for All Committee

• Pennsylvania Access to Justice Committee

• Puerto Rico Advisory Commission for Access to Justice, 2014

• South Carolina Access to Justice Commission, 2007
  http://www.scatj.org/, archived at https://perma.cc/DW64-T2KN

• Tennessee Access to Justice Commission, 2009
  https://www.tncourts.gov/programs/access-justice/access-justice-commission-0, archived at https://perma.cc/S24L-NL7A

• Texas Access to Justice Commission, 2001
  http://www.texasatj.org/, archived at https://perma.cc/5PLE-LR4A

• Texas Commission to Expand Civil Legal Services, 2016

• Futures Commission of the Utah State Bar

• Vermont Access to Justice Coalition, 2004

• Virginia Access to Justice Commission, 2013
  http://www.courts.state.va.us/programs/vajc/home.html, archived at https://perma.cc/3BDN-6JHQ

• Washington State Access to Justice Board, 1994

• West Virginia Access to Justice Commission, 2009

• Wisconsin Access to Justice, 2009
  http://wisatj.org/, archived at https://perma.cc/CHU6-WBWE

• Wyoming Access to Justice Commission, 2008
In July 2015, then-ABA President William C. Hubbard and NAACP Legal Defense and Educational Fund President and Director-Counsel Sherrilyn Ifill issued a joint statement in which they recommended that several additional actions be taken:

1. Better data on the variety of interactions between law enforcement and citizens must be collected and maintained. Earlier this year FBI Director James Comey – himself a former federal prosecutor – acknowledged that gathering better and more reliable data about encounters between the police and citizens is “the first step to understanding what is really going on in our communities and our country.” Data related to violent encounters is particularly important. As Director Comey remarked, “It’s ridiculous that I can’t know how many people were shot by police.” Police departments should be encouraged to make and keep reports on the racial identities of individuals stopped and frisked, arrested, ticketed or warned for automobile and other infractions. Police departments should report incidents in which serious or deadly force is used by officers and include the race of the officer(s) and that of the civilian(s). This will certainly require investment of funds, but that investment is key to a better future. It is difficult to understand what is not measured, and it is even more difficult to change what is not understood.

2. Prosecutors should collect and publicly disclose more data about their work that can enable the public to obtain a better understanding of the extent to which racial disparities arise from the exercise of prosecutorial discretion. While this data collection also will require investment of funds, it is essential to achieving the goal of eliminating racial bias in the criminal justice system.

3. Prosecutors and police should seek assistance from organizations with expertise in conducting objective analyses to identify and localize unexplained racial disparities. These and similar organizations can provide evidence-based analyses and propose protocols to address any identified racial disparities.

4. Prosecutors’ offices, defense counsel and judges should seek expert assistance to implement training on implicit bias for their employees. An understanding of the science of implicit bias will pave the way for law enforcement officers, prosecutors and judges to address it in their individual work. There should also be post-training evaluations to determine the effectiveness of the training.

5. Prosecutors’ offices must move quickly, aggressively, unequivocally – and yet deliberately – to address misconduct that reflects explicit racial bias. Such conduct is fundamentally incompatible with our shared values and it has an outsized impact on the public’s perception of the fairness of the system.

6. Prosecutors’ offices and law enforcement agencies should make efforts to hire and retain lawyers and officers who live in and reflect the communities they serve. Prosecutors and police should be encouraged to engage with the community by participating in community forums, civic group meetings and neighborhood events. Prosecutors’
offices should build relationships with African-American and minority communities to improve their understanding about how and why these communities may view events differently from prosecutors.

7. There should be a dialogue among all the stakeholders in each jurisdiction about race and how it affects criminal justice decision-making. In 2004, the ABA Justice Kennedy Commission recommended the formation of Racial Justice Task Forces – which would consist of representatives of the judiciary, law enforcement and prosecutors, defenders and defense counsel, probation and parole officers and community organizations – to examine the racial impact that policing priorities and prosecutorial and judicial decisions might produce and whether alternative approaches that do not produce racial disparities might be implemented without compromising public safety. There is little cost associated with the assembly of such task forces, and they can develop solutions that could be applicable to a variety of jurisdictions provided that the various stakeholders are willing to do the hard work of talking honestly and candidly about race.

8. As surprising as it may seem, many people do not understand what prosecutors do. Hence, prosecutors’ offices, with the help of local and state bar associations, should seek out opportunities to explain their function and the kinds of decisions they are routinely called upon to make. Local and state bar associations and other community organizations should help to educate the public that the decision not to prosecute is often as important as the decision to prosecute; that prosecutors today should not be judged solely by conviction rates but, instead, by the fairness and judgment reflected in their decisions and by their success in making communities safer for all their members; and that some of the most innovative alternatives to traditional prosecution and punishment – like diversion and re-entry programs, drug and veteran courts and drug treatment – have been instigated, developed and supported by prosecutors.

9. To ensure accountability, the public should have access to evidence explaining why grand juries issued “no true bills” and why prosecutors declined to prosecute police officers involved in fatal shootings of unarmed civilians. The release of grand jury evidence, as in Ferguson, is one way to promote the needed accountability.

10. Accountability can also be promoted by greater use of body and vehicle cameras to create an actual record of police-citizen encounters. With the proliferation of powerful firearms in our communities, law enforcement departments reasonably seek equipment that enable them to protect themselves and their communities when called upon to confront armed and dangerous individuals seeking to engage in criminal or terrorist acts. However, while it is appropriate to arm our police and train them in the use of ever-more powerful weapons, it is equally important to train our law enforcement officers in techniques designed to de-escalate tense situations, make accurate judgments about when use of force is essential and properly determine the appropriate amount of force required in each situation.

11. We must recognize that not every lawyer has the judgment and personal qualities to be a successful prosecutor, administer justice and be willing to acknowledge the possibility of implicit bias. Prosecutors who routinely engage in conduct or make decisions that call into question the fairness or integrity of their offices should be removed from office if they cannot be trained to meet the high standards expected of public officers. At the same time, the terms “prosecutorial misconduct” and “police misconduct” should be used with greater care. Even the best prosecutors will make mistakes, much like the best defense lawyers and judges do.
There is good reason to limit the characterization of “misconduct” to intentional acts that violate legal or ethical rules.

12. Prosecutors, judges and defense counsel must pay more attention to the collateral consequences of convictions. In many jurisdictions, after an individual is convicted of an offense and completes his or her sentence (by serving time, paying a fine or completing probation or parole), the individual nevertheless faces a life sentence of disqualification and deprivation of educational, employment, housing and other opportunities. This runs counter to the interests we all share in rehabilitation of the offender and positive re-integration into and engagement with the communities in which they live. In many cases, prosecutions can be structured to limit some of the most pernicious of these consequences, provided that the lawyers and the courts take the time and care to examine alternative disposition options. Prosecutors, judges and defense counsel should join together to urge legislatures and administrative agencies to reconsider the laws and regulations that impose these collateral consequences and determine whether they can be modified to provide more opportunities for former offenders without compromising public safety.378
Endnotes


6. See, e.g., Sandefur, infra note 38; Prepaid Legal Services, infra note 224.


8. See Inventory of Innovations and other materials, Commission on the Future of Legal Services, supra note 1.


10. FY 2017 Budget Request, supra note 5.

11. Id.


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


17. Sandefur, supra n. 15.

18. ABA House of Delegates, supra note 16 at 9.


26 FY 2017 Budget Request, supra note 5. The current budget request is $475 million. The ABA supports strong federal funding for the LSC and has recommended that Congress allocate the President’s budget request of $475 million for FY17. See Legal Services Corporation, American Bar Association, available at http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation.html, archived at (https://perma.cc/M9TH-VPXZ).

27 Id.


34 The ABA Legal Answers website is targeted for launch in August 2016.


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44 See, e.g., Sandefur, supra note 38 at 16.

45 See, e.g., Sandefur, supra note 38 at 16.


47 Id.

48 Sandefur, supra note 38 at 15.

49 Id.

50 See ABA/NCSC 2015 Survey, supra note 46. Ninety-one percent of respondents agreed that people are more likely to win in court with a lawyer. Seventy-five percent of respondents agreed that lawyers can save time and money by finding answers and resolving issues quickly. Nearly two-thirds of the respondents disagreed that hiring a lawyer is not worth the cost. Four out of five respondents agreed that people are more likely to resolve a dispute without going to court if a lawyer helps them negotiate a matter. Respondents were fairly equally divided when asked if lawyers make things more complicated and make things take longer than they should. Id.
for a system of “coordinated providers and institutions” in which people could be connected to “the least expensive and intrusive service necessary to meet their actual legal needs”).


See D.C. RULES OF PROF’L CONDUCT R. 5.4.

See WASH. RULES OF PROF’L CONDUCT R 5.9(a).

See Issues Paper Regarding Alternative Business Structures, supra note 60. Relatedly, in February 2016, Georgia amended its Rules of Professional Conduct to allow Georgia law firms to work with and share legal fees with ABS firms organized in jurisdictions outside of Georgia that permit nonlawyer partnership and passive investment. See Georgia Rules of Professional Conduct, Rule 5.4. Comment 2 to Rule 5.2 makes clear that the rule is “not intended to allow a Georgia lawyer or law firm to create or participate in alternative business structures in Georgia” but only “to work with an ABS outside of the state of Georgia and to share fees for that work”.

See WASH. RULES OF PROF’L CONDUCT R 5.9(a).


K. N. Llewellyn, The Bar’s Troubles, and Poultices—and Cures?, 5 Law & Contemp. Probs. 104, 115 (Winter 1938). One competing perspective is that the absence of those phenomena is what made and maintains law as a profession. The Commission sees the more pertinent question at the intersection of the two perspectives.

See discussion infra Recommendation 2.1.


Id.


Gillian K. Hadfield & Jaime Heine, supra note 7 at 1-2.


See Chambliss et al., supra note 72 at 194.


See Chambliss et al., supra note 72 at 199 (discussing the benefits of increasing collaboration between researchers, providers, and regulators). See also Deborah Thompson Eisenberg, What We Know and Need to Know About Court-Annexed Dispute Resolution, 67 S.C. L. Rev. 245, 256 (2016) (describing a collaboration between the Maryland judiciary and an interdisciplinary research team to design a statewide evaluation of alternative dispute resolution); D. James Greiner, What We Know and Need to Know About Outreach and Intake by Legal Services Providers, 67 S.C. L. REV. 287, 293 (2016) (discussing the design and testing of “an outreach strategy intended to persuade debt collection defendants to attend court,” at the request of the legal service provider staffing a program at the court to assist them).

See Paul Lippe, What We Know and Need to Know About Watson, Esq., 67 S.C. L. Rev. 419, 425 (arguing that, compared to other professionals’ responses to advances in information technology, such as medicine, the legal profession has been “somewhat ‘stuck’”); Stephanie Kimbro, What We Know and Need to Know About
Gamification and Online Engagement, 67 S.C.L. Rev. 345, 352 (2016) (observing that “[i]legal professionals, for the most part, are missing” from online conversations around legal services and have been slow to adapt to new forms of consumer engagement online).

Raymond H. Brescia, What We Know and Need to Know About Disruptive Innovation, 67 S.C.L. Rev. 203, 203 (2016).

Id.

Id.


See Ethan Katsh & Colin Rule, What We Know and Need to Know About Online Dispute Resolution, 67 S.C.L. Rev. 329, 329 (2016) (observing that online dispute resolution “has evolved greatly” since its emergence in e-commerce in the mid-1990s” and “is increasingly being applied to other areas, including offline and higher value disputes.”).


Katsh & Rule, supra note 89 at 339.


104 Id.

105 Id.


108 Id.

109 Id.


111 Id.at 39.


113 Id.


115 Id.


117 See id. at 3.

118 See id.

119 See id.

120 See id.

121 See id.

122 See id.

123 For a description of Washington courthouse facilitators, see http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=108, archived at [https://perma.cc/7WDK-TXR7]. For California, see http://www.courts.ca.gov/selfhelp-facilitators.htm, archived at [https://perma.cc/8NUK-A7N5].

See id.


See id.

See id.


See id. at 6.

See id.

See id.


See id.


See id.


While not part of the Commission’s study, it also should be recognized that several foreign jurisdictions have implemented various forms of LSPs, including Canada and England/Wales. See CBA Legal Futures Initiative, The Canadian Bar Association, available at http://www.cba.org/CBAMediaLibrary/cba_nai/PDFs/CBA%20Legal%20Futures%20PDFs/FuturesExecSum_Recommendations.pdf, archived at (https://perma.cc/7AAK-JPTD); see also Legal Services Act, 2007, c. 29 (U.K.), available at http://www.legislation.gov.uk/ukpga/2007/29/part/1, archived at (https://perma.cc/8TF8-B3M9).


For a full list of areas in which LDAs specialize, see http://calda.org/visitors/WhoAreLDA, archived at (https://perma.cc/6RWB-HL52).

See California Legal Document Assistant Frequently Asked Questions, supra note 143.

See id.


See id.


See Legal Document Preparers, supra note 147.

See id.


166 See, e.g., Barton, supra note 82 at 235 (2015)(“If significant numbers become LLLTs and charge less that would certainly help access to justice for the middle class.”); Brooks Holland, The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice, 82 Miss. L.J. Supra 75, 90 n.62 (2013), (observing that “the access to justice gap might be partially closed by allowing nonlawyers to engage in a specified range of activities subject to regulatory oversight”) (quotations omitted).


168 For example, the State Bar of Michigan’s MichiganLegalHelp.org is designed to make the entire dispute resolution process more consumer-centric/friendly through an easily accessible web interface and self-help tools. See http://michiganlegalhelp.org/, archived at (http://perma.cc/N6AV-W824).


As one example, the New York Permanent Access to Justice Commission has been successful in working with the judiciary to secure state funding for civil legal service for those in need. The budget for 2015-16 was $55 million for civil legal services, with a proposed $100 million increase in annual civil legal services for 2016-2107. See 2015 New York State Legislative Agenda, New York City Bar Association, available at http://www2.nycbar.org/pdf/report/uploads/2015StateLegislativeAgendaFINAL.pdf, archived at (https://perma.cc/RQ9G-Y6RU).


See John Christian Waites & Fred Rooney, What We Know and Need to Know About Incubators as a New Model for Legal Services Delivery, 67 S.C. L. Rev. 503, 518 (2016).

See also discussion infra Recommendations 7.2 and 10.2.

For more details on the myriad ways technology and social media have changed the practice of law, see the resources offered by the ABA Legal Technology Resource Center and the ABA Law Practice Division, available at http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis.html.


See id. at 62.

See id. at 66.


See id.


See Brescia, supra note 79 at 214 (discussing the efficiency gains from document assembly).


See Linna, supra note 197 at 391.


See Silvia Hodges Silverstein, What We Know and Need to Know About Legal Procurement, 67 S.C. L. Rev. 485, 488 (2016).

Id.


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Id.


See id.

See id.

See id.

See id.

See id.

See id.


233 See Forrest S. Mosten, Unbundled Legal Services for Today – and Predictions for the Future, 35 Fam. Advoc. 14 (2012); Stephanie Kimbro, Limited Scope Legal Representation: Unbundling and the Self-Help Client (ABA Book Publishing 2012) (“In this rapidly changing economic and legal climate, lawyers are seeking new methods for delivering their services efficiently and effectively while attracting new types of clients. For many firms, limited scope representation—also known as à la carte or unbundled legal services—may be the solution. By providing representation for a clearly defined portion of the client’s legal needs, such as preparing a legal document or making limited court appearances, lawyers can market their practice to an entirely new client base and give their firm a competitive advantage.”).

234 See id.

235 See id.

236 See id.

237 See id.

238 See id.

Andrew M. Perlman, Towards the Law of Legal Services, 37 Cardozo L. Rev. 49, 100 (“The number of people who are not lawyers and are already involved in the delivery of legal or law-related services is growing rapidly.”). Another scholar has divided them into three “relatively blurry” categories: (1) “Companies assembling teams for document review or other specialized legal projects;”(2) “Legal process outsourcers, typically involving foreign labor;” and (3) “Companies specializing in predictive coding and other solutions involving technology and machine learning.” Rachel Zahorsky & William D. Henderson, “Who’s eating law firms’ lunch?”, ABA J. (Oct. 1, 2013), available at http://www.abajournal.com/magazine/article/whos_eating_law_firms_lunch, archived at (https://perma.cc/W99S-TX2Y).


241 See id.

242 See id.

243 See id.


245 See Benjamin H. Barton, The Lawyer’s Monopoly – What Goes and What Stays, 82 Fordham L. Rev. 3067, 3079 (2014) (“The upshot is that lawyers – from big law firms to solo practitioners – have started to see a slow bleed of business to nonlawyers.”); Rachel Zahorsky & William D. Henderson, supra note 239.


See id.

See id.


See id.


See Lawyer Demographics Year 2015, supra note 251.

See id.


See id.


See Andrew Huang, Year of the female dean, National Jurist (July 8, 2015), available at http://www.nationaljurist.com/content/year-female-dean, archived at (https://perma.cc/ZM87-84Vh)

See id.


Id. (quoting Jerry Kang, Implicit Bias: A Primer for Courts, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts, Aug. 2009).

Jo-Ann Wallace, et al., supra note 74 at 5.


277 See, e.g., Georgia Civil Legal Needs Report, Comm. on Civil Justice-Supreme Court of Georgia Equal Justice Comm’n ("a lack of understanding as to how the court process works represents an obstacle to the courts’ ability to administer justice for all").

278 Chambliss et al., supra note 72 at 199-200 (citations omitted).

279 Id. (citations omitted).


281 Chambliss et al., supra note 72 at 200; see also Jordan, supra note 44 at 325–26 (discussing the burdens of highly mechanistic procedures in immigration court); (citations omitted); Rhode, supra note 14 at 430 (noting that parties in bankruptcy, housing, and family courts “confront procedures of excessive and bewildering complexity, and forms with archaic jargon”).


283 The Legacy of Gideon v. Wainwright, The United States Department of Justice, available at https://www.justice.gov/ at/legacy-gideon-v-wainwright, archived at (https://perma.cc/YH3P-GKXD); see also Tonya L. Brito et al., What We Know and Need to Know About Civil Gideon, 67 S.C.L. Rev. 223, 224-25 (2016) (examining efforts to expand the right to counsel in civil cases involving basic human needs and reviewing research on the efficacy and administration of “Civil Gideon”).


286 See id.

287 See id.

288 See id at 9.

289 See id.

290 See, e.g., Argersinger v. Hamlin, 407 U.S. 25, 46 (1972) (Powell, J., concurring in the result) (“The interest protected by the right to have guilt or innocence determined by a jury . . . is not as fundamental to the guarantee of a fair trial as is the right to counsel.”).

291 Charles J. Ogletree, Jr., supra note 284 at 84.


294 Id.

295 Id.


297 See id.

298 See id.


302 See id.


“(A state’s system for the delivery of civil legal aid provides a full range of high quality, coordinated and uniformly available civil law-related services to the state’s low-income and other vulnerable populations who cannot afford counsel, in sufficient quantity to meet their civil legal needs.”); ABA Standards for the Provision of Civil Legal Aid, ABA Policy 111 (Aug. 2006), available at http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_111.authcheckdam.pdf, archived at (https://perma.cc/CDR2-8HQE) (articulating as key principles that civil legal aid systems should be (1) responsive to the needs of low income communities and of the clients who are served, (2) achieve lasting results, (3) treat persons served with dignity and respect, (4) facilitate access to justice for all, (4) provide high quality and effective assistance, and (5) provide zealous representation of client interests.).


Id.

Id.


Laurel Terry, Steve Mark & Tahlia Gordon, Adopting Regulatory Objectives for the Legal Profession, 80 Fordham Law Review 2685, 2686 (2012). The original quote refers to “legislation” rather than “regulation,” but regulatory objectives serve the same purpose in both cases.

See ABA House of Delegates Recommendation 10F (July 11, 2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html, archived at (https://perma.cc/9DL6-9WV7). This recommendation lists the following as among the core values of the legal profession: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty competently to exercise independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice; and the lawyer’s duty to promote access to justice.

The Commission notes that there also are important professionalism values to which all legal services providers should aspire. Some aspects of professionalism fold into the Objectives related to ethical delivery of services, independence of professional judgment and access to justice. Others may not fit neatly into the distinct purpose of regulatory objectives for legal services providers, just as they do not fall within the mandate of the ethics rules for lawyers.


Other LSP entities offer their services to lawyers. The Commission’s recommendation addresses only LSP entities that deliver services directly to the public.

Any regulation in this area must be consistent with the First Amendment. Narrowly tailored regulations are more likely to be constitutional. See, e.g., Gillian Hadfield, Right-Regulating Legal Markets, Truth on the Market (Sept. 19, 2011), http://truthonthemarket.com/2011/09/19/gillian-hadfield-on-right-regulating-legal-markets/, archived at (https://perma.cc/8FGQ-NQ62); Chas Rampenthal & James Peters, Comments on the ABA Issues Paper on the Future of Legal Services, ABA Comm’n on the Future of Legal Servs., http://www.americanbar.org/content/dam/aba/images/office_president/chas_rampenthal_and_james_peters.pdf (advocating “right regulation”), archived at (https://perma.cc/EWN9-5KMW); Chas Rampenthal is the General Counsel for LegalZoom.com, Inc. and James Peters is the Vice President of New Market Initiatives for LegalZoom.com, Inc.

For example, consider the work of the National Organization of Bar Counsel (NOBC). Beginning in 2015, NOBC, through its Ad Hoc International Committee, began gathering information, analyzing data, assessing regulatory options and producing reports on the topics of ABS, entity regulation, alternative licensure, and state and international reciprocity. These resources are intended to help member jurisdictions evaluate the regulatory impacts and challenges posed by recent developments in the way legal services are accessed, delivered and regulated, both globally and domestically, and may assist in developing of responses and local initiatives that will ensure the continued protection of the public and integrity of the profession. See, Global Resources, National Organization of Bar Counsel, available at http://www.nobc.org/index.php/jurisdiction-info/global-resources, archived at (https://perma.cc/GC3G-F2GP).

See Carole Silver, What We Know and Need to Know About Global Lawyer Regulation, 67 S.C. L. Rev. 461, 471 (noting that the definition of what constitutes “legal services” is changing, both domestically and globally). “In the United States, it once may have been accurate to define legal services as the output of lawyers’ work; today, as the Commission well knows, even domestically this definition is too narrow because a host of non-law firm organizations are participating creatively in the delivery of law-related services. Outside of the United States, where regulation permits combinations of ownership and services not currently possible here, the notion of legal services is not necessarily shaped by the status of the entity or individual delivering them.” Id. (citations omitted).


See Conference of Chief Justices and Conference of State Court Administrators Resolution 5, supra note 306 (supporting the development of “a continuum of meaningful and appropriate services”) (advocating “right regulation”).

Rebecca Sandefur, supra note 38 at 12.


The National Center for State Courts, the Legal Services Corporation, and other cooperating organizations are developing public-facing platforms that will direct the public to resources to address their legal needs. Legal checkup tools should work in collaboration with these triage programs, by, for example, being fully compatible with the data exchange standards that these groups are developing.

These proposed guidelines are consistent with the Best Practice Guidelines for Legal Information Web Site Providers, developed by the ABA Lawyering Task Force. The American Bar Association House of Delegates approved these guidelines on February 10, 2003. See Best Practice Guidelines for Legal Information Web Site Providers, ABA Law Practice Division, available at http://www.americanbar.org/groups/law_practice/committees/elawyering-best-practices.html, archived at (https://perma.cc/RA34-V8ES). Despite dramatic changes in technology, the enduring principles incorporated into this Issues Paper remain sound.

For example, lawyers who provide legal checkups should consider whether providing a legal checkup to a user creates a prospective client relationship under the relevant jurisdiction’s version of Model Rule of Professional Conduct 1.18.


See Deborah Thompson Eisenberg, *supra* note 77 at 249.


See Deborah Thompson Eisenberg, *supra* note 77 at 249.

See Ethan Katsh & Colin Rule, *supra* note 89 at 343-44 (“Advancing the practice and understanding of ODR may provide expanded access to justice for citizens around the world, which will help achieve the objectives that purely face-to-face ADR services have been unable to deliver.”).


Id.

See Diversity & Inclusion 360 Commission, *supra* note 248.


See Diversity and Inclusion 360 Commission, *supra* note 248.


Id.


Id.


Id.


United States Department of Justice, Investigation of the Ferguson Police Department (March 4, 2015).


*See ABA Model Rule 1.1 (“A lawyer shall provide competent representation to a client, which includes the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); ABA Model Rule 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).*


*See About Us, Pro Bono Training Institute, http://www.pbtraining.org/about-us/, archived at (https://perma.cc/STER-NTXR).*

*See, e.g., Blueprint Project, ABA Standing Committee on the Delivery of Legal Services, available at http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/blueprints_for_better_access.html, archived at (https://perma.cc/TVL8-YUC3).*

*See The Ideas Page, ABA Standing Committee on the Delivery of Legal Services, available at http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/blueprints_for_better_access/ideas_page.html#games, archived at (https://perma.cc/R3GW-4FKA).*

This initiative is supported by the Public Welfare Foundation though a grant to the American Bar Foundation. For more information, see Rebecca L. Sandefur & Thomas M. Clarke, *Increasing Access to Justice Through Expanded “Roles Beyond Lawyers”: Preliminary Evaluation and Classification Frameworks*, American Bar Foundation (Apr. 2015), available at http://www.americanbarfoundation.org/uploads/cms/documents/rbl_evaluation_and_program_design_frameworks_4_12_15.pdf, archived at (https://perma.cc/BY7R-ZRXQ). In addition, the project researchers are applying the frameworks to their empirical study of two existing programs, New York’s Court Navigators and Washington’s Limited License Legal Technicians.


*Joint Statement on Eliminating Bias in the Criminal Justice System, supra note 300 at 2.*
To view the Commission’s final report website and to download this report, please visit ambar.org/ABAFuturesReport. A limited number of printed copies are available. Please contact futureoflegalservices@americanbar.org to inquire.
XI. District of Columbia Rules of Professional Conduct: Rule 5.4—Professional Independence of a Lawyer

District of Columbia Rules of Professional Conduct:

Rule 5.4—Professional Independence of a Lawyer

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

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

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

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

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b); and

(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.

(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.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees with nonlawyers. (On sharing fees among lawyers not in the same firm, see Rule 1.5(e).) These limitations are to protect the lawyer’s professional independence of judgment. Where someone other than the client pays the lawyer’s fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer’s professional judgment.

[2] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.
[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants’ services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

[8] Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

[9] The term “individual” in subparagraph (b) is not intended to preclude the participation in a law firm or other organization by an individual professional corporation in the same manner as lawyers who have incorporated as a professional corporation currently participate in partnerships that include professional corporations.
[10] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.

[11] Subparagraph (a)(5) permits a lawyer to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. A lawyer may decide to contribute all or part of legal fees recovered from the opposing party to a nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or part of the lawyer’s fees does not inherently compromise the lawyer’s professional independence, whether the lawyer is employed by the organization or was only retained or recommended by it. A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client’s best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.
May 4, 2016

Via email: IPcomments@americanbar.org

Ms. Katy Englehart
American Bar Association
Office of the President
321 North Clark Street
Chicago, IL 60610

RE: Issues Paper Regarding Alternative Business Structures

Dear Ms. Englehart:

I am the President of DRI – The Voice of the Defense Bar and respond on behalf of our members to the request for comments on the 2016 Issues Paper Regarding Alternative Business Structures provided by the ABA Commission on the Future of Legal Services. (“ABS Issues Paper”). DRI – The Voice of the Defense Bar is the largest professional organization exclusively representing civil defense attorneys in the country.

The issues surrounding this topic are of great significance to the American Civil Justice System and to every one of the 22,000 members of DRI. The ABS Issues Paper states that the ABA Commission has not decided at this time whether to propose any Resolutions concerning the issues identified in this paper. It further states that the Commission “seeks broad feedback and additional factual information regarding ABS. Before deciding whether to proceed with a recommendation on this complex and sensitive topic, the Commission wants to ensure that it has as much information and data as possible.”

DRI and its members have a substantial interest in, and resources to devote to, the questions posed in the Commission’s ABS Issues Paper and we would welcome the opportunity to provide meaningful input to the Commission’s process by the submission of a paper on the subject. However the timeline for responding, even with the extension to May 6, prevents DRI from responding in any detailed fashion. Such a brief comment period is inadequate given the complexity of the issues under consideration and the magnitude of their potential effect on the profession as a whole, on each of us as lawyers, and on every American served by our system of justice.

DRI has grave concerns about the impact that non-lawyer ownership of law firms would have on a) the independence of lawyers to provide legal advice to their clients unfettered by corporate incentives for profits, b) the preservation the attorney-
client privilege, and c) a number of other, equally important issues involving our duties as lawyers, both to our clients and to the courts we serve. Within the brief period allowed, we cannot produce a meaningful and comprehensive set of comments to this Commission on all of these profound issues. For now, I will address some of our initial concerns subject to further study and elaboration at a later date.

The ABS Issues Paper does not identify a clear and compelling need to allow non-lawyer ownership of law firms to benefit the American people or to enhance the American civil justice system. If the goal of the Commission is to improve access to justice for those who cannot afford it, there are multiple pathways to improve that access that do not involve non-lawyer ownership of law firms and the radical changes to our profession that will accompany non-lawyer ownership. While the ABS Issues Paper alludes to a potential for greater access to justice, there is no empirical evidence that greater access to justice has been achieved in jurisdictions that allow this form of ownership. The possible benefits suggested in this paper are primarily financial in nature and would appear to benefit the shareholders of newly-created lawyer/non-lawyer firms, as opposed to improving the justice system.

The proposed ABSs would essentially allow for the creation of “law corporations.” Corporations are financial devices set up for the benefit of those who invest in them. When an entity is structured in this way, management’s primary obligation is to return profits to the shareholders, in contrast to a lawyer’s obligations to his or her clients, and to the court. This difference in the fundamental loyalties of a corporation and a lawyer may likely trigger situations in which non-lawyers with an ownership interest in a law firm will exert pressure that potentially may influence a lawyer’s ethical and fiduciary obligations to a client for the sole purpose of maximizing the owners’ return on investment.

The ABS Issues Paper suggests in-house counsel have demonstrated the ability to exercise independent professional judgment in similar settings, stating “[T]he practice of lawyers working in-house is not only well accepted but in-house counsel time and time again have demonstrated their ability to exercise independent professional judgment.” While it is true that in many instances in-house counsel are well equipped to exercise independent judgment, this statement fails to recognize that it is equally true that in many cases such as investigations and compliance matters, among others, independent outside counsel is necessary in order to ensure there is independent professional judgment that is not viewed as biased and unnecessarily influenced by close business relationships. This is especially true when the matters involve senior management and officers in the corporation.

Perhaps even more importantly, the exercise of independent professional judgment of in-house corporate counsel does nothing to change the inherent nature of the corporate structure and its driving motivation. And while it is true that some law
firms operate in a corporate structure today and many law partnerships create profits for the partners, the critical difference is that these business structures are run by lawyers for lawyers and for the benefit of the lawyers’ clients, and not for the pure profit interest of non-lawyer investors.

Likewise, while the attorney-client privilege and attorney work product doctrine can apply to the work of in-house attorneys, a quick look at case law around the country reveals that courts have routinely applied stricter standards to in-house counsel in determining whether materials are protected. The work of in-house counsel is more likely to be viewed as “business” in nature. Courts are less likely to find a business purpose when the primary purpose is to seek strictly legal advice as opposed to advice on other aspects of the client’s business. Involvement of non-lawyers in the discussion mix may further undermine the protections now accorded confidential communications of client secrets and legal advice.

Additionally, the potential for conflict of interest in these type of structures is very high. For instance, one proffered benefit of ABS is “Enhanced Financial Flexibility” and the ability for a firm to finance “risky but potentially lucrative business.” A strong argument can be made that the current system acts as a safeguard against frivolous lawsuits, and providing this type of “flexible financing” will lead to more frivolous actions being filed. Rule 3.1 of the Model Rules of Professional Conduct states a “lawyer will not bring or defend a matter unless there is a basis in law or fact for doing so that is not frivolous.” Imagine a matter that has the potential to be very lucrative, but at the same time is judged by the lawyer to be frivolous, is presented to an ABS firm. Are the non-lawyer owners of the firm going to allow the lawyer to turn that business away because of ethical considerations? The same is true under Model Rule 1.7 that governs conflicts of interest with current clients. The more “services” available at these “one stop shops,” the more potential there is for conflicts among clients. In these situations, the desire to benefit the investors will inevitably come into conflict with the lawyer’s duty to protect his or her clients from conflicts of interest.

The ABS Issues Paper characterizes the “cors” of ABS as threats to lawyers’ core values. It identifies the primary “core values” as professional independent judgment and loyalty to clients. These are two fundamental values that must be protected. But our core values are even deeper than that. As lawyers we not only have a duty to our clients, but we are also officers of the court and we have a responsibility to advance the rule of law in everything we do.

What is most disturbing in this regard is the ABS Issues Paper’s characterization of the basis of the lawyer’s ethical responsibility. According to the authors,
Even if measures are put in place to ensure that non-lawyer owners will obey the rules of professional conduct, critics of ABS point out that this is insufficient: after all, lawyers must demonstrate their understanding of the rules by graduating from law school and passing the bar examination and the multistate professional responsibility examination.

As lawyers, our understanding of the need to obey the rules of ethical conduct does not merely arise because we went to law school, passed the bar and took an ethics exam. It comes from the oath we took to the highest court in our state to support the Constitution of the United States and the constitution of the state in which we practice, and to practice our profession to the best of our skill and ability. A violation of that oath and the canons of ethics can result in one’s license being revoked and one’s ability to practice law taken away. A non-lawyer is not subject to this type of regulation. While one can attempt to put measures in place to have non-lawyers be subject to the rules of professional conduct, they have no duty to the legal system and lose nothing if they choose to ignore the rules that were designed to protect our clients, the courts and the judicial system as a whole.

While Commission’s report points to the use of ABS in other counties, the report ignores that the manner in which lawyers and law firms are regulated are far different than in the United States. England, for instance, follows a compliance-based approach to lawyer regulation with Compliance Officers for Legal Practice (COLPs) and Compliance Officers for Finance and Administration (COFA) playing a key role in the Solicitors Regulatory Authority’s regulatory regimen.

The importance of a lawyer’s professional independence and ability to self-regulate is best described in paragraphs 10 through 12 of the Preamble to the Model Rules of Professional Conduct:

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The 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. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Allowing non-lawyer ownership of law firms would put our ability to self-govern at risk. Once the legal profession is no longer viewed as independent, we will no longer be allowed the privilege of self-governing.

DRI plans to study this issue in more detail. We look forward to providing you with the results of that study in the near future. We trust the Commission will provide appropriate time for DRI and other organizations to comment meaningfully the profound issues raised by this important topic. In the meantime, DRI urges the ABA not to adopt any policy changes with respect to ABS structures.

Very truly yours,

Laura E. Proctor
President of DRI – The Voice of the Defense Bar
Report to Convocation
June 29, 2017

Professional Regulation Committee

Committee Members
William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
Seymour Epstein
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Decision and Information

Prepared by the Professional Regulation Division
Margaret Drent (416-947-7613)
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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on June 8, 2017. In attendance were William C. McDowell (Chair), Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice-Chair), Fred Bickford, John Callaghan, Gisèle Chrétien, (by telephone), Suzanne Clément, Seymour Epstein, Michael Lerner (by telephone), Virginia MacLean, Susan Richer, and Jerry Udell (by telephone). Robert Evans also attended the meeting.

2. Law Society staff members Karen Manarin, Caterina Galati, Juda Strawczynski, and Margaret Drent also attended the meeting.
FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT - COMMENTARY REGARDING INCRIMINATING PHYSICAL EVIDENCE

MOTION


Nature of the Issue

4. In March 2017 the Council of the Federation of Law Societies of Canada (FLSC) approved amendments to the Model Code of Professional Conduct in several areas. The following sentence has been added to paragraph [5] of the Commentary: “the lawyer’s advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation”.

5. In 2016 the Committee reviewed a FLSC consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC in June 2016. At that time, a notice and an e-bulletin were circulated to legal organizations, lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.

Summary of Proposed Amendments

6. A “clean” version of the proposed amendment is available at Tab 4.1.3. A French language version is shown at Tab 4.1.4.

7. According to materials provided by the Model Code Standing Committee, the Nova Scotia Barristers Society had suggested the proposed amendment to reflect the constitutionally-protected right against self-incrimination, and to emphasize that the lawyer’s advice to this effect does not place the lawyer outside the Rule (i.e. obstructing justice).

8. The Committee has reviewed the proposed amendment and is of the view that it would enhance the existing guidance to lawyers in this area.
Incriminating Physical Evidence

5.1-2A A lawyer shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, “physical evidence” does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options, which may include consulting with a senior legal practitioner. These options include, as soon as reasonably possible:

(a) considering whether to retain independent legal counsel to provide advice about the lawyer’s obligations. If retained, the lawyer and independent legal counsel should consider

   (i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing lawyer to law enforcement authorities or to the prosecution, and

   (ii) whether independent legal counsel, should, either directly or anonymously, taking into account the procedures appropriate in the circumstances

      (I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or

      (II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;
(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client’s identity, and to preserve solicitor-client privilege.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer’s advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.
VERSION MONTRANT LES CHANGEMENTS PROPOSÉS AU CODE DE DÉONTOLOGIE – MODIFICATIONS AU COMMENTAIRE CONCERNANT LA PREUVE MATÉRIELLE INCrimINANTE

Preuve matérielle incriminante

5.1-2A L’avocat ne conseille pas de dissimuler, de détruire ou de modifier une preuve matérielle incriminante et n’y participe pas ou n’agit pas de façon à entraver ou à tenter d’entraver le cours de la justice.

Commentaire

[1] Dans la présente règle, la « preuve matérielle » ne repose pas sur l’admissibilité devant un tribunal ni sur l’existence d’accusations criminelles. Elle vise les documents, l’information électronique, les objets ou les substances ayant trait à un acte criminel, à une enquête ou à une poursuite criminelle. Elle ne vise pas les documents ou les communications qui sont protégés par le privilège du secret professionnel ou que les autorités peuvent se procurer autrement, selon l’avis raisonnable de l’avocat.

[2] Cette règle ne s’applique pas lorsqu’un avocat a en sa possession une preuve qui tend à établir l’innocence d’un client, comme la preuve concernant un alibi. Cependant, un avocat doit faire preuve de prudence dans son jugement lorsqu’il s’agit de déterminer si une telle preuve est en fait disculpatoire et, par conséquent, ne relève pas de l’application de la présente règle. Par exemple, si la preuve est à la fois incriminante et disculpatoire, une mauvaise utilisation de cette règle pourrait constituer une violation de la règle et exposer l’avocat à des accusations criminelles.

[3] Un avocat n’est jamais tenu de prendre possession ou de conserver une preuve matérielle incriminante ni d’en divulguer l’existence. La possession d’objets illégaux pourrait constituer une infraction. Un avocat qui est en possession d’une preuve matérielle incriminante devrait examiner soigneusement l’une ou l’autre des mesures possibles suivantes, notamment en faisant appel à un praticien juridique chevronné :

a) Envisager d’obtenir des conseils juridiques indépendants quant à ses obligations. Le cas échéant, l’avocat et son conseiller juridique indépendant devraient

   (i) décider si le conseiller juridique indépendant devrait être informé de l’identité du client et instruit de ne pas divulguer l’identité de l’avocat aux autorités policières ou au procureur;

   (ii) décider si le conseiller juridique indépendant devrait, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances, faire l’une ou l’autre des choses suivantes :

      (I) divulguer ou remettre la preuve aux autorités policières ou au procureur,

      (II) divulguer et remettre la preuve aux autorités policières et au procureur;
b) Remettre la preuve aux autorités policières ou au procureur et, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances;

c) Présenter la preuve au tribunal dans l’instance applicable et notamment solliciter une directive du tribunal pour faciliter l’accès par le procureur ou la défense aux éléments de preuve afin qu’ils puissent les vérifier et les examiner;

d) Informer le procureur de l’existence de la preuve et, s’il y a lieu, être prêt à soutenir devant un tribunal les moyens d’utiliser la preuve et d’en disposer, ainsi que sa recevabilité.

[4] L’avocat devrait trouver le juste équilibre entre l’obligation de loyauté et de confidentialité envers le client et les obligations envers l’administration de la justice. Lorsqu’un avocat divulgue ou présente une preuve matérielle incriminante aux autorités policières ou au procureur, l’avocat a l’obligation de protéger la confidentialité des renseignements concernant le client, y compris son identité, et de préserver le privilège du secret professionnel.

[5] L’avocat n’est pas tenu d’aider les autorités à recueillir des éléments de preuve matérielle d’un crime, mais ne peut agir de façon à entraver une enquête ou une poursuite, ou conseiller à une personne d’agir ainsi. Ne constitue pas une entrave à une enquête le fait pour l’avocat d’informer son client que celui-ci a le droit de refuser de révéler où se trouvent certains éléments de preuve matérielle. L’avocat qui apprend l’existence d’une preuve matérielle incriminante ou qui refuse d’en prendre possession ne doit pas conseiller de la dissimuler, la détruire ou la modifier, ni participer à de tels actes.

[6] L’avocat peut déterminer qu’il est nécessaire de vérifier, de reproduire ou d’examiner de façon non destructive des documents ou de l’information électronique. L’avocat devrait s’assurer que la preuve n’est pas dissimulée, détruite ou modifiée et doit agir avec prudence à cet égard. Par exemple, ouvrir ou reproduire un document électronique pourrait l’altérer. L’avocat qui décide de reproduire, de vérifier ou d’examiner la preuve avant de la présenter ou de la divulguer doit le faire sans tarder.
Incriminating Physical Evidence

5.1-2A A lawyer shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, “physical evidence” does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options, which may include consulting with a senior legal practitioner. These options include, as soon as reasonably possible:

(a) considering whether to retain independent legal counsel to provide advice about the lawyer’s obligations. If retained, the lawyer and independent legal counsel should consider

(i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing lawyer to law enforcement authorities or to the prosecution, and

(ii) whether independent legal counsel, should, either directly or anonymously, taking into account the procedures appropriate in the circumstances

(I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or

(II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;
(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client’s identity, and to preserve solicitor-client privilege.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer’s advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.
Tab 4.1.4

VERSION MONTRANT LES CHANGEMENTS PROPOSÉS AU CODE DE DÉONTOLOGIE – MODIFICATIONS AU COMMENTAIRE CONCERNANT LA PREUVE MATÉRIELLE INCRIMINANTE

Preuve matérielle incriminante

5.1-2A L’avocat ne conseille pas de dissimuler, de détruire ou de modifier une preuve matérielle incriminante et n’y participe pas ou n’agit pas de façon à entraver ou à tenter d’entraver le cours de la justice.

Commentaire

[1] Dans la présente règle, la « preuve matérielle » ne repose pas sur l’admissibilité devant un tribunal ni sur l’existence d’accusations criminelles. Elle vise les documents, l’information électronique, les objets ou les substances ayant trait à un acte criminel, à une enquête ou à une poursuite criminelle. Elle ne vise pas les documents ou les communications qui sont protégés par le privilège du secret professionnel ou que les autorités peuvent se procurer autrement, selon l’avis raisonnable de l’avocat.

[2] Cette règle ne s’applique pas lorsqu’un avocat a en sa possession une preuve qui tend à établir l’innocence d’un client, comme la preuve concernant un alibi. Cependant, un avocat doit faire preuve de prudence dans son jugement lorsqu’il s’agit de déterminer si une telle preuve est en fait disculpatoire et, par conséquent, ne relève pas de l’application de la présente règle. Par exemple, si la preuve est à la fois incriminante et disculpatoire, une mauvaise utilisation de cette règle pourrait constituer une violation de la règle et exposer l’avocat à des accusations criminelles.

[3] Un avocat n’est jamais tenu de prendre possession ou de conserver une preuve matérielle incriminante ni d’en divulguer l’existence. La possession d’objets illégaux pourrait constituer une infraction. Un avocat qui est en possession d’une preuve matérielle incriminante devrait examiner soigneusement l’une ou l’autre des mesures possibles suivantes, notamment en faisant appel à un praticien juridique chevronné :

a) Envisager d’obtenir des conseils juridiques indépendants quant à ses obligations. Le cas échéant, l’avocat et son conseiller juridique indépendant devraient

   (i) décider si le conseiller juridique indépendant devrait être informé de l’identité du client et instruit de ne pas divulguer l’identité de l’avocat aux autorités policières ou au procureur;

   (ii) décider si le conseiller juridique indépendant devrait, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances, faire l’une ou l’autre des choses suivantes :

      (I) divulguer ou remettre la preuve aux autorités policières ou au procureur,
(II) divulguer et remettre la preuve aux autorités policières et au procureur;

b) Remettre la preuve aux autorités policières ou au procureur et, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances;

c) Présenter la preuve au tribunal dans l’instance applicable et notamment solliciter une directive du tribunal pour faciliter l’accès par le procureur ou la défense aux éléments de preuve afin qu’ils puissent les vérifier et les examiner;

d) Informer le procureur de l’existence de la preuve et, s’il y a lieu, être prêt à soutenir devant un tribunal les moyens d’utiliser la preuve et d’en disposer, ainsi que sa recevabilité.

[4] L’avocat devrait trouver le juste équilibre entre l’obligation de loyauté et de confidentialité envers le client et les obligations envers l’administration de la justice. Lorsqu’un avocat divulgue ou présente une preuve matérielle incriminante aux autorités policières ou au procureur, l’avocat a l’obligation de protéger la confidentialité des renseignements concernant le client, y compris son identité, et de préserver le privilège du secret professionnel.

[5] L’avocat n’est pas tenu d’aider les autorités à recueillir des éléments de preuve matérielle d’un crime, mais ne peut agir de façon à entraver une enquête ou une poursuite, ou conseiller à une personne d’agir ainsi. Ne constitue pas une entrave à une enquête le fait pour l’avocat d’informer son client que celui-ci a le droit de refuser de révéler où se trouvent certains éléments de preuve matérielle. L’avocat qui apprend l’existence d’une preuve matérielle incriminante ou qui refuse d’en prendre possession ne doit pas conseiller de la dissimuler, la détruire ou la modifier, ni participer à de tels actes.

[6] L’avocat peut déterminer qu’il est nécessaire de vérifier, de reproduire ou d’examiner de façon non destructive des documents ou de l’information électronique. L’avocat devrait s’assurer que la preuve n’est pas dissimulée, détruite ou modifiée et doit agir avec prudence à cet égard. Par exemple, ouvrir ou reproduire un document électronique pourrait l’altérer. L’avocat qui décide de reproduire, de vérifier ou d’examiner la preuve avant de la présenter ou de la divulguer doit le faire sans tarder.
FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING COMPETENCE AND THE PROVISION OF LEGAL OPINIONS

MOTION


Nature of the Issue

10. These amendments are intended to provide additional guidance to lawyers about the provision of legal opinions, and would reflect amendments to the Model Code of Professional Conduct of the Federation of Law Societies of Canada approved by Federation Council in March 2017.

11. In 2016, the Committee reviewed a consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC in June 2016. A notice was also sent to legal organizations and an e-bulletin was circulated to all lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.

12. According to the FLSC consultation report, the impetus for this proposed amendment regarding the provision of legal opinions is a recommendation of the Canadian Bar Association (CBA) Legal Futures Initiative (“Futures”). The “Futures” Report emphasized the importance of lawyer independence and raised the possibility of undue influence being exercised by powerful clients over lawyers’ legal opinions.

13. The proposed amendment to the Commentary would, if approved by Convocation, also provide greater guidance on the issue of a lawyer making unreasonable assurances to a client.

14. A “clean” version is attached as Tab 4.2.3. A French language version is shown at Tab 4.2.4.
Tab 4.2.1

REDLINE SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT ARISING FROM MODEL CODE AMENDMENTS

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client’s behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

(a) the complexity and specialized nature of the matter;

(b) the lawyer’s general experience;

(c) the lawyer’s training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should
(a) decline to act;

(b) obtain the client’s instructions to retain, consult, or collaborate with a licensee who is competent for that task; or

(c) obtain the client’s consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client’s instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. **A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.**

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[9] A lawyer should be wary of bold providing and unreasonable or over-confident assurances to the client, especially when the lawyer’s employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy, or social complications involved in the question or the course the client should choose. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.
In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-licensee. Advice or services from non-licensee members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices.

The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer’s own reputation and practice, incompetence may also injure the lawyer’s partners and associates.

Incompetence, Negligence and Mistakes – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

The Law Society Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

(a) the lawyer’s knowledge, skill, or judgment,
(b) the lawyer’s attention to the interests of clients,
(c) the records, systems, or procedures of the lawyer’s professional business, or
(d) other aspects of the lawyer’s professional business,

and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]
VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE DÉCOULANT DES MODIFICATIONS DU CODE TYPE APPROUVÉES EN MARS 2017
– Commentaire sur la compétence

Compétence

3.1-2 Un avocat doit fournir tous les services juridiques entrepris au nom d’un client conformément à la norme de compétence exigée d’un avocat.

Commentaire

[1] À titre de membre de la profession juridique, l’avocat est censé avoir les connaissances, l’expérience et les aptitudes requises pour exercer le droit. Ses clients sont donc en droit de croire qu’il a les aptitudes et qualités requises pour traiter convenablement toutes les affaires juridiques dont ils le saisissent.

[2] La compétence est fondée sur des principes déontologiques et juridiques. La présente règle traite des principes déontologiques. La compétence est plus qu’une affaire de compréhension des principes du droit ; il s’agit de comprendre adéquatement la pratique et les procédures selon lesquelles ces principes peuvent s’appliquer de manière efficace. Pour ce faire, l’avocat doit se tenir au courant des faits nouveaux dans tous les domaines du droit relevant de ses compétences.

[3] En décidant si l’avocat a fait appel aux connaissances et habiletés requises dans un dossier particulier, les facteurs dont il faudra tenir compte comprennent
a) la complexité et la nature spécialisée du dossier ;
b) l’expérience générale de l’avocat ;
c) la formation et l’expérience de l’avocat dans le domaine ;
d) le temps de préparation et d’étude que l’avocat est en mesure d’accorder au dossier ;
e) s’il est approprié et faisable de renvoyer le dossier à un titulaire de permis dont les compétences sont reconnues dans le domaine en question, de s’associer avec ce dernier ou de le consulter.

[4] Dans certaines circonstances, une expertise dans un domaine du droit particulier pourrait être requise ; dans bien des cas, le niveau de compétence nécessaire sera celui du généraliste.

[5] L’avocat ne devrait donc pas accepter une affaire s’il n’est pas honnêtement convaincu de posséder la compétence nécessaire pour la traiter ou de pouvoir l’acquérir sans délai, sans frais et sans risques excessifs pour son client. Il s’agit là d’une considération d’ordre éthique, distincte des normes de diligence que pourrait invoquer un tribunal pour conclure à la négligence professionnelle.

[6] L’avocat doit reconnaître son manque de compétence pour une affaire déterminée et que s’il s’en chargeait, il desservirait les intérêts de son client. Si son client le consulte au sujet d’une telle affaire, l’avocat doit :
a) refuser le mandat ;

b) obtenir les directives du client pour engager un titulaire de permis ayant les compétences pour prendre en charge cette affaire ou consulter ou collaborer avec un tel titulaire de permis ;

c) obtenir le consentement du client afin d’acquérir les compétences sans délai, sans risques et sans frais pour le client.

[7] L’avocat devrait également reconnaître que, pour avoir les compétences nécessaires à une tâche en particulier, il devra peut-être demander conseil à des experts dans le domaine scientifique, comptable ou autre domaine non juridique, ou collaborer avec de tels experts. De plus, il ne doit pas hésiter à demander au client la permission de consulter des experts lorsque cela est approprié.

[7A] Lorsqu’un avocat envisage la possibilité de fournir des services juridiques en vertu d’un mandat à portée limitée, il doit évaluer soigneusement pour chaque cas si, dans les circonstances, il est possible de rendre ces services de manière compétente. Une entente visant à fournir ce type de service n’exonère pas un avocat de son obligation de représenter un client avec compétence. Comme dans tout mandat, l’avocat devrait tenir compte des connaissances juridiques, des aptitudes, de la rigueur et de la préparation raisonnablement nécessaires pour assurer une représentation compétente. L’avocat devrait veiller à ce que le client comprenne complètement et clairement la nature de l’entente et la portée des services, y compris les limites. Voir aussi les règles 3.2-1.A à 3.2-1.A.2.

[8] L’avocat devrait préciser clairement les faits, les circonstances et les hypothèses sur lesquels une opinion est fondée, particulièrement lorsque les circonstances ne justifient pas une enquête exhaustive ainsi que les dépenses qui en résultent et qui seraient imputées au client. Toutefois, à moins d’indication contraire de la part du client, l’avocat devrait mener une enquête suffisamment détaillée afin d’être en mesure de donner une opinion, plutôt que de faire de simples commentaires assortis de nombreuses réserves. L’avocat ne devrait donner d’autre opinion juridique que celle qui est véritablement la sienne et qui satisfait à la norme de l’avocat compétent.

[8.1] Ce qui est considéré comme une communication efficace avec le client variera selon la nature du mandat, les besoins et les connaissances du client ainsi que la nécessité pour le client de prendre des décisions bien éclairées et de fournir des directives.

[9] L’avocat devrait faire attention de ne pas faire de promesses excessives et présomptueuses et déraisonnables au client, surtout lorsque l’emploi ou le mandat de l’avocat peut en dépendre.

[10] En plus de demander à l’avocat de donner son avis sur des questions de droit, on pourrait lui demander de donner son avis sur des questions de nature non juridique – comme les complications commerciales, économiques, politiques ou sociales que pourrait comporter l’affaire – ou sur le plan d’action que devrait choisir le client, ou s’attacher à ce qu’il donne son avis sur de telles questions. Dans bien des cas, l’expérience de l’avocat sera telle que le client pourra tirer profit de ses opinions sur des questions non juridiques. L’avocat qui exprime ses opinions sur de telles questions devrait, s’il y a lieu et dans la mesure nécessaire, signaler tout manque d’expérience ou de compétence dans le domaine particulier et devrait faire nettement la distinction entre un avis juridique ou un avis autre que juridique.
[11] Dans le cas d’un cabinet multidisciplinaire, l’avocat doit veiller à ce que le client sache que l’avis ou les services d’un non-titulaire de permis pourraient s’ajouter à l’avis juridique donné par l’avocat. Un avis ou les services de membres non avocats du cabinet qui n’ont aucun lien avec le mandat des services juridiques doivent être fournis à l’extérieur du cadre du mandat des services juridiques et à partir d’un endroit distinct des lieux du cabinet multidisciplinaire. La prestation d’avis ou de services non juridiques qui n’ont aucun lien avec le mandat de services juridiques sera également assujettie aux contraintes énoncées dans les règlements administratifs et les règlements régissant les cabinets multidisciplinaires.

[12] En exigeant un service consciencieux, appliqué et efficace, on demande que l’avocat fasse tout effort possible pour servir le client en temps opportun. Si l’avocat peut raisonnablement prévoir un retard dans l’exécution de ses tâches, il devrait en aviser le client de sorte que ce dernier puisse faire un choix éclairé quant à ses options, comme la possibilité de retenir les services d’un autre avocat.

[13] L’avocat devrait s’abstenir de toute conduite qui pourrait gêner ou compromettre sa capacité ou son empressément à fournir des services juridiques satisfaits au client et devrait être conscient de tout facteur ou de toute circonstance pouvant avoir cet effet.

[14] L’avocat incompétent nuit à ses clients, déshonore sa profession et risque de jeter le discrédit sur l’administration de la justice. En plus de compromettre sa réputation et sa carrière, il peut aussi causer du tort à ses associés et aux professionnels salariés de son cabinet.

[15] Incompétence, négligence et erreurs – La présente règle ne vise pas la perfection. Une erreur ou une omission, bien qu’elle puisse donner lieu à une action en dommages-intérêts pour cause de négligence ou de rupture de contrat, ne constituera pas forcément un manquement à la norme de compétence professionnelle décrite dans la règle. Bien que des dommages-intérêts puissent être accordés pour cause de négligence, l’incompétence peut aussi entrainer une sanction disciplinaire.

[15.1] La Loi sur le Barreau prévoit qu’un avocat ne respecte pas les normes de compétence de la profession s’il existe des lacunes sur l’un ou l’autre des plans suivants :

a) ses connaissances, ses habiletés ou son jugement ;

b) l’attention qu’il porte aux intérêts de ses clients ;

c) les dossiers, les systèmes ou les méthodes qu’il utilise pour ses activités professionnelles ;

d) d’autres aspects de ses activités professionnelles,

et que ces lacunes soulèvent des craintes raisonnables quant à la qualité du service qu’il offre à ses clients.

“CLEAN” VERSION SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT ARISING FROM MODEL CODE AMENDMENTS

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client’s behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

(a) the complexity and specialized nature of the matter;
(b) the lawyer’s general experience;
(c) the lawyer’s training and experience in the field;
(d) the preparation and study the lawyer is able to give the matter; and
(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should
(a) decline to act;

(b) obtain the client’s instructions to retain, consult, or collaborate with a licensee who is competent for that task; or

(c) obtain the client’s consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client’s instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[9] A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer’s employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy, or social complications involved in the question or the course the client should choose. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.
[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-licensee. Advice or services from non-licensee members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

[13] The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer’s own reputation and practice, incompetence may also injure the lawyer’s partners and associates.

[15] Incompetence, Negligence and Mistakes – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

[15.1] The Law Society Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

(a) the lawyer’s knowledge, skill, or judgment,

(b) the lawyer’s attention to the interests of clients,

(c) the records, systems, or procedures of the lawyer’s professional business, or

(d) other aspects of the lawyer’s professional business,

and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]
VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE DÉCOULANT DES MODIFICATIONS DU CODE TYPE APPROUVÉES EN MARS 2017
– Commentaire sur la compétence

Compétence

3.1-2 Un avocat doit fournir tous les services juridiques entrepris au nom d’un client conformément à la norme de compétence exigée d’un avocat.

Commentaire

[1] À titre de membre de la profession juridique, l’avocat est censé avoir les connaissances, l’expérience et les aptitudes requises pour exercer le droit. Ses clients sont donc en droit de croire qu’il a les aptitudes et qualités requises pour traiter convenablement toutes les affaires juridiques dont ils le saisissent.

[2] La compétence est fondée sur des principes déontologiques et juridiques. La présente règle traite des principes déontologiques. La compétence est plus qu’une affaire de compréhension des principes du droit ; il s’agit de comprendre adéquatement la pratique et les procédures selon lesquelles ces principes peuvent s’appliquer de manière efficace. Pour ce faire, l’avocat doit se tenir au courant des faits nouveaux dans tous les domaines du droit relevant de ses compétences.

[3] En décidant si l’avocat a fait appel aux connaissances et habiletés requises dans un dossier particulier, les facteurs dont il faudra tenir compte comprennent

a) la complexité et la nature spécialisée du dossier ;

b) l’expérience générale de l’avocat ;

c) la formation et l’expérience de l’avocat dans le domaine ;

d) le temps de préparation et d’étude que l’avocat est en mesure d’accorder au dossier ;

e) s’il est approprié et faisable de renvoyer le dossier à un titulaire de permis dont les compétences sont reconnues dans le domaine en question, de s’associer avec ce dernier ou de le consulter.

[4] Dans certaines circonstances, une expertise dans un domaine du droit particulier pourrait être requise ; dans bien des cas, le niveau de compétence nécessaire sera celui du généraliste.

[5] L’avocat ne devrait donc pas accepter une affaire s’il n’est pas honnêtement convaincu de posséder la compétence nécessaire pour la traiter ou de pouvoir l’acquérir sans délai, sans frais et sans risques excessifs pour son client. Il s’agit là d’une considération d’ordre éthique, distincte des normes de diligence que pourrait invoquer un tribunal pour conclure à la négligence professionnelle.

[6] L’avocat doit reconnaître son manque de compétence pour une affaire déterminée et que s’il s’en chargeait, il desservirait les intérêts de son client. Si son client le consulte au sujet d’une telle affaire, l’avocat doit :
a) refuser le mandat ;

b) obtenir les directives du client pour engager un titulaire de permis ayant les compétences pour prendre en charge cette affaire ou consulter ou collaborer avec un tel titulaire de permis ;

c) obtenir le consentement du client afin d’acquérir les compétences sans délai, sans risques et sans frais pour le client.

[7] L’avocat devrait également reconnaître que, pour avoir les compétences nécessaires à une tâche en particulier, il devra peut-être demander conseil à des experts dans le domaine scientifique, comptable ou autre domaine non juridique, ou collaborer avec de tels experts. De plus, il ne doit pas hésiter à demander au client la permission de consulter des experts lorsque cela est approprié.

[7A] Lorsqu’un avocat envisage la possibilité de fournir des services juridiques en vertu d’un mandat à portée limitée, il doit évaluer soigneusement pour chaque cas si, dans les circonstances, il est possible de rendre ces services de manière compétente. Une entente visant à fournir ce type de service n’exonère pas un avocat de son obligation de représenter un client avec compétence. Comme dans tout mandat, l’avocat devrait tenir compte des connaissances juridiques, des aptitudes, de la rigueur et de la préparation raisonnablement nécessaires pour assurer une représentation compétente. L’avocat devrait veiller à ce que le client comprenne complètement et clairement la nature de l’entente et la portée des services, y compris les limites. Voir aussi les règles 3.2-1A à 3.2-1A.2.

[8] L’avocat devrait préciser clairement les faits, les circonstances et les hypothèses sur lesquels une opinion est fondée, particulièrement lorsque les circonstances ne justifient pas une enquête exhaustive ainsi que les dépenses qui en résultent et qui seraient imputées au client. Toutefois, à moins d’indication contraire de la part du client, l’avocat devrait mener une enquête suffisamment détaillée afin d’être en mesure de donner une opinion, plutôt que de faire de simples commentaires assortis de nombreuses réserves. L’avocat ne devrait donner d’autre opinion juridique que celle qui est véritablement la sienne et qui satisfait à la norme de l’avocat compétent.

[8.1] Ce qui est considéré comme une communication efficace avec le client variera selon la nature du mandat, les besoins et les connaissances du client ainsi que la nécessité pour le client de prendre des décisions bien éclairées et de fournir des directives.

[9] L’avocat devrait faire attention de ne pas faire de promesses présomptueuses et déraisonnables au client, surtout lorsque l’emploi ou le mandat de l’avocat peut en dépendre.

[10] En plus de demander à l’avocat de donner son avis sur des questions de droit, on pourrait lui demander de donner son avis sur des questions de nature non juridique – comme les complications commerciales, économiques, politiques ou sociales que pourrait comporter l’affaire – ou sur le plan d’action que devrait choisir le client, ou s’attendre à ce qu’il donne son avis sur de telles questions. Dans bien des cas, l’expérience de l’avocat sera telle que le client pourra tirer profit de ses opinions sur des questions non juridiques. L’avocat qui exprime ses opinions sur de telles questions devrait, s’il y a lieu et dans la mesure nécessaire, signaler tout manque d’expérience ou de compétence dans le domaine particulier et devrait faire nettement la distinction entre un avis juridique ou un avis autre que juridique.
Dans le cas d’un cabinet multidisciplinaire, l’avocat doit veiller à ce que le client sache que l’avis ou les services d’un non-titulaire de permis pourraient s’ajouter à l’avis juridique donné par l’avocat. Un avis ou les services de membres non avocats du cabinet qui n’ont aucun lien avec le mandat des services juridiques doivent être fournis à l’extérieur du cadre du mandat des services juridiques et à partir d’un endroit distinct des lieux du cabinet multidisciplinaire. La prestation d’avis ou de services non juridiques qui n’ont aucun lien avec le mandat de services juridiques sera également assujettie aux contraintes énoncées dans les règlements administratifs et les règlements régissant les cabinets multidisciplinaires.

En exigeant un service consciencieux, appliqué et efficace, on demande que l’avocat fasse tout effort possible pour servir le client en temps opportun. Si l’avocat peut raisonnablement prévoir un retard dans l’exécution de ses tâches, il devrait en avertir le client de sorte que ce dernier puisse faire un choix éclairé quant à ses options, comme la possibilité de retenir les services d’un autre avocat.

L’avocat devrait s’abstenir de toute conduite qui pourrait gêner ou compromettre sa capacité ou son empressément à fournir des services juridiques satisfaits au client et devrait être conscient de tout facteur ou de toute circonstance pouvant avoir cet effet.

L’avocat incompétent nuit à ses clients, déshonne sa profession et risque de jeter le discrédit sur l’administration de la justice. En plus de compromettre sa réputation et sa carrière, il peut aussi causer du tort à ses associés et aux professionnels salariés de son cabinet.

Incompétence, négligence et erreurs – La présente règle ne vise pas la perfection. Une erreur ou une omission, bien qu’elle puisse donner lieu à une action en dommages-intérêts pour cause de négligence ou de rupture de contrat, ne constituerait pas forcément un manquement à la norme de compétence professionnelle décrite dans la règle. Bien que des dommages-intérêts puissent être accordés pour cause de négligence, l’incompétence peut aussi entraîner une sanction disciplinaire.

La Loi sur le Barreau prévoit qu’un avocat ne respecte pas les normes de compétence de la profession s’il existe des lacunes sur l’un ou l’autre des plans suivants :

a) ses connaissances, ses habiletés ou son jugement ;

b) l’attention qu’il porte aux intérêts de ses clients ;

c) les dossiers, les systèmes ou les méthodes qu’il utilise pour ses activités professionnelles ;

d) d’autres aspects de ses activités professionnelles,

et que ces lacunes soulèvent des craintes raisonnables quant à la qualité du service qu’il offre à ses clients.

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT - NEW RULE REGARDING LEAVING A LAW FIRM

MOTION

15. That Convocation approve amendments to the Rules of Professional Conduct that would incorporate new sub-rules and Commentary describing a lawyer’s obligations when leaving a law firm, as set out at Tabs 4.3.1 and 4.3.2 (English and French).

Nature of the Issue

16. According to materials provided by the Standing Committee on the Model Code of Professional Conduct of the Federation of Law Societies of Canada, these Model Code amendments are intended to ensure that the Rules and Commentary address issues of client choice of counsel, how a lawyer and a law firm should interact when a lawyer departs, and how lawyers should provide notice of their departure to clients.

17. The Model Code was amended in March 2017 to incorporate a new sub-rule and Commentary regarding leaving a law firm. At that time, paragraph [4] of the Commentary to Model Code Rule 3.7-1 (Withdrawal from Representation) was deleted, since the content of the Commentary is now addressed in the new Rule.

18. In 2016, the Committee reviewed a consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC in June 2016. A notice was also circulated to legal organizations and an e-bulletin was circulated to all lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.¹

Issue Under Consideration

19. The Committee has reviewed the Model Code amendments and recommends their adoption to Convocation, with some modifications. Proposed subrule 3.7-7A(1) would, if approved by Convocation, define the terms "affected client", "relevant matter", and "remaining lawyers" for the purpose of the Rules.

¹ Reports regarding additional guidance in the Commentary on the provision of legal opinions, and an amendment to the Commentary regarding Incriminating Physical Evidence appear elsewhere in these materials.
20. Proposed new subrule 3.7-7B would require a lawyer and the “remaining lawyers” to provide reasonable notice of their departure to all affected clients and take reasonable steps to obtain the instructions of each affected client as to whom they will retain to act in relevant matters. These modifications have been drafted with a view to ensuring that the new subrule and Commentary do not impose an undue obligation on lawyers.

21. New Rule 3.7-7A(3) would also be unique to the Law Society and would provide that these obligations would also apply in the event that a paralegal left a law firm.

22. Paragraph [2] of the proposed Commentary begins with the following: “The client’s interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm”. The proposed Commentary reinforces the principle, set out in Robert Findlay Law Office Professional Corporation v. Werner, that the interests of clients must be protected when a lawyer leaves a law firm. The Commentary makes it clear that clients must be provided with adequate information to make informed decisions about their representation and that lawyers have a duty to work cooperatively and professionally with their law firms to ensure that clients are not negatively affected.

23. Paragraph [3] of the proposed Commentary addresses the issue of notification to clients about their available options. In some cases, it may be preferable to prepare a joint notification. Commentary paragraph [8] provides that the principles outlined in the rule and commentary apply to the dissolution of a law firm.

24. Proposed subrule 3.7-7B provides that Rule 3.7-7A does not apply to a lawyer leaving a government, Crown corporation or other public body; nor does it apply to a corporation or other organization where a lawyer is employed as in-house counsel.

25. The Law Society of Upper Canada’s Closing Down Your Practice Guideline is available at http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/File-Management/Closing-Down-Your-Practice-Guideline/. The Committee recommends the adoption of the proposed new subrules and Commentary to Convocation to provide additional guidance to lawyers regarding their ethical obligations in these circumstances.

26. A “clean” version of the Rules of Professional Conduct is attached as Tab 4.3.3. A French language “clean” version is available at Tab 4.3.4.

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REDLINE SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer’s obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

[4] When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client’s interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.
Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer’s advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

[Amended – October 2014]

Non-payment of Fees

3.7-3 Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

[Amended – October 2014]

Withdrawal from Criminal Proceedings

3.7-4 A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation, and the lawyer

[Amended – June 2007]

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;
(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and
(e) complies with the applicable rules of court.

[Amended – October 2014]

Commentary

[1] A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

3.7-5 A lawyer who has agreed to act in a criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client’s interests.

3.7-6 In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

(a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;
(b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007, October 2014]

Commentary

[1] Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client;
(b) the client’s instructions require the lawyer to act contrary to these rules or by-laws under the *Law Society Act*; or

(c) the lawyer is not competent to continue to handle the matter.

[Amended – March 2004, October 2014]

**Leaving a Law Firm**

**3.7-7A(1)** In this subrule

(a) “affected client” means a client for whom the law firm has a relevant matter;

(b) “relevant matter” means a current matter for which the lawyer who is leaving the law firm has conduct or substantial responsibility;

(c) “remaining lawyers” means the lawyers who have, or are intended by the law firm to have, conduct of a relevant matter and the lawyers in the law firm who have direct and indirect management responsibility in respect of the practice of the lawyer who is leaving the law firm.

(2) When a lawyer leaves a law firm to practice elsewhere, the lawyer and the remaining lawyers shall

(a) ensure that affected clients are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and

(b) take reasonable steps to obtain the instructions of each affected client as to whom they will retain to act in relevant matters.

(3) The obligations in Rules 3.7-7A(2)(a) and (b) also apply to the departure of a paralegal from a law firm to practice elsewhere.

**Commentary**

[1] When a lawyer leaves a law firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

[2] The client’s interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm. The client should be provided with sufficient information by the lawyer and the remaining lawyers to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.
The lawyer and the remaining lawyers should cooperate to ensure that the client receives the necessary information on the available options. While it is preferable to prepare a joint notification setting forth such information, factors to consider in determining who should provide it to the client include the extent of the lawyer’s work for the client, the client’s relationship with other lawyers in the law firm and access to client contact information. In the absence of agreement between the departing lawyer and the remaining lawyers as to who will notify the clients, both the departing lawyer and the remaining lawyers should provide notification.

If a client contacts a law firm to request a departed lawyer’s contact information, the remaining lawyers should provide the professional contact information where reasonably possible.

Where a client decides to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. In all cases, the situation should be managed in a way that minimizes expense and avoids prejudice to the client.

In advance of providing notice to clients or his or her intended departure the lawyer should provide such notice to the firm as is reasonable in the circumstances.

When a client chooses to remain with the firm, the firm should consider whether it is reasonable in the circumstances to charge the client for time expended by another firm member to become familiar with the file.

The principles outlined in this rule and commentary will apply to the dissolution of a law firm. When a law firm is dissolved the lawyer-client relationship may end with one or more of the lawyers involved in the retainer. The client should be notified of the dissolution and provided with sufficient information to decide who to retain as counsel. The lawyers who are no longer retained by the client should try to minimize expense and avoid prejudice to the client.

See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a solicitor’s lien and the duties of former and successor counsel.

Lawyers are reminded that Rules 3.08(13.1) and (13.2) of the Paralegal Rules of Conduct and paragraphs 18-25 of Paralegal Guideline 11 describe similar obligations for paralegals.

Rule 3.7-7A does not apply to a lawyer leaving (a) a government, a Crown corporation or any other public body or (b) a corporation or other organization for which the lawyer is employed as in-house counsel.
Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

3.7-9 Upon discharge or withdrawal, a lawyer shall

(a) notify the client in writing, stating

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new legal practitioner promptly;

(b) subject to the lawyer’s right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all information that may be required in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements; and

(f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

[Amended – June 2009, October 2014]
Commentary

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor legal practitioner will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

[5] A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Amended – June 2009, October 2014]

Duty of Successor Licensee

3.7-10 Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

[Amended – June 2007]

( . . . )
### Tab 4.3.2

**VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE SUIVANT LES DISCUSSIONS DU PSC LE 10 MAI 2017, PRC 11 MAI ET PSC 7 JUIN**

#### SECTION 3.7  
**LE RETRAIT DE L’AVOCAT**

**Retrait de l’avocat**

**3.7-1** L’avocat ne peut se retirer d’une affaire que pour des motifs valables et après en avoir convenablement avisé son client.

*Modifié – octobre 2014*

<table>
<thead>
<tr>
<th>Commentaire</th>
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<tbody>
<tr>
<td>[1] Bien que le client puisse mettre fin à son gré à ses rapports avec son avocat, ce dernier ne jouit pas de la même liberté. L’avocat qui a accepté une affaire doit la mener à terme le mieux possible, à moins qu’il n’ait des raisons légitimes de mettre fin à son mandat.</td>
</tr>
<tr>
<td>[2] Un élément essentiel du préavis raisonnable est l’avis au client, à moins que l’avocat n’arrive pas à trouver le client après avoir déployé des efforts raisonnables. Il n’existe pas de règle stricte pour déterminer ce qui constitue un préavis raisonnable avant un retrait, et le moment où l’avocat pourra cesser d’agir à la suite de l’avis dépendra de toutes les circonstances pertinentes. Lorsque la situation est régie par des dispositions législatives ou des règles de procédure, celles-ci s’appliqueront. Sinon, le principe directeur veut que l’avocat protège de son mieux les intérêts de son client et n’abandonne pas son client à une étape critique ou à un moment où son retrait mettrait le client dans une position désavantageuse ou périlleuse.</td>
</tr>
<tr>
<td>[3] L’avocat devrait déployer tous les efforts nécessaires pour s’assurer de se retirer en temps opportun au cours de l’instance, conformément à ses obligations en tant qu’avocat. La cour, les parties adverses et autres parties directement concernées devraient également être avisées du retrait.</td>
</tr>
<tr>
<td>[4] La dissolution d’un cabinet juridique ou le fait qu’un avocat quitte un cabinet pour exercer ailleurs entraîne généralement la fin de la relation du client avec un ou plusieurs des avocats concernés. Dans une telle situation, la plupart des clients préfèrent faire appel aux services de l’avocat qu’ils considéraient comme responsable de leur dossier avant le changement. Cependant, le client a le dernier mot et les avocats n’agissant plus pour ce client devraient se conformer aux principes énoncés dans la présente règle et, en particulier, tenter de réduire au minimum les frais engagés et éviter de nuire au client. Puisque les intérêts du client passent avant tout, la décision de conserver les services de l’avocat doit être prise par le client sans qu’il ne soit influencé ou harcelé par l’avocat ou le cabinet. En outre, l’avocat et le cabinet qui se retirent, ou l’un des deux, pourraient être tenus d’adresser les clients par écrit que l’avocat quitte le cabinet et de leur indiquer les solutions possibles, soit de continuer de faire appel aux services de l’avocat qui quitte le cabinet, continuer de faire appel aux services du cabinet ou engager un nouvel avocat.</td>
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*Modifié – octobre 2014*
Retrait facultatif

3.7-2 Sous réserve des règles de procédure criminelle et des directives du tribunal, l’avocat peut se retirer d’une affaire lorsque lui et le client perdent fondamentalement confiance l’un dans l’autre.

Commentaire

[1] L’avocat pourrait avoir des motifs valables de se retirer d’une affaire dans des circonstances où la confiance ne semble plus exister, telles que dans les cas d’un avocat trompé par son client, d’un client qui refuse d’accepter ou de suivre les conseils de l’avocat sur un point important, d’un client qui persiste à agir de façon déraisonnable ou à ne pas coopérer ou d’un avocat qui a de la difficulté à obtenir des directives adéquates de la part de son client. Toutefois, l’avocat ne devrait pas menacer de se retirer d’une affaire pour forcer son client à se prononcer à la hâte sur une question complexe.

[Modifié – octobre 2014]

Non-paiement d’honoraires

3.7-3 Sous réserve des règles de procédure criminelle et des directives du tribunal, si, à la suite d’un préavis raisonnable, le client refuse de lui verser une provision ou des fonds pour débours ou honoraires, l’avocat peut se retirer, à condition toutefois que le client ne subisse pas de ce fait un préjudice grave.

[Modifié – octobre 2014]

Retrait d’instances criminelles

3.7-4 Si un avocat a accepté de représenter un client dans une affaire criminelle et si l’intervalle entre son retrait et la date du procès est suffisant pour permettre au client de trouver un autre titulaire de permis pour le représenter et permettre au nouveau titulaire de permis de se préparer pour le procès, l’avocat peut alors se retirer pour cause de non-paiement d’honoraires par le client ou autre raison suffisante pourvu que l’avocat :

[Modifié – juin 2007]

a) avise le client, de préférence par écrit, qu’il se retire de l’affaire en raison du non-paiement des honoraires ou pour un autre motif suffisant ;

b) lui rend compte de toute provision versée pour ses honoraires et débours ;
c) avise par écrit l’avocat de la poursuite qu’il n’agit plus pour le client ;

d) avise par écrit le greffe du tribunal compétent qu’il n’agit plus dans l’affaire, si son nom figure aux dossiers du tribunal comme avocat de la défense ;

e) respecte les règlements applicables du tribunal.

[Modifié – octobre 2014]

**Commentaire**

[1] L’avocat qui s’est retiré en raison d’un conflit avec son client ne devrait en aucun cas en préciser la cause dans l’avis adressé au tribunal ou à l’avocat de la poursuite, ni faire mention d’une question visée par le secret professionnel. L’avis précise simplement que l’avocat n’agit plus pour le client et se retire.

3.7-5 Un avocat qui a consenti à représenter un client ne peut se retirer d’une affaire criminelle en raison du défaut de paiement des honoraires lorsque la date prévue du procès n’est pas assez éloignée pour permettre à son client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès et que le report de la date du procès nuirait aux intérêts du client.

3.7-6 Si le retrait de l’avocat d’une affaire criminelle est justifié pour des raisons autres que le défaut de paiement des honoraires et que l’intervalle entre l’avis donné au client de son intention de se retirer et la date du procès est insuffisant pour permettre au client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès :

a) l’avocat devrait tenter, à moins d’indication contraire de la part du client, de faire reporter la date du procès ;

b) l’avocat ne peut se retirer de l’affaire qu’avec la permission du tribunal qui est saisi de cette affaire.

[Modifié – juin 2007, octobre 2014]

**Commentaire**

[1] L’avocat qui s’estime tenu de demander au tribunal l’autorisation de se retirer, en raison des circonstances, devrait en aviser sans délai l’avocat de la poursuite et le tribunal afin d’éviter ou de limiter les inconvénients que sa demande pourrait occasionner au tribunal et aux témoins.

**Retrait obligatoire**

3.7-7 Sous réserve des règles de procédure criminelle et des directives du tribunal, l’avocat se retire si, selon le cas :
a) il est dessaisi d’une affaire par un client ;

b) un client lui demande d’agir de façon contraire à la déontologie professionnelle ou aux règlements administratifs pris en application de la Loi sur le Barreau ;

c) il n’a pas les compétences requises pour continuer à s’occuper du dossier en question.

[Modifié – mars 2004, octobre 2014]

**Quitter un cabinet**

3.7-7A (1) Dans ce paragraphe,

a) « client concerné » s’entend d’un client qui a un dossier pertinent avec le cabinet ;

b) « dossier pertinent » s’entend d’une affaire en cours que l’avocat qui quitte le cabinet mène ou dont il a la responsabilité principale ;

c) le « cabinet » s’entend des avocats qui ont la conduite d’un dossier pertinent, ou à qui le cabinet destine un dossier pertinent, et des avocats du cabinet qui ont la responsabilité de la gestion directe ou indirecte à l’égard de la pratique de l’avocat qui quitte le cabinet.

(2) Lorsqu’un avocat quitte un cabinet juridique pour exercer ailleurs, l’avocat et le cabinet doivent :

a) s’assurer que tous les clients concernés reçoivent un préavis raisonnable du départ de l’avocat et soient avisés des options qui s’offrent à eux pour se faire représenter ;

b) prendre des mesures raisonnables pour obtenir de chaque client concerné des instructions quant à sa représentation dans des dossiers pertinents.

(3) Les obligations des règles 3.7-7A (2) a) et b) s’appliquent également dans le cas d’un parajuriste qui quitte un cabinet juridique pour pratiquer ailleurs.

**Commentaire**

[1] Le fait qu’un avocat quitte un cabinet pour exercer ailleurs peut entraîner la fin de la relation avocat-client entre cet avocat et un client.

[2] Les intérêts du client passent avant tout. Les clients doivent être libres de décider qui va les représenter, sans aucune influence ou pression indue de la part de l’avocat ou du cabinet. Le client doit recevoir suffisamment d’information pour pouvoir prendre une décision éclairée sur le choix qu’il a entre suivre l’avocat qui part, rester avec le cabinet, si c’est possible, ou engager un nouvel avocat.
L’avocat et le cabinet doivent collaborer pour s’assurer que le client reçoit l’information nécessaire quant à ses options. Bien qu’il soit préférable de préparer un avis conjoint contenant cette information, les facteurs dont il faut tenir compte pour déterminer qui devrait aviser le client comprennent l’ampleur des travaux de l’avocat pour le client, les rapports du client avec les autres membres du cabinet et l’accès aux coordonnées du client. Faute d’entente, l’avis doit être donné à la fois par l’avocat qui part et le cabinet.

Si un client contacte un cabinet juridique pour obtenir les coordonnées d’un avocat qui est parti, le cabinet doit fournir les coordonnées professionnelles de cet avocat dans la mesure du possible.

Si le client choisit de suivre l’avocat qui part, les instructions mentionnées dans la règle doivent être assorties d’autorisations écrites pour le transfert des dossiers et des biens du client. En chaque cas, la situation doit être gérée de sorte à réduire au maximum les dépenses et à éviter de porter préjudice au client.

Avant même d’aviser ses clients de son intention de quitter le cabinet, l’avocat devrait donner au cabinet le préavis qui convient dans les circonstances.

Si le client choisit de maintenir sa relation avec le cabinet, ce dernier doit se demander s’il est raisonnable dans les circonstances de facturer au client le temps mis par un autre membre du cabinet à se familiariser avec le dossier.

Les principes énoncés dans la présente règle et le présent commentaire s’appliquent à la dissolution d’un cabinet juridique. À la dissolution du cabinet, la relation avocat-client peut prendre fin à l’égard d’un ou de plusieurs avocats qui s’occupaient des affaires du client. Le client devrait être avisé de la dissolution et recevoir suffisamment d’information pour pouvoir décider qui retenir pour continuer de le représenter. Les avocats qui ne sont plus retenus par le client devraient s’efforcer de réduire au maximum les dépenses et évent de désavantager le client.

Reportez-vous également aux règles 3.7-8 à 3.7-10 et aux commentaires afférents en ce qui concerne l’exercice d’un privilège d’avocat et les obligations de l’ancien avocat et du nouvel avocat.

Il est rappelé aux avocats que les règles 3.08 (13.1) et (13.2) du Code de déontologie des parajuristes et les paragraphes 18 à 25 de la Ligne directrice 11 sur le Code des parajuristes décrivent des obligations similaires pour les parajuristes.

La règle 3.7-7A ne s’applique pas à un avocat qui quitte a) un gouvernement, une société de la Couronne ou tout autre organisme public ou b) une société ou autre organisation qui l’emploie comme avocat interne.
Devoirs liés au retrait

3.7-8 L’avocat qui se retire d’une affaire tente de réduire au minimum les frais encourus par le client et d’éviter de lui nuire ; il fait tout ce qu’il est raisonnable de faire pour faciliter le transfert ordonné de l’affaire au praticien juridique ou à la praticienne juridique qui lui succède.

3.7-9 L’avocat qui est dessaisi de l’affaire par le client, ou qui s’en retire fait ce qui suit :

a) il avise le client par écrit :

   (i) qu’il se retire de l’affaire ;

   (ii) des raisons, s’il y a lieu, de son retrait ;

   (iii) dans le cas d’un litige, que le client devrait s’attendre à ce que l’audience ou le procès commence à la date prévue et que celui-ci devrait trouver un autre praticien juridique sans tarder ;

b) sous réserve de son privilège, il remet au client tous les documents et biens auxquels ce dernier peut prétendre, ou en dispose selon ce qu’il lui ordonne ;

c) sous réserve de toutes conditions fiduciaires applicables, il donne au client tous les renseignements nécessaires sur l’affaire ;

d) il rend compte de tous les fonds du client qu’il détient ou qu’il a administrés, et il rembourse notamment toute rémunération à laquelle il n’a pas droit pour ses services ;

e) il produit sans délai le compte de ses honoraires et débours impayés ;

f) il collabore avec le praticien juridique qui lui succède de façon à réduire au minimum les frais encourus par le client et à éviter de lui nuire ;

g) il respecte les règlements applicables du tribunal.

[Modifié – juin 2009, octobre 2014]

Commentaire

[1] Si l’avocat qui est dessaisi d’une affaire ou qui se retire d’une affaire fait partie d’un cabinet, le client devrait être avisé que l’avocat et le cabinet n’agissent plus pour lui.
Lorsque l’avocat est dessaisi d’une affaire ou se retire d’une affaire et que des honoraires et débours demeurent impayés, il devrait considérer comment l’exercice de son droit à un privilège pourrait avoir une incidence sur la situation de son client. En règle générale, un avocat ne devrait pas exercer son droit à un privilège si celui-ci risque de compromettre gravement la position du client dans une affaire en cours.

L’obligation de rendre au client ses documents et ses biens s’applique sous réserve du privilège de l’avocat. Dans le cas où plusieurs parties réclameraient les documents ou les biens, l’avocat devrait prendre toutes les mesures requises pour les amener à une entente.

Lorsque l’avocat initial est appelé à collaborer avec le nouveau praticien juridique, il devrait généralement fournir tous les mémoires exposant les faits et le droit qu’il a préparés relativement à l’affaire, mais ne devrait pas divulguer des renseignements confidentiels qui n’ont aucun lien direct avec l’affaire sans le consentement écrit du client.

L’avocat qui représente plusieurs parties dans une affaire et qui cesse d’agir pour une ou plusieurs d’entre elles devrait collaborer avec le ou les praticiens juridiques qui lui succèdent dans la mesure permise par le Code et chercher à éviter toute rivalité, réelle ou apparente.

Devoirs du titulaire de permis qui prend la succession de l’affaire

3.7-10 Le titulaire de permis qui prend la succession d’une affaire s’assure, avant d’accepter le mandat, que le titulaire de permis initial y consent, s’est bien retiré de l’affaire ou en a été dessaisi par le client.

Commentaire

Il convient également que le titulaire de permis qui prend la succession incite fortement le client à régler ou à garantir les honoraires de son collègue, ou à prendre des mesures raisonnables en ce sens, surtout si cette personne s’est retirée de l’affaire pour un motif valable ou en a été dessaisie pour des motifs futilis. Néanmoins, l’existence d’un compte en souffrance ne devrait pas empêcher le titulaire de permis qui prend la succession d’agir pour le client si le procès ou l’audience est en cours, ou sur le point de s’ouvrir, ou encore si son refus d’agir risque de nuire au client.
SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation
3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

[Amended – October 2014]

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client’s interests to the best of the lawyer’s ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer’s obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

[Amended – October 2014]

Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.
Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer’s advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

3.7-3 Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Withdrawal from Criminal Proceedings

3.7-4 A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation, and the lawyer

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.
Commentary

[1] A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

3.7-5 A lawyer who has agreed to act in a criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client’s interests.

3.7-6 In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

(a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;

(b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007, October 2014]

Commentary

[1] Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client;

(b) the client’s instructions require the lawyer to act contrary to these rules or by-laws under the Law Society Act; or

(c) the lawyer is not competent to continue to handle the matter.
Leaving a Law Firm

3.7-7A(1) In this subrule

(a) “affected client” means a client for whom the law firm has a relevant matter:

(b) “relevant matter” means a current matter for which the lawyer who is leaving the law firm has conduct or substantial responsibility;

(c) “remaining lawyers” means the lawyers who have, or are intended by the law firm to have, conduct of a relevant matter and the lawyers in the law firm who have direct and indirect management responsibility in respect of the practice of the lawyer who is leaving the law firm.

(2) When a lawyer leaves a law firm to practice elsewhere, the lawyer and the remaining lawyers shall

(a) ensure that affected clients are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and

(b) take reasonable steps to obtain the instructions of each affected client as to whom they will retain to act in relevant matters.

(3) The obligations in Rules 3.7-7A(2)(a) and (b) also apply to the departure of a paralegal from a law firm to practice elsewhere.

Commentary

[1] When a lawyer leaves a law firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

[2] The client’s interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm. The client should be provided with sufficient information by the lawyer and the remaining lawyers to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.

[3] The lawyer and the remaining lawyers should cooperate to ensure that the client receives the necessary information on the available options. While it is preferable to prepare a joint notification setting forth such information, factors to consider in determining who should provide it to the client include the extent of the lawyer’s work for the client, the client’s relationship with other lawyers in the law firm and access to client contact information. In the absence of agreement between the departing lawyer and the remaining lawyers as to who will notify the clients, both the departing lawyer and the remaining lawyers should provide notification.
[4] If a client contacts a law firm to request a departed lawyer’s contact information, the
remaining lawyers should provide the professional contact information where reasonably
possible.

[5] Where a client decides to remain with the departing lawyer, the instructions referred to in
the rule should include written authorizations for the transfer of files and client property. In all
cases, the situation should be managed in a way that minimizes expense and avoids prejudice
to the client.

[6] In advance of providing notice to clients or his or her intended departure the lawyer should
provide such notice to the firm as is reasonable in the circumstances.

[7] When a client chooses to remain with the firm, the firm should consider whether it is
reasonable in the circumstances to charge the client for time expended by another firm
member to become familiar with the file.

[8] The principles outlined in this rule and commentary will apply to the dissolution of a law
firm. When a law firm is dissolved the lawyer-client relationship may end with one or more of
the lawyers involved in the retainer. The client should be notified of the dissolution and
provided with sufficient information to decide who to retain as counsel. The lawyers who are
no longer retained by the client should try to minimize expense and avoid prejudice to the
client.

[9] See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a
solicitor’s lien and the duties of former and successor counsel.

[10] Lawyers are reminded that Rules 3.08(13.1) and (13.2) of the Paralegal Rules of Conduct
and paragraphs 18-25 of Paralegal Guideline 11 describe similar obligations for paralegals.

3.7-7B Rule 3.7-7A does not apply to a lawyer leaving (a) a government, a Crown corporation or
any other public body or (b) a corporation or other organization for which the lawyer is employed
as in-house counsel.
Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

3.7-9 Upon discharge or withdrawal, a lawyer shall

(a) notify the client in writing, stating

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new legal practitioner promptly;

(b) subject to the lawyer’s right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all information that may be required in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements; and

(f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

[Amended – June 2009, October 2014]
Commentary

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor legal practitioner will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

[5] A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Duty of Successor Licensee]

3.7-10 Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

[Amended – June 2007]

( . . . )
VERSION « AU PROPRE » DES MODIFICATIONS AU CODE DE DÉONTOLOGIE

SECTION 3.7 LE RETRAIT DE L’AVOCAT

Retrait de l’avocat
3.7-1 L’avocat ne peut se retirer d’une affaire que pour des motifs valables et après en avoir convenablement avisé son client.

[Modifié – octobre 2014]

Commentaire

[1] Bien que le client puisse mettre fin à son gré à ses rapports avec son avocat, ce dernier ne jouit pas de la même liberté. L’avocat qui a accepté une affaire doit la mener à terme le mieux possible, à moins qu’il n’ait des raisons légitimes de mettre fin à son mandat.

[2] Un élément essentiel du préavis raisonnable est l’avis au client, à moins que l’avocat n’arrive pas à trouver le client après avoir déployé des efforts raisonnables. Il n’existe pas de règle stricte pour déterminer ce qui constitue un préavis raisonnable avant un retrait, et le moment où l’avocat pourra cesser d’agir à la suite de l’avis dépendra de toutes les circonstances pertinentes. Lorsque la situation est régie par des dispositions législatives ou des règles de procédure, celles-ci s’appliqueront. Sinon, le principe directeur veut que l’avocat protège de son mieux les intérêts de son client et n’abandonne pas son client à une étape critique ou à un moment où son retrait mettrait le client dans une position désavantageuse ou périlleuse.

[3] L’avocat devrait déployer tous les efforts nécessaires pour s’assurer de se retirer en temps opportun au cours de l’instance, conformément à ses obligations en tant qu’avocat. La cour, les parties adverses et autres parties directement concernées devraient également être avisées du retrait.

[Modifié – octobre 2014]

Retrait facultatif

3.7-2 Sous réserve des règles de procédure criminelle et des directives du tribunal, l’avocat peut se retirer d’une affaire lorsque lui et le client perdent fondamentalement confiance l’un dans l’autre.
Commentaire

[1] L’avocat pourrait avoir des motifs valables de se retirer d’une affaire dans des circonstances où la confiance ne semble plus exister, telles que dans les cas d’un avocat trompé par son client, d’un client qui refuse d’accepter ou de suivre les conseils de l’avocat sur un point important, d’un client qui persiste à agir de façon déraisonnable ou à ne pas coopérer ou d’un avocat qui a de la difficulté à obtenir des directives adéquates de la part de son client. Toutefois, l’avocat ne devrait pas menacer de se retirer d’une affaire pour forcer son client à se prononcer à la hâte sur une question complexe.

[Modifié – octobre 2014]

Non-paiement d’honoraires

3.7-3 Sous réserve des règles de procédure criminelle et des directives du tribunal, si, à la suite d’un préavis raisonnable, le client refuse de lui verser une provision ou des fonds pour débours ou honoraires, l’avocat peut se retirer, à condition toutefois que le client ne subisse pas de ce fait un préjudice grave.

[Modifié – octobre 2014]

Retrait d’instances criminelles

3.7-4 Si un avocat a accepté de représenter un client dans une affaire criminelle et si l’intervalle entre son retrait et la date du procès est suffisant pour permettre au client de trouver un autre titulaire de permis pour le représenter et permettre au nouveau titulaire de permis de se préparer pour le procès, l’avocat peut alors se retirer pour cause de non-paiement d’honoraires par le client ou autre raison suffisante pourvu que l’avocat :

[Modifié – juin 2007]

a) avise le client, de préférence par écrit, qu’il se retire de l’affaire en raison du non-paiement des honoraires ou pour un autre motif suffisant ;

b) lui rend compte de toute provision versée pour ses honoraires et débours ;

c) avise par écrit l’avocat de la poursuite qu’il n’agit plus pour le client ;

d) avise par écrit le greffe du tribunal compétent qu’il n’agit plus dans l’affaire, si son nom figure aux dossiers du tribunal comme avocat de la défense ;

e) respecte les règlements applicables du tribunal.

[Modifié – octobre 2014]
Commentaire

[1] L’avocat qui s’est retiré en raison d’un conflit avec son client ne devrait en aucun cas en préciser la cause dans l’avis adressé au tribunal ou à l’avocat de la poursuite, ni faire mention d’une question visée par le secret professionnel. L’avis précise simplement que l’avocat n’agit plus pour le client et se retire.

3.7-5 Un avocat qui a consenti à représenter un client ne peut se retirer d’une affaire criminelle en raison du défaut de paiement des honoraires lorsque la date prévue du procès n’est pas assez éloignée pour permettre à son client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès et que le report de la date du procès nuirait aux intérêts du client.

3.7-6 Si le retrait de l’avocat d’une affaire criminelle est justifié pour des raisons autres que le défaut de paiement des honoraires et que l’intervalle entre l’avis donné au client de son intention de se retirer et la date du procès est insuffisant pour permettre au client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès :

a) l’avocat devrait tenter, à moins d’indication contraire de la part du client, de faire reporter la date du procès ;

b) l’avocat ne peut se retirer de l’affaire qu’avec la permission du tribunal qui est saisi de cette affaire.

[Modifié – juin 2007, octobre 2014]

Commentaire

[1] L’avocat qui s’estime tenu de demander au tribunal l’autorisation de se retirer, en raison des circonstances, devrait en aviser sans délai l’avocat de la poursuite et le tribunal afin d’éviter ou de limiter les inconvénients que sa demande pourrait occasionner au tribunal et aux témoins.

Retrait obligatoire

3.7-7 Sous réserve des règles de procédure criminelle et des directives du tribunal, l’avocat se retire si, selon le cas :

a) il est dessaisi d’une affaire par un client ;

b) un client lui demande d’agir de façon contraire à la déontologie professionnelle ou aux règlements administratifs pris en application de la Loi sur le Barreau ;

c) il n’a pas les compétences requises pour continuer à s’occuper du dossier en question.

[Modifié – mars 2004, octobre 2014]
Quitter un cabinet

3.7-7A (1) Dans ce paragraphe,

a) « client concerné » s’entend d’un client qui a un dossier pertinent avec le cabinet ;

b) « dossier pertinent » s’entend d’une affaire en cours que l’avocat qui quitte le cabinet mène ou dont il a la responsabilité principale ;

c) le « cabinet » s’entend des avocats qui ont la conduite d’un dossier pertinent, ou à qui le cabinet destine un dossier pertinent, et des avocats du cabinet qui ont la responsabilité de la gestion directe ou indirecte à l’égard de la pratique de l’avocat qui quitte le cabinet.

(2) Lorsqu’un avocat quitte un cabinet juridique pour exercer ailleurs, l’avocat et le cabinet doivent :

a) s’assurer que tous les clients concernés reçoivent un préavis raisonnable du départ de l’avocat et soient avisés des options qui s’offrent à eux pour se faire représenter ;

b) prendre des mesures raisonnables pour obtenir de chaque client concerné des instructions quant à sa représentation dans des dossiers pertinents.

(3) Les obligations des règles 3.7-7A (2) a) et b) s’appliquent également dans le cas d’un parajuriste qui quitte un cabinet juridique pour pratiquer ailleurs.

Commentaire

[1] Le fait qu’un avocat quitte un cabinet pour exercer ailleurs peut entraîner la fin de la relation avocat-client entre cet avocat et un client.

[2] Les intérêts du client passent avant tout. Les clients doivent être libres de décider qui va les représenter, sans aucune influence ou pression indues de la part de l’avocat ou du cabinet. Le client doit recevoir suffisamment d’information pour pouvoir prendre une décision éclairée sur le choix qu’il a entre suivre l’avocat qui part, rester avec le cabinet, si c’est possible, ou engager un nouvel avocat.

[3] L’avocat et le cabinet doivent collaborer pour s’assurer que le client reçoit l’information nécessaire quant à ses options. Bien qu’il soit préférable de préparer un avis conjoint contenant cette information, les facteurs dont il faut tenir compte pour déterminer qui devrait avenir le client comprennent l’ampleur des travaux de l’avocat pour le client, les rapports du client avec les autres membres du cabinet et l’accès aux coordonnées du client. Faute d’entente, l’avis doit être donné à la fois par l’avocat qui part et le cabinet.

[4] Si un client contacte un cabinet juridique pour obtenir les coordonnées d’un avocat qui est parti, le cabinet doit fournir les coordonnées professionnelles de cet avocat dans la mesure du possible.
Si le client choisit de suivre l’avocat qui part, les instructions mentionnées dans la règle doivent être assorties d’autorisations écrites pour le transfert des dossiers et des biens du client. En chaque cas, la situation doit être gérée de sorte à réduire au maximum les dépenses et à éviter de porter préjudice au client.

Avant même d’aviser ses clients de son intention de quitter le cabinet, l’avocat devrait donner au cabinet le préavis qui convient dans les circonstances.

Si le client choisit de maintenir sa relation avec le cabinet, ce dernier doit se demander s’il est raisonnable dans les circonstances de facturer au client le temps mis par un autre membre du cabinet à se familiariser avec le dossier.

Les principes énoncés dans la présente règle et le présent commentaire s’appliquent à la dissolution d’un cabinet juridique. À la dissolution du cabinet, la relation avocat-client peut prendre fin à l’égard d’un ou de plusieurs avocats qui s’occupaient des affaires du client. Le client devrait être avisé de la dissolution et recevoir suffisamment d’information pour pouvoir décider qui retenir pour continuer de le représenter. Les avocats qui ne sont plus retenus par le client devraient s’efforcer de réduire au maximum les dépenses et éviter de désavantager le client.

Reportez-vous également aux règles 3.7-8 à 3.7-10 et aux commentaires afférents en ce qui concerne l’exercice d’un privilège d’avocat et les obligations de l’ancien avocat et du nouvel avocat.

Il est rappelé aux avocats que les règles 3.08 (13.1) et (13.2) du Code de déontologie des parajuristes et les paragraphes 18 à 25 de la Ligne directrice 11 sur le Code des parajuristes décrivent des obligations similaires pour les parajuristes.

La règle 3.7-7A ne s’applique pas à un avocat qui quitte a) un gouvernement, une société de la Couronne ou tout autre organisme public ou b) une société ou autre organisation qui l’emploie comme avocat interne.
Devoirs liés au retrait

3.7-8 L’avocat qui se retire d’une affaire tente de réduire au minimum les frais encourus par le client et d’éviter de lui nuire ; il fait tout ce qu’il est raisonnable de faire pour faciliter le transfert ordonné de l’affaire au praticien juridique ou à la praticienne juridique qui lui succède.

3.7-9 L’avocat qui est dessaisi de l’affaire par le client, ou qui s’en retire fait ce qui suit :

a) il avise le client par écrit :

(i) qu’il se retire de l’affaire ;

(ii) des raisons, s’il y a lieu, de son retrait ;

(iii) dans le cas d’un litige, que le client devrait s’attendre à ce que l’audience ou le procès commence à la date prévue et que celui-ci devrait trouver un autre praticien juridique sans tarder ;

b) sous réserve de son privilège, il remet au client tous les documents et biens auxquels ce dernier peut prétendre, ou en dispose selon ce qu’il lui ordonne ;

c) sous réserve de toutes conditions fiduciaires applicables, il donne au client tous les renseignements nécessaires sur l’affaire ;

d) il rend compte de tous les fonds du client qu’il détient ou qu’il a administrés, et il rembourse notamment toute rémunération à laquelle il n’a pas droit pour ses services ;

e) il produit sans délai le compte de ses honoraires et débours impayés ;

f) il collabore avec le praticien juridique qui lui succède de façon à réduire au minimum les frais encourus par le client et à éviter de lui nuire ;

g) il respecte les règlements applicables du tribunal.

[Modifié – juin 2009, octobre 2014]

Commentaire

[1] Si l’avocat qui est dessaisi d’une affaire ou qui se retire d’une affaire fait partie d’un cabinet, le client devrait être avisé que l’avocat et le cabinet n’agissent plus pour lui.
Lorsque l’avocat est dessaisi d’une affaire ou se retire d’une affaire et que des honoraires et débours demeurent impayés, il devrait considérer comment l’exercice de son droit à un privilège pourrait avoir une incidence sur la situation de son client. En règle générale, un avocat ne devrait pas exercer son droit à un privilège si celui-ci risque de compromettre gravement la position du client dans une affaire en cours.

L’obligation de rendre au client ses documents et ses biens s’applique sous réserve du privilège de l’avocat. Dans le cas où plusieurs parties réclameraient les documents ou les biens, l’avocat devrait prendre toutes les mesures requises pour les amener à une entente.

Lorsque l’avocat initial est appelé à collaborer avec le nouveau praticien juridique, il devrait généralement fournir tous les mémoires exposant les faits et le droit qu’il a préparés relativement à l’affaire, mais ne devrait pas divulguer des renseignements confidentiels qui n’ont aucun lien direct avec l’affaire sans le consentement écrit du client.

L’avocat qui représente plusieurs parties dans une affaire et qui cesse d’agir pour une ou plusieurs d’entre elles devrait collaborer avec le ou les praticiens juridiques qui lui succèdent dans la mesure permise par le Code et chercher à éviter toute rivalité, réelle ou apparente.

Devoirs du titulaire de permis qui prend la succession de l’affaire

3.7-10 Le titulaire de permis qui prend la succession d’une affaire s’assure, avant d’accepter le mandat, que le titulaire de permis initial y consent, s’est bien retiré de l’affaire ou en a été dessaisi par le client.

Commentaire

Il convient également que le titulaire de permis qui prend la succession incite fortement le client à régler ou à garantir les honoraires de son collègue, ou à prendre des mesures raisonnables en ce sens, surtout si cette personne s’est retirée de l’affaire pour un motif valable ou en a été dessaisie pour des motifs futile. Néanmoins, l’existence d’un compte en souffrance ne devrait pas empêcher le titulaire de permis qui prend la succession d’agir pour le client si le procès ou l’audience est en cours, ou sur le point de s’ouvrir, ou encore si son refus d’agir risque de nuire au client.
FOR DECISION

REPORT OF THE ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP

MOTION

27. That Convocation approve that licensees may deliver legal services through civil society organizations, such as charities, not for profit organizations and trade unions, to clients of such organizations in order to facilitate access to justice.

SUMMARY OF ISSUE UNDER CONSIDERATION

28. In September 2015, the Alternative Business Structures Working Group (“Working Group”) reported to Convocation that it would not continue to consider majority non-licensee ownership of traditional law firms in Ontario for the time being, but would continue to explore ABS options with the potential to foster innovation or enhance access to justice, including:

   a. minority ownership by non-licensees;
   b. franchise models;
   c. ownership by civil society organizations such as charities, not-for-profits and trade unions in order to facilitate access to legal services; and
   d. new forms of legal service delivery in areas not currently well served by traditional practices.  

29. In this report, the Working Group provides its recommendations regarding direct delivery of legal services through civil society organizations such as charities, not for profit organizations and trade unions (hereinafter “CSOs”) in order to facilitate access to justice.

30. The Working Group recommends that Convocation approve the policy decision to enable the direct delivery of legal services to CSO clients by lawyers and paralegals providing services through such organizations.

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1 The Working Group is chaired by Malcolm Mercer and Susan McGrath. Current members are Fred Bickford, Marion Boyd, Suzanne Clément, Cathy Corsetti, Janis P. Criger, Carol Hartman, Brian Lawrie, Jeffrey Lem, Joanne St. Lewis and Anne Vespry.

31. The Working Group reports to Convocation through the Committee, with the concurrence of the Paralegal Standing Committee. The Access to Justice Committee has also reviewed the report and is in agreement with these recommendations.

32. If approved, it is proposed that the Law Society amend its By-Laws to permit CSOs to register with the Law Society. Lawyers and paralegals would be permitted to provide legal services directly to clients through the registered CSOs.

33. It is proposed that CSOs would register with Law Society if the circumstances under which legal services would be provided to CSO clients (by “embedded” lawyers and paralegals) meet the requirements prescribed by new by-laws to be adopted by Convocation. The requirements will focus, among other things, on ensuring that:
   a. the licensee has control over their delivery of legal services;
   b. solicitor-client privilege will be protected; and
   c. the fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded.

34. A registered CSO would be de-registered if the prescribed circumstances under which legal services may be provided to CSO clients by “embedded” licensees were no longer present.

35. Lawyers and paralegals providing legal services through registered CSOs would continue to be fully regulated by the Law Society.

BACKGROUND

36. The Working Group was established by Convocation in September 2012 to explore various possible options available for the delivery of legal services, including structures, financing and the related regulatory processes, and to recommend specific models and arrangements it determines are suitable for the Canadian and Ontario contexts.4

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3 For the purpose of this report, the phrase “legal services” includes services provided by both lawyers and paralegals.
4 For general background information related to the work of the ABS Working Group, please see “Alternative Business Structures”, Law Society of Upper Canada online at http://lsuc.on.ca/abs/.
37. From September 2012 to January 2014, the Working Group researched structures for the delivery of legal services, held an initial consultation session, and held a full day symposium with 70 attendees from various aspects of practice.\(^5\)

38. In its February 2014 Report to Convocation, the Working Group described in detail the relationship between ABS and access. It observed that while ABSs are not a “panacea” and are not “the sole, nor likely the most important” access to justice solution, ABSs nevertheless have “real potential” to enhance access to justice.\(^6\)

39. In February 2014, Convocation approved a consultation with the professions and others on the delivery of legal services through alternative business structures. In September 2014, the Working Group began a broad consultation process by releasing a Discussion Paper on potential models for ABS in Ontario.\(^7\) The Working Group continued to hold meetings with legal organizations through the fall of 2014 and early 2015 to continue to hear perspectives regarding ABS.\(^8\)

40. The Working Group received over 40 responses to the Discussion Paper from individuals and legal and other organizations. The Working Group provided a summary of these responses in its February 2015 Report to Convocation.\(^9\)

41. In its September 2015 Report to Convocation, based in large part on the responses it received from the professions, the Working Group stated that it “did not propose to further examine any majority or controlling non-licensee ownership models for traditional law firms in Ontario at this time.”\(^10\)

42. The Working Group determined that it would continue its mandate by exploring options with the potential to foster innovation or enhance access to justice, including minority ownership by non-licensees, franchise models, ownership by civil society organizations such as charities, and new forms of legal service.

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\(^6\) Ibid. at paras. 107, 119 and 120.


delivery in areas not currently well served by traditional practices.\textsuperscript{11}

43. The Working Group’s decision to focus on charities and other CSOs was informed by the recommendation made in the responses to the Discussion Paper that ABS regulation could be developed in a manner to facilitate access to justice. As the Working Group noted in September 2015 (at para. 137):

One submission coined the phrase “ABS+.” An ABS+ regulatory approach would build on the following statement by Nick Robinson that was adopted by many responding to the ABS Discussion Paper:

For policymakers the goal should not be deregulation for its own sake, but rather increasing access to legal services that the public can trust delivered by legal service providers who are part of a larger legal community that sees furthering the public good as a fundamental commitment. Carefully regulated non-lawyer ownership may be a part of achieving this larger goal, but only a part.\textsuperscript{12}

44. In September 2015, the Working Group also recognized that:

a. Although ABS efforts in Australia and England and Wales were not designed to facilitate access to justice \textit{per se}, there have been practices which have emerged to provide legal assistance to vulnerable persons;

b. There may be an opportunity to build from these experiences in a way that seeks to harness ABS as one means of addressing the significant access to justice barriers in Ontario; and

c. Civil society organizations might be able to provide access to legal services at the same time that their clients are provided access to other services.\textsuperscript{13}

45. The Working Group posited that “External ownership by particular civil society groups may be one way of leveraging non-legal networks and expertise to

\textsuperscript{11} Ibid. at paras. 56-58.


\textsuperscript{13} ABS Working Group, September 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 139, 140 and 143, online at http://www.lscu.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.
facilitate access to legal services provided by licensees.”

46. Based on the above, the Working Group determined that it would “consider eligibility criteria and how an ABS+ regulatory structure could facilitate access to justice while protecting core professional values.”

DISCUSSION

47. The Working Group has continued to regularly meet since its last report to Convocation in September 2015. It has considered the opportunities and risks associated with permitting the delivery of legal services by or through charities, not for profit organizations and other CSOs by:

a. Studying how charities and other civil society entities currently seek to connect their clients to legal services;

b. Exploring examples of innovative models whereby civil society entities directly deliver legal services;

c. Conducting a series of focus group meetings with charities and other civil society organizations, “embedded” lawyers, front line social service workers, social innovation leaders and supporters of social and legal services; and

d. Deliberating on the appropriateness of recommending potential new models based on set criteria.

48. The Working Group reports on each of these stages below.

a. Current Efforts to Connect Legal and Other Community Services

49. To date, community service providers and legal organizations have worked to develop connections to serve their clients in a variety of ways, including the following:

a. Front line workers such as social workers and settlement workers, at times described as “trusted intermediaries”, refer individuals to legal clinics and/or the private bar when their clients require legal advice.16

15 Ibid. at para. 144.
16 The Law Foundation has developed The Connecting Project, an innovative initiative designed to improve access to legal information and legal services for people who do not speak English or French, and for people who live in rural or remote areas, in part by improving the capacity of such frontline workers to provide basic legal information and legal referrals, and to enhance coordination to ensure that clients receive continuous assistance. See “The Connecting Project”,
b. Certain legal aid lawyers are able to meet clients at civil society settings such as settlement services offices, community centres, health centres and shelters.

c. Two Legal Aid Ontario staff lawyers work as counsel “embedded” in civil society settings. A Staff Lawyer at the ARCH Disability Law Centre is the Onsite Lawyer for the Health Justice Program at St. Michael’s Hospital in Toronto.\textsuperscript{17} Another legal aid lawyer works on-site at Sound Times, a mental health support services provider in Toronto.

d. Pro Bono Ontario staff lawyers are embedded in children’s hospitals (an approach described further below).

e. Pro Bono licensees at times volunteer to provide services to clients who have been referred by CSOs, and/or make themselves available in shelters or other settings to provide pro bono services through their firms.

f. There are government funded programs providing legal services pursuant to s.30 of By-Law 4.

50. The Working Group believes that the above models should be encouraged, as they facilitate access to justice. However, the Working Group also recognizes that there may be new models which could be developed to facilitate access to legal services.

b. Examples of Civil Society Delivery of Legal Services

51. In its September 24, 2015 Report to Convocation, the Working Group provided examples of types of ABS innovations involving CSOs. This section provides further detail regarding certain examples noted by the Working Group at that time and new examples of structures which have emerged.

\textit{(i) Law Firm Ownership by Trade Unions and Associations}

52. In its September 24, 2015 Report to Convocation, the Working Group noted that in England and Wales, a trade union and British Medical Association had set up alternative business structures in order to serve their members.\textsuperscript{18}

\textsuperscript{17} “Department of Family and Community Medicine and St. Michael’s Academic Family Health Team Health Justice Program”, St Michael’s Hospital, online at http://www.stmichaelshospital.com/programs/familypractice/legal-education-and-advice.php.

53. The trade union ABS, Unionline, is wholly owned by two unions to provide legal services to their members. It has been reported that any profits would be returned to the unions.

54. The British Medical Association created BMA Law as an in-house team of lawyers who provided legal advice to UK doctors. In 2015, it converted into an ABS. It now serves the medical community and other clients. It operates on a not-for-profit basis, and is reportedly owned by the British Medical Association through a trust. Any profits appear to be reinvested in the BMA.

(ii) Aspire Law LLP: A Joint Venture Between a Charity and a Law Firm

55. Aspire Law LLP is an ABS that operates as a “joint venture between Aspire, the national spinal cord injury charity and Moore Blatch” a personal injury firm. It describes itself as: “specialist spinal cord injury lawyers”. In addition to providing legal services, it works “with Aspire [the charity] to provide a service that tackles every issue arising from spinal cord injury including housing, education, care, and rehabilitation as well as emotional and family support”. Half of Aspire Law LLP’s profits go back to Aspire “the charity, to provide support, funding and housing for people with spinal cord injury.”

56. Aspire Law LLP provides services throughout England and Wales. In addition to its spinal cord injury practice, it is licensed to undertake a range of related reserved legal activities, such as conveyancing, employment, and wills and

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19 Register of licensed bodies (ABS) Trade Union Legal LLP (trading as Unionline), Solicitors Regulatory Authority, online at http://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/608309.page.
20 “About Us”, Unionline, online at: http://www.unionline.co.uk/about-us/.
22 “About Us”, BMA Law, online at: http://bmalaw.co.uk/about/.
23 Ibid. See also: Register of licensed bodies (ABS) BMA Law Limited (trading as BMA Law), Solicitors Regulatory Authority, online at: http://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/619810.page.
25 BMA Law states that “We are proud to operate on a not-for-profit basis, reinvesting any surpluses back into services for you and your colleagues. So, by working with us, you’re supporting the wider medical community”: About Us”, BMA Law, online at: http://bmalaw.co.uk/about/.
26 “About Us”, Aspire Law, Solicitors for People with Spinal Cord Injury, online at: https://www.aspirelaw.co.uk/about/.
27 “What makes Aspire Law unique?”, Aspire Law, Solicitors for People with Spinal Cord Injury, online at: https://www.aspirelaw.co.uk/about-us.
28 Ibid.
29 Ibid.
30 “Contact Us”, Aspire Law, online at: https://www.aspirelaw.co.uk/contact-us.
The Working Group’s September 24, 2015 Report to Convocation provided general background information about Salvos Legal and Salvos Legal (Humanitarian) (collectively the “Salvos Entities”), two law firms owned by The Salvation Army Australia Eastern Territory. Salvos Legal is a not-for-profit firm. Salvos Legal (Humanitarian) is structured as a Public Benevolent Institution. The profits from Salvos Legal fund the work of Salvos Legal (Humanitarian).

As part of its ongoing review of different potential civil society legal service delivery models, the Working Group reviewed the Salvos model on a more in-depth basis. The Working Group consulted with Luke Geary, the Managing Partner of Salvos Legal and Salvos Legal (Humanitarian).

The Working Group Co-Chairs have also met with representatives of the Salvation Army Canada who have expressed interest in adopting the Salvos Legal model to Ontario if it can be done in a manner that complies with Law Society and other regulations.

The Working Group is grateful to Mr. Geary for the time and expertise that he provided, and to the Salvation Army Canada.

In order to launch the Salvos Legal initiative, the Salvation Army Australia provided seed funds to cover start-up costs.

The two entities are organized and operated as traditional law firms. They are managed as two separate firms, with separate staff. Both address issues such as avoiding conflicts, and protecting confidentiality and solicitor-client privilege in

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32 A Public Benevolent Institution is “one of the categories or ‘subtypes’ of charity that can register with the Australian Charities and Not-for-profits Commission” […] which has as its main objective “to relieve poverty or distress”: Factsheet: Public benevolent institutions and the ACNC, Australian Charities and Not-for-Profits Commission, online at [http://www.acnc.gov.au/ACNC/FTS/Fact_PBI.aspx](http://www.acnc.gov.au/ACNC/FTS/Fact_PBI.aspx).

33 At the request of the Salvation Army Canada, the Chairs of the ABS Working Group have also met with senior staff and counsel from the Salvation Army Canada regarding potential opportunities for adopting a Salvos Entities’ model to provide legal services in Ontario.


35 Ibid.
the same ways that such issues would be addressed in traditional law firm settings.36

63. Salvos Legal offers legal advice in corporate / commercial, property, not-for-profit, intellectual property and technology law.37 It is now fully self-sustaining and profitable. Its client base includes “ASX200 companies, federal & state government agencies, not-for-profit organisations, small to medium enterprises and individuals.”38

64. Salvos Legal (Humanitarian) has expanded over the years, and has provided legal services to thousands of individuals at no cost to clients or governments. It provides legal advice with respect to a range of matters including police matters, debt, family law (other than property disputes), housing matters, and immigration and refugee law.39

65. Salvos Legal (Humanitarian) operates “Advice Bureaus” at multiple Salvation Army locations in New South Wales and Queensland. For clients in rural and regional areas, or for individuals who cannot attend due to these locations due to age, disability or incarceration, services can also be accessed by telephone. Salvos Legal (Humanitarian) will provide summary advice to anyone through its “Advice Bureaus”, but will only provide full-time representation to individuals requiring further assistance if the individual does not qualify for legal aid, cannot afford a private lawyer, and meets other screening requirements set out in the firm’s Means and Merits Test Assessment.40

66. The Salvos Legal (Humanitarian) firm reports the following:

a. It has handled over 17,000 cases since it was founded in 2010.
b. It provides free advice on 150-200 humanitarian cases each week;
c. It has 19.8 full time lawyers who provided legal advice in 2016; and
d. It provided over 36,000 hours of pro bono services in 2016.41

67. In addition, Salvos Legal (Humanitarian) works in close collaboration with related Salvation Army services to address clients’ other needs. It “can engage clients with other Salvation Army social and pastoral services such as drug & alcohol

36 Ibid.
38 Ibid.
recovery, employment assistance, housing, welfare, counselling, financial management and aged care.\textsuperscript{42}

68. Salvos Legal has been named Australian Law Firm of the Year 2016 (up to 100 lawyers) in the \textit{Australasian Law Awards}, and in both 2015 and 2016 was named Corporate Citizen Firm of the Year 2016 & 2015 in the \textit{Australasian Law Awards}. It is also a certified B Corporation.\textsuperscript{43}

\textit{(iv) The Lawyer Owned Limited Profit Law Firm and Not for Profit Law Firms}

69. In the United States, lawyer owned limited profit law firms and not for profit law firms have recently emerged. These entities are addressing the unmet legal needs of people who cannot afford an attorney but are not eligible for free legal services.

70. As an example, Open Legal Services, described as “Utah’s first non-profit law firm for clients”, provides “low bono” legal services to low to moderate income people who are ineligible for pro bono assistance.\textsuperscript{44} The firm provides a sliding “low bono” rate depending on income and family size. It offers services in family law and criminal defense, as well as public guardian services to represent the interests of children in high conflict divorce and custody cases. As an incorporated non-profit it can also accept donations to support its work.

71. While some of these non-profit law firms rely mostly on the fees received from clients in order to operate, some have received funding from additional sources. Louisiana’s SWLA Law Center, for example, was established in 1967 and provides reduced fee legal services for those who cannot afford the regular fees of a private attorney but do not qualify for legal aid. It receives funding from the United Way, the City of Lake Charles (through its Office of Community Development) and other grants and donations.\textsuperscript{45}

\textit{(v) Medical-Legal Partnership Models}

\textsuperscript{42} \textit{Ibid.}

\textsuperscript{43} \textit{Ibid.} “B Corps are for-profit companies certified by the non-profit B Lab to meet rigorous standards of social and environmental performance, accountability, and transparency”: B Lab online: \url{https://www.bcorporation.net/what-are-b-corps}.

\textsuperscript{44} Open Legal Services, online at \url{http://openlegalservices.org/}.

\textsuperscript{45} SWLA Law Center, online at \url{http://www.swla-law-center.com/index-2.html}. To learn more about American not-profit law firms, see the Open Legal Services Nonprofit Law Firm Directors, which provides a non-exhaustive list of similar non-profit law firms: \url{http://openlegalservices.org/nonprofit-law-firm-directory/}. 10
The Medical-Legal Partnership ("MLP") is a relatively new model that is being called "a cornerstone of access to justice."\(^{46}\) It has been described as follows:

MLP is a healthcare delivery model that integrates legal assistance as a vital component of healthcare. The power of the MLP model lies in its cross-disciplinary, leveraging nature, which aligns the legal community with a range of stakeholders and professions that are unified in seeking to improve the health conditions and systems for vulnerable populations.

MLPs are built on the understanding that social determinants of health often manifest in the form of legal needs, and that attorneys have special tools and skills to address these needs.

[...]

MLP practice has multiple impacts for patient-clients and communities, as well as for the professions and the legal and health institutions that partner together. A key outcome is the improved capacity of both legal and health professionals to screen, triage, and resolve problems that overlap legal and health domains [...].\(^{47}\)

In the United States, the American Bar Association passed a resolution in 2007 encouraging lawyers, law firms and other members of the legal professions to develop MLPs with hospitals, community-based health care providers and social service organizations.\(^{48}\) There are now hundreds of MLPs operating in the United States, with a wide range of structures.\(^{49}\) MLPs have been established in a range of settings, including children’s hospitals, health centers, veteran health care settings and behavioural health settings.\(^{50}\)

In Ontario, Pro Bono Law Ontario, now Pro Bono Ontario ("PBO"), has developed MLPs at children’s hospitals in Ontario, beginning with its program at Toronto’s SickKids Hospital. This program, initially known as the “PBLO at SickKids” program, was described in a report to Convocation in January 2011 as follows:

\(^{47}\) Ibid.
\(^{49}\) See generally “Partnerships Across the U.S.” National Center for Medical Legal Partnership, online at http://medical-legalpartnership.org/partnerships/.
\(^{50}\) For further resources, and examples, see generally “Setting-Specific Resources” National Center for Medical Legal Partnership, online at http://medical-legalpartnership.org/resources/.
The PBLO at SickKids program was created as a 2-year pilot project by PBLO and launched in January 1, 2009. Based on a successful program model from Boston, Medical-Legal Partnerships, the SickKids’ program delivers free legal services to low-income families whose children receive treatment at The Hospital for Sick Children (“SickKids Hospital”).

The program enables the integration of legal advocacy into clinical practice. It provides legal resources to families and also supports clinicians who provide services to families with children seeking treatment at the hospital. The governing principle is that legal issues affecting families during the time when a child is seeking medical treatment can have an adverse effect on the child’s health as well as impact a family’s capacity to manage the child’s care. According to PBLO, the program served 624 families from its launch in January 2009 until December 31, 2010.

The program has one staff person, a Triage Lawyer, who works as part of a patient’s care team with the SickKids Hospital medical and social work staff. The Triage Lawyer assesses the legal needs of the child-patient and the patient’s family, provides brief legal services for accepted clients and refers clients to the pro bono legal partners where appropriate. […]51

75. At that time, Convocation was asked to consider providing $90,000 to support the program while PBLO worked to secure permanent financial support for the initiative. Convocation approved the funding of this “extremely important and successful access to justice program.”52

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76. The PBO at SickKids program has been evaluated and is considered an overwhelming success.\textsuperscript{53} An independent evaluation found that “The project works extremely well in a clinical setting at the hospital and enjoys the full confidence of hospital clinicians”, that it “has steadily enlarged its service capacity” and that “The program has a good record of achieving resolution to clients’ legal problems, which in turn has created significant impacts for families.”\textsuperscript{54}

77. Today PBO operates five MLPs at the following children’s hospitals: SickKids (Toronto), Children’s Hospital (London), the Children’s Hospital of Eastern Ontario (Ottawa), Holland Bloorview Kids’ Rehabilitation Hospital (Toronto) and McMaster Children’s Hospital (Hamilton). They are staffed by five Triage Lawyers. These MLPs are LawPRO approved Pro Bono Ontario projects.\textsuperscript{55}

78. In addition to the PBO MLPs, a medical-legal partnership, known as the Health Justice Program, has been established as a partnership between St. Michael’s Hospital Academic Family Health Team, St. Michael’s Hospital (Toronto), and four legal clinics. An Onsite Lawyer is able to provide legal services at St. Michael’s Hospital directly to clients. As the Health Justice Program explains:

**Who do you provide service to?**

We aim to support patients who are low-income and have legal issues affecting their well-being, such as experiences of discrimination, personal safety, and problems with employment, housing, etc. Services are directed towards preventative legal information, advice and brief services. We encourage patients who are in unstable housing, identify as aboriginal, as having a disability and/or identify as having HIV/AIDS to access our services.\textsuperscript{56}

**(vi) Summary of Types of New Means of Delivering Legal Services**

\textsuperscript{53} Focus Consultants, PBLO at Sick Kids: A Phase II Evaluation of the Medical-Legal Partnership between Pro Bono Law Ontario and Sick Kids Hospital, Toronto, Final Report, February 17, 2012, online at: \url{http://www.probono.net/va/search/download.225017}.

\textsuperscript{54} Ibid. at page 61.

\textsuperscript{55} LawPRO, LawPRO approved Pro Bono Ontario projects (Last Updated: December 2016), LawPRO online at \url{http://www.lawpro.ca/insurance/pdf/LawPRO_approved_ProBonoProjects.pdf} at page 1.

\textsuperscript{56} Department of Family and Community Medicine and St. Michael’s Academic Family Health Team, Health Justice Program, St. Michael’s Hospital, online at: \url{http://www.stmichaelshospital.com/programs/familypractice/legal-education-and-advice.php}.
79. The above non-exhaustive examples show that innovative structures are being developed by or in partnership with a range of different types of CSOs to provide access to affordable and specialized legal services.

80. The ownership structures are varied. In some cases, legal services are delivered by a traditional firm that is fully owned by the CSO. In other instances, legal services are delivered through an “embedded” staff lawyer of a CSO.

81. There are different approaches to legal service delivery. In some of the examples described above, only legal services are made available. In other examples, a range of services are available, including but not limited to legal services.

c. Focus Group Meetings

82. In late 2016 and early 2017 the Working Group held a series of by invitation focus group meetings to further consider the possibility of licensee delivery of legal services through civil society organizations to facilitate access to justice. Attendees included front line workers, “embedded lawyers” (lawyers who provide services from offices within a hospital or not for profit organization’s physical space), directors of not for profit organizations with mandates to assist vulnerable populations and public policy / funding organizations. A list of meeting participants is found at Tab 4.4.1.

83. Meeting participants were overwhelmingly supportive of the idea of permitting the delivery of legal services by licensees through CSOs. As the attached summary notes, the strengths and opportunities were seen by nearly all meeting participants as greatly exceeding identified potential challenges and risks, which meeting participants strongly maintained could be overcome.

84. Meeting participants noted the following potential strengths and opportunities to permitting delivery of legal services through CSOs:

   a. This approach could facilitate access to justice by providing legal services through trained, licensed lawyers and paralegals.
   b. On-site delivery of legal services in locations that are trusted by vulnerable individuals will facilitate access to justice.
   c. CSOs are often ideally suited to help clients address multiple, interconnected issues, which could include legal issues.
   d. Licensees providing legal services within CSOs to clients would also be able to teach clients and CSO staff about legal rights; licensees embedded in CSO environments can also learn more about the client.
   e. CSO delivery of on-site legal advice to clients would foster efficient service delivery. It would reduce hidden costs, provide opportunities for effective delivery of appropriate services, and ultimately benefit the client and the
providers of legal and other services.

85. Meeting participants raised a range of concerns and risks, but also suggested that they can be addressed, and should not be treated as “show stoppers”. Participants noted the following:

a. With respect to conflicts of interest, there may be settings where conflicts could arise and protocols would be necessary to address this. There might be instances where an inherent conflict may need to be considered, but this would arise on a case-by-case basis.

b. Clients need to have the role of counsel clearly communicated to them.

c. The parameters of the provision of legal services within a civil society structure would need to be clearly developed.

d. Licensees working with vulnerable clients will need specialized expertise and a high level of cultural competency.

e. Licensees working in embedded environments are at risk of feeling isolated. Consideration should be given to how such licensees can be supported.

f. CSOs and licensees must recognize potential duty to report issues. One way of addressing this may be to develop appropriate protocols.

86. While seeing considerable advantage in allowing CSO clients to receive legal services together with other CSO services, the meeting participants noted that lifting regulatory limitations would not necessarily result in the delivery of legal services by CSOs because of the need for funding. However, meeting participants nevertheless encouraged the Law Society to address regulatory limitations to enable delivery of legal services where possible.

87. Meeting participants also encouraged the Law Society to be open to experimenting with new options in this area, and to evaluate these initiatives.

d. Analysis: Applying the Criteria for Considering ABS Options

88. In September 2015, the ABS Working Group confirmed that it will continue to consider potential models with regard to the following criteria:

a. Access to justice: Any structural and related regulatory changes concerning alternative business structures should be reviewed to determine their effect on access to justice. Solutions that provide potential improvements for access to justice should be given more weight on that basis.

b. Responsive to the public: In promoting access, the new structures and processes should be responsive to the needs of the public for legal services including greater flexibility in cost, location and availability of
legal and other services with appropriate quality and adequate financial assurance of legal services.

c. **Professionalism**: The fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice should be safeguarded in any move to liberalize ownership and structure.

d. **Protection of Solicitor-Client Privilege**: Any change proposed to implement alternative business structures must not jeopardize the protection of solicitor-client privilege.

e. **Promote Innovation**: New business structures and processes should be designed to promote innovation which may include, among other things, the adoption of technology and/or other business processes that will enable them to adapt to the legal services marketplace and to better serve the public.

f. **Orderly transition**: The preferred alternative business structures or related solutions options should be amenable to an orderly and thoughtful transition to new regulatory models. Any plan for new structures or service models should be inclusive, responsible, and mindful of any necessary disruptions that may be occasioned.

g. **Efficient and Proportionate Regulation**: Any changes should improve the Law Society’s ability to effectively protect and promote the public interest in competent and ethical practices, including appropriate responses to client complaints. Restrictions on who may provide legal services should be proportionate to the significance of the regulatory objectives.

89. The Working Group considered the above criteria and reached the unanimous view that the Law Society should use its regulatory tools in ways that may enable the delivery of legal services through charities and other CSOs. As described further below, the Working Group is satisfied that legal services could be delivered through charities and other CSOs in new ways which could bring access to justice to Ontarians, including to some of our most vulnerable segments of society, in a manner whereby professionalism and solicitor-client privilege are safeguarded.

   a. **Access to Justice**

90. The acute unmet legal needs in Ontario are well documented. The Working Group addressed this in its February 2014 Report to Convocation, and in its
Unmet Legal Needs in Ontario backgrounder. Justice, including access to legal services, remains a significant challenge in Ontario.

Against this backdrop, the direct delivery of legal services by civil society groups, properly structured, could have several access to justice benefits. Many of the benefits were highlighted in the focus group meetings, and are noted above. Potential benefits may include, for example:

a. Providing a new inclusive entry point for vulnerable people to find legal services (described further below);
b. Reducing the number of referrals a client must receive in order to access legal services;
c. Delivering integrated and holistic services to clients, to address “clusters of problems”, whether legal or non-legal, in recognition of the fact that client problems are often multifaceted and interconnected;
d. Identifying and assessing legal issues at the outset before they contribute to a “cascade” of legal and other problems; and
e. Providing leveraged services, with appropriate professional expertise, provided by the appropriate professional, at the appropriate times.

Legal service delivery models through the charity and CSO sector could be designed with the client’s needs at the core of the program design. The specific needs of different populations could lead to a range of different types of means of delivering legal services through CSOs.

Ultimately access to justice considerations strongly favour action.

b. Responsive to the public

As described above, CSO delivery of legal services could be highly responsive to the needs of vulnerable sectors of the population and the public in general. By embedding lawyers and paralegals where charities or other CSOs are located (such as in shelters, hospitals, community centres, drop-in centres, public libraries or other similarly accessible environments), it is expected that legal services would become more readily accessible and available to the public.

This is a particular advantage when seeking to deliver legal services to particularly vulnerable populations. In the course of its focus group meetings, the Working Group heard examples of situations where a person in need of legal services may be unable to visit a lawyer or paralegal’s office. Under this model, these clients would be able to receive legal services where they are comfortable.
and able to receive them.

96. This approach also ensures that clients are receiving appropriate legal services from professionals licensed to provide such services. The Working Group learned that for some of our most vulnerable, there is often no access to legal help. In such instances, efforts to provide initial legal assistance may come from other service providers. While no doubt well intentioned for the most part, in some cases such efforts to assist can make legal matters worse for the client. A CSO model may enable clients to receive legal assistance from trained, regulated legal professionals. It would also free up the time of other service providers to provide their expert services without having to extend to seek to fill a legal services gap.

97. The Working Group also expects that services provided through CSOs would be delivered at no cost or at a highly subsidized cost to the client.

98. All of these factors strongly point towards permitting CSO direct delivery of legal services.

c. Professionalism

99. The Working Group has considered the key fundamentals of professionalism.

100. The Working Group notes that under this proposal the licensee would be required to have independence over the legal services being provided. The lawyer or paralegal would continue to be required to deliver services competently, with integrity, and with full candour to the client. The lawyer or paralegal would be required to maintain client confidences, and avoid conflicts of interests.

101. There may be particular risks or factors to consider when delivering legal services through a CSO, or in a multidisciplinary environment. However, many of these professionalism issues have already been successfully addressed by innovative providers of legal services. For example:

a. Legal clinics providing legal services through a holistic approach have been able to do so successfully. Issues related to different professionals having different duties to report are addressed by communicating the risks to the client, and having systems in place for professionals to seek independent legal advice should there ever be a situation where conflicting duties may arise.

b. MLPs have already developed protocols to address how the medical-legal partners will operate. Clients are advised as to the role of counsel and the MLP, and necessary consents or ethical screens are put in place as are
necessary.

102. In short, risks related to potential inherent conflicts of interest between a CSO’s legal interests and that of a client served by the CSO, and potential risks related to multidisciplinary services and different professional duty to report requirements appear to have been managed in multidisciplinary environments.

103. The Working Group is unaware of any significant challenges to professionalism arising out of the operation of any of the CSO models, discussed above, including in MLP environments already in operation in Ontario.

104. The Working Group also notes that service to the public good through client relationships, which is one of the elements of professionalism that it identified as a factor to consider, may be enhanced by providing service to individuals who otherwise may not receive needed services.

105. As described further below, the Working Group’s proposed model would introduce a framework within which lawyers and paralegals “embedded” within a CSO could provide legal services to CSO clients. The Law Society would continue to require licensees practicing in CSO settings to meet their full professional obligations. The Working Group is of the view that the fundamentals of professionalism can be safeguarded appropriately under this proposal.

d. Protection of Solicitor-Client Privilege

106. The Working Group views the protection of solicitor-client privilege much in the same way as it views issues related to professionalism; changes must not jeopardize the protection of solicitor-client privilege, and change can be introduced while meeting this requirement. The Working Group recognizes that multidisciplinary partnerships have operated without raising solicitor-client privilege concerns for some time. Multidisciplinary service delivery models require clear protocols and client communication, but can be developed in ways which do not significantly add risk to the protection of solicitor-client privilege.

107. The Working Group’s proposed model would require steps to be taken to ensure solicitor-client privilege is protected. The individual licensee practising in the CSO setting would ultimately be responsible for ensuring that client privilege is protected to the same extent as it would be within any other practice setting.

e. Promote Innovation

108. The Working Group views the potential of delivery of legal services through CSOs as a means of promoting innovation for the purpose of facilitating access to justice. The models described above demonstrate that legal services can be
delivered efficiently to underserved populations, and that tailored solutions can be crafted to best meet the needs of vulnerable groups. Innovation might involve technology, but can in these cases include new processes to more seamlessly provide legal services where they were previously unavailable, difficult to access, or provided in a silo. It is expected that changes to permit delivery of legal services through CSOs would enhance the delivery of legal services to the public, and thus this factor strongly favours regulatory change.

f. **Orderly transition**

109. The proposed new approach is intended to facilitate the development of new service models to address unmet legal needs. It is focusing on a part of the market for legal services that is generally not being served by for-profit sectors. It is not expected that it would create disruptions for the regulator (as the Law Society would continue to regulate the licensees providing the legal services), for current providers of legal services (as this proposal seeks to address areas of service where they do not currently operate), for licensees (who would simply have new opportunities to provide legal services in the public interest) or for the public in general (who would have new means of accessing legal services). The Working Group has every confidence that the proposed approach can be introduced in an orderly manner, and in a manner that ultimately could directly contribute to seeing more people accessing the legal services they need. As such, this factor strongly supports regulatory action.

g. **Efficient and Proportionate Regulation**

110. With the above factors on balance strongly pointing towards regulatory action, the Working Group considered what options would be both efficient and proportionate to the regulatory objective of facilitating access to legal services through charities and other CSOs in a manner that effectively protects the public.

111. The Working Group therefore considered the full range of options available.

112. The Working Group considered amending the Multi-Discipline Practice requirements in order to facilitate charity and CSO delivery of legal services, but ultimately concluded that the MDP is not the appropriate vehicle to drive such change. The MDP model is premised on legal services being the core service being provided, with ancillary services also available through the MDP. However, the involvement of charities and CSOs in the delivery of legal services would represent a fundamental shift from the MDP model; in these settings legal services could be provided as a related service, as part of a holistic service, or as an ancillary service delivered to CSO clients.
113. The Working Group therefore considered options for developing a brand new approach, and developed the following model which it believes is both efficient and proportionate to the access to justice and public protection objectives it seeks to achieve.

e. The Recommended Approach: By-Law Amendments to Enable Licensee Delivery of Legal Services Through Charities and Other CSOs

114. As stated at the outset of this report, the Working Group recommends amending Law Society By-Laws to enable lawyers and paralegals to directly deliver legal services through CSOs.

115. Under this approach, the Law Society would specify the circumstances under which legal services could be provided to CSO clients (by “embedded” lawyers and paralegals). If those circumstances were present in a CSO, and the CSO wished its clients to have access to legal services from a lawyer or paralegal embedded in the CSO, the CSO would register with the Law Society. The prescribed circumstances will focus on ensuring that, among other things:

   a. the licensee has control over the delivery of their professional services;
   b. solicitor-client privilege will be protected; and
   c. the fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded.

116. A registered CSO would be de-registered if the prescribed circumstances under which legal services may be provided to CSO clients by “embedded” licensees were no longer present.

117. On registering, lawyers and paralegals would be permitted to provide legal services directly to clients through the registered CSOs. Licensees providing legal services through registered entities would continue to be fully regulated by the Law Society.

118. Complaints regarding legal services provided by licensees through registered CSOs could still be made to the Law Society.

119. The proposed model would seem to integrate easily with current insurance requirements, as the licensee would carry coverage as required by the By-Laws, in order to protect clients. With LawPRO’s new 75% discount risk-rated group for selected government agency lawyers having come into effect this year, LawPRO could be approached to consider whether the lawyers employed by CSOs could
also be evaluated for risk rating in this fashion.

120. The Working Group is of the view that this approach provides an innovative, proportionate regulatory option. It has been designed to encourage innovation and new means of delivering legal services where services are required. The registration requirement is intended to meet Law Society public protection and regulatory requirements without imposing overly bureaucratic application requirements or unnecessarily complex legal requirements on charities and CSOs.

**NEXT STEPS**

121. If approved, the Committee would return with recommended By-Law changes.

122. The Working Group is continuing to consider minority ownership by non-licensees and franchise models, and new forms of legal service delivery in areas not currently well served by traditional practices. It will report further with respect to these issues in due course.
### Civil Society Meetings, December 2016 – January 2017 Attendees

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<td>Jacquie Bohnhardt and Janet Wilson</td>
<td>Family Service Toronto</td>
<td>Janet Wilson, Manager, Violence Against Women Program</td>
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<tr>
<td>Graham Brown</td>
<td>John Howard Society of Ontario</td>
<td>Policy Analyst, Centre of Research, Policy &amp; Program Development</td>
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<td>Lynn Burns</td>
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<td>Bonnie Cole</td>
<td>Akwesasne Justice Department</td>
<td>Legal Counsel &amp; Prosecutor</td>
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<td>JoAnne Doyle</td>
<td>United Way</td>
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<td>Mary Jane Ellis</td>
<td>Canadian Mental Health Association – Toronto Branch</td>
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<td>Lana Frado</td>
<td>Sound Times</td>
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<td>Marian MacGregor</td>
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<td>Elizabeth McIsaac</td>
<td>Maytree</td>
<td>President</td>
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<td>Juliette Nicolet and Chelsea Krahn</td>
<td>Ontario Federation of Friendship Centres</td>
<td>Director of Policy / Justice Policy Analysis</td>
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<td>Gita Schwartz</td>
<td>Elizabeth Fry Toronto</td>
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<tr>
<td>Amy Slotek</td>
<td>Legal Aid Ontario</td>
<td>LAO lawyer at Sound Times 4 days per week</td>
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FOR DECISION

FOURTH REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

MOTION

123. That Convocation approve amendments to the Rules of Professional Conduct regarding price advertising for legal services with respect to residential real estate transactions as set out at Tabs 4.5.1 and 4.5.2 (English and French).

SUMMARY OF ISSUE UNDER CONSIDERATION

124. In this fourth report to Convocation, the Advertising and Fee Arrangements Issues Working Group (“Working Group”) reports its recommendation that all inclusive advertising with respect to residential real estate transactions should be permitted, subject to new requirements that promote disclosure and consistency so that consumers may more easily compare services. The Working Group has developed draft amendments to the advertising of fees rule, and to the Commentary to Rule 3.6 regarding reasonable fees and disbursements. The draft amendments are attached as Tab 4.5.1 (English) and Tab 4.5.2 (French) to this report.

BACKGROUND

125. In June 2016, the Working Group reported to Convocation through the Professional Regulation Committee, and presented its proposal to seek further input with respect to the potential regulatory responses to a number of issues relating to licensee advertising, referral fees and fee arrangements (“June 2016 Report to Convocation”).

126. At that time, the Working Group described issues with respect to real estate advertising

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1 The Advertising & Fee Arrangements Issues Working Group (“Working Group”) is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society’s website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

2 The June 2016 Report to Convocation can also be found online at https://www.lsuc.on.ca/advertising-fee-arrangements/.
and fee issues as follows:

**Real Estate**

There has also been an increased volume of advertising for real estate work. However, the context of real estate advertising is very different than for personal injury advertising.

Many consumers are prepared to select their real estate lawyers on the basis of price. Fixed price services are commonly advertised by real estate lawyers to attract residential real estate work. However, there is concern whether some fixed-price advertising honestly and accurately discloses what costs are included in the fixed price and what are in addition. In a price sensitive market where relatively small price differences can affect consumer choices, it may be particularly important to ensure that consumers are not misled as to what is promised and what is not.3

127. The Working Group stated that as a matter of policy, it “believes that the advertising of “all in” real estate pricing should be transparent, and that consumers should be able to effectively compare offered prices”.

128. It described the “all in” pricing issue in detail as follows:

Real estate legal work is price sensitive with the result that price advertising is important. Most consumers of real estate legal services will only use a real estate lawyer once or a few times in their lives. Consumers will not necessarily be aware of differences between fees and disbursements, or that the nature of legal services provided will change, and so too will the fees and disbursements, depending, for example, on whether a purchase is with or without mortgage financing.

The Working Group recognizes that real estate advertising of “all in” pricing can be misleading if it is not transparent about additional fees, disbursements or charges which will ultimately lead to the client receiving a bill that exceeds the quoted “all in” price. Clients usually do not meet with the lawyer at the outset of the retainer, so once a client is “in the door” through deceptive advertising, by the time the real price is revealed, it is often too late to change lawyers. Moreover, the difference between the “all

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3 *Ibid.* at paras. 31-32.

in” price and the actual invoice may be relatively minor, such that individual clients may not take recourse, leaving possibly deceptive pricing unchecked.

The Working Group notes that Rule 4.2-2 of the Rules of Professional Conduct already provides that a lawyer may advertise fees, but only if the advertising is “reasonably precise as to the services offered for each fee quoted”, the advertising “states whether other amounts, such as disbursements and taxes will be charged in addition to the fee” and “the lawyer strictly adheres to the advertised fee in every applicable case”. The determination of what constitutes a "disbursement" in many instances is the crux of the issue.5

129. The Working Group also noted that it heard divergent views by real estate lawyers as to what might reasonably be a disbursement that can be charged to a client.6

130. The Working Group recognized that there are a range of ways to potentially regulate “all in” pricing, and indicated that it would be seeking input into what might be appropriate approaches which may facilitate comparison when lawyers advertise on a fixed-fee basis.7

131. In July 2016, the Working Group sought further input with respect to specific issues related to advertising, referral fees, and contingency and other fee arrangements through a Call for Feedback. In its Call for Feedback document, the Working Group asked for input on the following issues with respect to advertising in real estate law:

How could pricing in real estate law be made consistent so that consumers may more easily compare services? Should the Law Society take further action regarding “all in” pricing in real estate transactions?8

132. The Call for Feedback closed at the end of September 2016. The summary of the comments received in response to the Call for Feedback (“Summary”), attached to the Working Group’s February 2017 Report to Convocation provided the following overview with respect to the issue of advertising “all in” fees in real estate:

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5 Ibid. at paras. 54-56, footnotes omitted.

6 Ibid. at footnote 13.

7 Ibid. at paras. 58-59.

8 Call for Feedback: Advertising and fee arrangements, online at http://www.lsuc.on.ca/uploadedFiles/Fact-Sheet-Ad-and-Fee-Consultation-EN-July-2016.pdf.
The feedback received in this area provided divergent views.

The input confirmed that “all in” real estate advertising practices present several challenges, including the following:

a. A lack of consistency in the marketplace as to what is included in “all in” pricing. Variations depend, for example, on whether all disbursements are included, whether certain costs are categorized as disbursements and not included in the up-front quote, and how the lawyer decides to treat amounts received from a title insurer or other third party.

b. “Bait and switch” techniques / deceptive “all in” pricing: There is a concern that prospective clients may retain a firm on the basis of one price and then be billed a different amount due to the nature of the transaction or because of disbursements.

c. Threats to ethical and professional practice:
   i. Many expressed the concern that the advertising of all-in fees has fueled price competition that has created disincentives for real estate lawyers to spend money to conduct searches or spend the necessary time on matters.
   ii. Many noted that the downward cost pressure and current uneven advertising practices causes a race to the bottom.

d. Focusing solely on price to the detriment of other considerations: Some expressed concern that a regulatory focus on price risks detracting from other important consumer considerations such as professionalism, service and expertise, and consumer evaluation of real estate legal services on price and other considerations.

There were differences in approaches regarding how to address the above pricing issues.

Some noted that existing rules can be used to enforce transparency in real estate pricing.

Certain legal organizations are opposed to permitting any “all-in”
fee quotes in real estate transactions unless there are regulatory changes. Another legal organization appeared to take issue with regulation of pricing, stressing that there is no “on size fits all” real estate transaction, and that it would be a mistake to assume that real estate transactions can or should be subject to uniform pricing.

In contrast, some of the feedback received generally recognized that if it were possible to easily compare prices on an “all in” basis, this would give prospective clients choice and peace of mind. Some therefore recommend regulating “all in” pricing, with the caution that if the rationale of “all in” pricing is to foster reasonable price comparisons, then any regulatory approach would need to ensure that there are not hidden fees or inconsistencies in approach which could skew the marketplace.

Options for considering “all in” real estate pricing include, for example:

a. Taking no further action with respect to real estate pricing;
b. Educating consumers on real estate advertising and the costs of real estate transactions;
c. Regulating what is included in any price quote, and what categories of costs are not included and should be paid by the client;
d. Regulating whether a lawyer should be required to abide by an all-in legal fee in all cases without exception;
e. Defining what constitutes disbursements;
f. Re-introducing a tariff with respect to disbursements or otherwise regulating disbursements; and/or
g. Developing different “all in” requirements for different types of common real estate transactions; and
h. Banning “all in” pricing.⁹

133. The Working Group has considered appropriate recommendations with respect to real

⁹ Summary of Feedback Received in Response to the Advertising and Fee Issues Working Group July 2016 Call for Feedback, February 2017 Convocation – Professional Regulation Committee Report, at paras. 23-29, online at: www_lsuc_on_ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.
estate advertising. In addition to relying on Working Group member Jerry Udell’s real estate expertise, the Working Group invited benchers Sidney Troister and Jeffrey Lem to participate in these meetings given their real estate expertise. Ross Earnshaw also participated in one meeting given his role as Chair of the Law Society’s Real Estate Liaison Group.

DISCUSSION

134. The Working Group has considered the issue of advertising of pricing in real estate, particularly with respect to residential real estate matters. It remains of the view that there are concerns in this area. As the Working Group has previously noted:

a. Advertising can be misleading if it is not clear as to what is included and what is not included in the price.

b. There are issues arising due to a lack of consistency in the marketplace as to what is included in an advertised price.

c. Clients who may have been attracted to a lawyer through misleading advertising have few options once in the door. Due to the timing of residential real estate transactions, clients are unlikely to be in a position to change lawyers once they become aware of issues regarding the cost of the services being provided.

d. It is difficult for consumers to compare services.

135. The Working Group has concluded that change is warranted.

136. Banning advertising of pricing in real estate law would be inappropriate. As the Working Group has previously noted,10 lawyer and paralegal commercial expression is protected by s.2(b) of the Charter of Rights and Freedoms, which protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.11 A ban on advertising price would likely violate the Charter. Moreover, a ban on advertising price would be a disservice to consumers of real estate legal services.

137. The Working Group was invited by some to define what constitutes a disbursement, with some also recommending a Law Society tariff on disbursements. The Working Group does not believe that such Law Society micro-regulation is necessary or in the public interest. Any list of permitted disbursements would need to be constantly revised. A tariff approach would similarly need constant updating. Moreover, tariffs risk being anti-


competitive. The rates risk becoming ceilings, such that real estate lawyers who do not currently charge for certain matters, or do not charge at the tariff rate may then choose to charge at the prescribed tariff rate.

138. Ultimately the Working Group is of the view that a rule amendment provides the simplest way to encourage the advertising of pricing that facilitates transparency and consumer choice.

139. The proposed rule does not require real estate lawyers to advertise, or to advertise on the basis of price. However, it provides that if a lawyer advertises a price for the completion of a residential real estate transaction, then the lawyer must meet the following requirements:

a. The price must be inclusive of all fees, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors' lawyers regarding similar name executions and any title insurance premium.

b. The advertised price must clearly state that the harmonized sales tax and the permitted disbursements noted above are not included in the price.

c. The lawyer must adhere to the price in every applicable case.

d. In the case of a purchase transaction, the price is for acting on the purchase and one mortgage.

140. The proposed Commentary states that the lawyer who provides services pursuant to an advertised price must meet the standard of a competent lawyer. It explains that the intent of the rule is to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. It also makes it clear that the rule applies to all forms of advertising, and provides that when a lawyer chooses to advertise a price, the lawyer should ensure that all the relevant information is provided. The Commentary makes it clear that the rule applies for providing a price on a website, whether the price is listed on the site, or make available in response to a request made on a webpage. The rule does not apply to a specific price quotation, so long as the lawyer provides a specific quotation based on an actual assessment of the work and disbursements required, and that the types of anticipated disbursements are disclosed.

141. The Working Group also proposes an amendment to Commentary to Rule 3.6 (the rule relating to fees,) to remind lawyers that they must comply with the provisions of Rules 4.2.2 and 4.2.2.1 regarding advertising of fees.

NEXT STEPS

142. The Working Group continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and
other services. It also continues to consider current practices related to contingency fee arrangements and the operation of the *Solicitors Act*, which is the subject of the Working Group’s fifth report to Convocation, which is also being presented in June 2017. The Working Group will report in due course once it has considered these issues further.
REDLINE SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING ADVERTISING OF FEES AND REASONABLE FEES AND DISBURSEMENTS

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements, third party charges and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

(a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors’ lawyers regarding similar name executions and any title insurance premium;

(b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;

(c) the lawyer strictly adheres to the price for every transaction; and

(d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage.

Commentary

[1] A lawyer who agrees to provide services pursuant to an advertised price is required to perform legal services to the standard of a competent lawyer. Clients are entitled to the same quality of legal services whether the services are provided pursuant to an advertised price or otherwise.

[2] The requirements set out in Rule 4.2-2.1 are intended to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. The rule applies where the lawyer advertises a price for acting on a sale, a purchase or a refinancing of residential real estate.

[3] This rule applies to all forms of price advertising including in traditional media, on the internet, on the lawyer’s own website and in standardized price lists. Providing a price by a website is price advertising whether prices are listed on a webpage or are only available by response to a request made on a webpage. However, this rule does not apply where a specific fee quotation is provided through a website inquiry based on an actual assessment of the work.
and disbursements required for the transaction provided that full disclosure is made of the anticipated types of disbursements and other charges which the consumer would be required to pay in addition to the quoted fee.

[4] Where a lawyer chooses to advertise a price for the completion of a residential real estate transaction, the lawyer should ensure that all relevant information is provided. For example, the permitted disbursements should not be set out in small print or in separate documents or webpages. Particular care should be taken with mass advertising where consumers will not have the opportunity to read and understand all of the details of the price. Lawyers should take into account the general impression conveyed by a representation and not only its literal meaning.

[5] The price in paragraph (a) of Rule 4.2-2.1 is an all-inclusive price. The only permitted exclusions from the price are the harmonized sales tax and permitted disbursements specifically mentioned in the subrule. Fees paid to government, municipalities or other similar authorities for due diligence investigations are permitted disbursements as fees charged by government. For greater certainty, the all-inclusive price is required to include overhead costs, staff costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer’s title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.
Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the Solicitors Act or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

(a) the time and effort required and spent,
(b) the difficulty of the matter and the importance of the matter to the client,
(c) whether special skill or service has been required and provided,
(c.1) the amount involved or the value of the subject-matter,
(d) the results obtained,
(e) fees authorized by statute or regulation,
(f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,
(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer’s inability to accept other employment,
(h) any relevant agreement between the lawyer and the client,
(i) the experience and ability of the lawyer,
(j) any estimate or range of fees given by the lawyer, and
(k) the client’s prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer’s fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and
interest as is reasonable and practical in the circumstances, including the basis on which fees
will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the
client. This is particularly important concerning fee charges or disbursements that the client
might not reasonably be expected to anticipate. When something unusual or unforeseen occurs
that may substantially affect the amount of a fee or disbursement, the lawyer should give to the
client an immediate explanation. A lawyer should confirm with the client in writing the substance
of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial
estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the Solicitors Act.

[4.2] Lawyers must comply with the provisions of Rules 4.2-2 and 4.2-2.1 regarding advertising
of fees.
“CLEAN” VERSION SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING ADVERTISING OF FEES AND REASONABLE FEES AND DISBURSEMENTS

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements, third party charges and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

(a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors’ lawyers regarding similar name executions and any title insurance premium;

(b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;

(c) the lawyer strictly adheres to the price for every transaction; and

(d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage.

Commentary

[1] A lawyer who agrees to provide services pursuant to an advertised price is required to perform legal services to the standard of a competent lawyer. Clients are entitled to the same quality of legal services whether the services are provided pursuant to an advertised price or otherwise.

[2] The requirements set out in Rule 4.2-2.1 are intended to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. The rule applies where the lawyer advertises a price for acting on a sale, a purchase or a refinancing of residential real estate.

[3] This rule applies to all forms of price advertising including in traditional media, on the internet, on the lawyer’s own website and in standardized price lists. Providing a price by a website is price advertising whether prices are listed on a webpage or are only available by response to a request made on a webpage. However, this rule does not apply where a specific fee quotation is provided through a website inquiry based on an actual assessment of the work and disbursements required for the transaction provided that full disclosure is made of the
anticipated types of disbursements and other charges which the consumer would be required to pay in addition to the quoted fee.

[4] Where a lawyer chooses to advertise a price for the completion of a residential real estate transaction, the lawyer should ensure that all relevant information is provided. For example, the permitted disbursements should not be set out in small print or in separate documents or webpages. Particular care should be taken with mass advertising where consumers will not have the opportunity to read and understand all of the details of the price. Lawyers should take into account the general impression conveyed by a representation and not only its literal meaning.

[5] The price in paragraph (a) of Rule 4.2-2.1 is an all-inclusive price. The only permitted exclusions from the price are the harmonized sales tax and permitted disbursements specifically mentioned in the subrule. Fees paid to government, municipalities or other similar authorities for due diligence investigations are permitted disbursements as fees charged by government. For greater certainty, the all-inclusive price is required to include overhead costs, staff costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer’s title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.
Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the Solicitors Act or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

(a) the time and effort required and spent,

(b) the difficulty of the matter and the importance of the matter to the client,

(c) whether special skill or service has been required and provided,

(c.1) the amount involved or the value of the subject-matter,

(d) the results obtained,

(e) fees authorized by statute or regulation,

(f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,

(h) any relevant agreement between the lawyer and the client,

(i) the experience and ability of the lawyer,

(j) any estimate or range of fees given by the lawyer, and

(k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and
interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the Solicitors Act.

[4.2] Lawyers must comply with the provisions of Rules 4.2-2 and 4.2-2.1 regarding advertising of fees.
TAB 4.5.2

VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE CONCERNANT LA PUBLICITÉ DES HONORAIRES ET LES HONORAIRES ET DÉBOURS RAISONNABLES

Publicité des honoraires

4.2-2 L’avocat peut annoncer ses honoraires pour des services juridiques aux conditions suivantes :

a) l’annonce des honoraires indique de façon suffisamment précise les services compris pour chaque prix indiqué ;

b) l’annonce des honoraires indique si d’autres montants, tels que les débours, les frais payables à des tiers et les taxes, sont facturés en sus ;

c) l’avocat s’en tient strictement aux frais annoncés dans toutes les circonstances applicables

4.2-2.1 L’avocat peut annoncer un prix pour agir dans une opération immobilière résidentielle si :

a) Le prix comprend tous les honoraires pour services juridiques, débours, frais payables à des tiers et autres montants à l’exception de la taxe de vente harmonisée et des débours permis suivants : droits de cession immobilière, droits d’inscription de documents gouvernementaux, droits imposés par le gouvernement, frais Teranet, paiement pour lettres d’avocat de créanciers concernant des exécutions envers des noms similaires et primes d’assurance de titre ;

b) La publicité énonce que la taxe de vente harmonisée et les débours permis mentionnés au paragraphe a) de la présente règle ne sont pas compris dans le prix ;

c) L’avocat adhère strictement aux prix annoncés pour chaque transaction ;

d) Dans le cas d’une transaction d’achat, le prix comprend le prix pour agir à la fois dans la transaction d’achat et une transaction hypothécaire.

Commentaire

[1] L’avocat qui accepte de fournir des services conformément à un prix annoncé est tenu de fournir ses services juridiques selon la norme d’un avocat compétent. Les clients ont droit à la même qualité de services juridiques, que les services soient fournis en vertu d’un prix annoncé ou autre.

[2] Les exigences énoncées à la règle 4.2-2.1 visent à assurer que les prix annoncés par les avocats pour des opérations immobilières résidentielles sont clairs pour les consommateurs et sont comparables. La règle s’applique lorsque l’avocat annonce un prix pour agir dans une vente, un achat ou un refinancement de résidence.

[3] La présente règle s’applique à toutes les formes d’annonces de prix, y compris dans les médias traditionnels, sur Internet, sur le site Web de l’avocat et dans des listes standardisées.
de prix. Donner un prix sur un site Web équivaut à annoncer ses prix, que ceux-ci soient annoncés sur un site Web ou seulement disponibles en réponse à une demande faite sur un site Web. Cependant, cette règle ne s’applique pas si une estimation spécifique des honoraires est fournie par suite d’une demande sur le site Web selon une évaluation réelle du travail et des débours requis pour la transaction, pourvu que soient divulgués les débours prévisibles et autres frais que le consommateur devrait payer en sus des frais estimés.

[4] Si l’avocat décide d’annoncer un prix pour faire une opération immobilière résidentielle, l’avocat devrait s’assurer de fournir tous les renseignements pertinents. Par exemple, les débours permis ne devraient pas être énoncés en petits caractères ou dans des documents ou pages Web séparés. Il faut porter une attention particulière à la publicité de masse où les consommateurs n’auront pas la possibilité de lire et de comprendre tous les détails du prix. Les avocats devraient tenir compte de l’impression générale transmise par une annonce et non seulement sa signification littérale.

[5] Le prix faisant l’objet du paragraphe a) de règle 4.2-2.1 est un prix forfaitaire. Les seules exclusions permises sont la taxe de vente harmonisée et les débours permis spécifiquement mentionnés dans le paragraphe. Les frais payés au gouvernement, aux municipalités ou à toute autre autorité semblable pour des enquêtes de diligence raisonnable sont des débours permis à titre de droits imposés par le gouvernement. Pour plus de certitude, le prix forfaitaire doit nécessairement comprendre les frais d’administration, de personnel, de messagerie, les frais bancaires, postaux, de photocopie, de recherche de titre ou autre recherche effectuée par un praticien tiers, les frais de clôture et autres dépenses et débours qui ne sont pas spécifiquement mentionnés dans ce paragraphe.
Honoraires et débours raisonnables

3.6-1 L’avocat ne doit pas demander ni accepter des honoraires et des débours qui ne sont ni justes ni raisonnables et qui n’ont pas été divulgués en temps utile.

3.6-1.1 L’avocat ne peut percevoir d’intérêts sur les comptes en souffrance qu’aux conditions fixées par la loi, notamment par la Loi sur les procureurs.

Commentaire

[1] Le calcul d’honoraires justes et raisonnables tient compte des facteurs suivants :

a) le temps et les efforts consacrés à l’affaire ;

b) la difficulté de l’affaire et son importance pour le client ;

c) la prestation de services inhabituels ou exigeant une compétence particulière ;

c.1) les montants en cause ou la valeur de l’objet du litige ;

d) les résultats obtenus ;

e) les honoraires prévus par la loi ou les règlements ;

f) les circonstances particulières, comme la perte d’autres mandats, les retards de règlement, l’incertitude de la rémunération et l’urgence ;

g) la probabilité, si divulguée au client, que l’avocat ne puisse accepter d’autre travail s’il accepte ce mandat ;

h) toute entente pertinente entre l’avocat et le client ;

i) l’expérience et l’aptitude de l’avocat ;

j) toute estimation ou échelle d’honoraires donnée par l’avocat ;

k) le consentement préalable du client relativement aux honoraires.

[2] Le rapport de confiance qui existe entre l’avocat et son client exige la divulgation complète de tous les éléments de leurs rapports financiers et interdit à l’avocat d’accepter le moindre honoraire caché. L’avocat ne peut, à l’insu de son client et sans son consentement, recevoir pour ses services une rétribution quelconque (honoraires, gratifications, frais, commissions, intérêts, escomptes, primes de représentation ou de promotion, etc.) des mains d’un tiers. De même, lorsque ses honoraires ne lui sont pas payés par le client, mais, notamment, par un bureau d’aide juridique, un emprunteur ou un représentant successoral, toute rétribution supplémentaire doit être approuvée par ces personnes.
[3] Avant ou dans un délai raisonnable après le début d’un mandat, l’avocat devrait donner au client autant de renseignements que possible par écrit concernant les honoraires, les débours et les intérêts, selon ce qui est raisonnablement possible compte tenu des circonstances, incluant le calcul qui permettra de fixer les honoraires.

[4] L’avocat devrait être en mesure d’expliquer le calcul des honoraires et des débours demandés au client. Ceci est particulièrement important pour les honoraires et les débours que le client ne pourrait pas raisonnablement prévoir. En cas de situation inhabituelle ou imprévisible pouvant avoir une incidence importante sur le montant des honoraires ou des débours, l’avocat devrait tout de suite expliquer la situation au client. L’avocat devrait confirmer par écrit à son client la teneur de toute discussion concernant les honoraires au fur et à mesure de la progression de l’affaire et peut réviser l’estimation initiale des honoraires et des débours.

[4.1] L’avocat devrait informer son client de son droit de demander la liquidation de son compte conformément à la Loi sur les procureurs.

[4.2] Les avocats doivent respecter les dispositions des règles 4.2-2 et 4.2-2.1 à l’égard de la publicité des honoraires.
VERSION « AU PROPRE » DES MODIFICATIONS AU CODE DE DÉONTOLOGIE CONCERNANT LA PUBLICITÉ DES HONORAIRES ET LES HONORAIRES ET DÉBOURS RAISONNABLES

Publicité des honoraires

4.2-2 L’avocat peut annoncer ses honoraires pour des services juridiques aux conditions suivantes :

a) l’annonce des honoraires indique de façon suffisamment précise les services compris pour chaque prix indiqué ;

b) l’annonce des honoraires indique si d’autres montants, tels que les débours, les frais payables à des tiers et les taxes, sont facturés en sus ;

c) l’avocat s’en tient strictement aux frais annoncés dans toutes les circonstances applicables

4.2-2.2 L’avocat peut annoncer un prix pour agir dans une opération immobilière résidentielle si :

e) Le prix comprend tous les honoraires pour services juridiques, débours, frais payables à des tiers et autres montants à l’exception de la taxe de vente harmonisée et des débours permis suivants : droits de cession immobilière, droits d’inscription de documents gouvernementaux, droits imposés par le gouvernement, frais Teranet, paiement pour lettres d’avocat de créanciers concernant des exécutions envers des noms similaires et primes d’assurance de titre ;

f) La publicité énonce que la taxe de vente harmonisée et les débours permis mentionnés au paragraphe 4.2-2.1 ne sont pas compris dans le prix ;

g) L’avocat adhère strictement aux prix annoncés pour chaque transaction ;

h) Dans le cas d’une transaction d’achat, le prix comprend le prix pour agir à la fois dans la transaction d’achat et une transaction hypothécaire.

Commentaire

[1] L’avocat qui accepte de fournir des services conformément à un prix annoncé est tenu de fournir ses services juridiques selon la norme d’un avocat compétent. Les clients ont droit à la même qualité de services juridiques, que les services soient fournis en vertu d’un prix annoncé ou autre.

[2] Les exigences énoncées à la règle 4.2-2.1 visent à assurer que les prix annoncés par les avocats pour des opérations immobilières résidentielles sont clairs pour les consommateurs et sont comparables. La règle s’applique lorsque l’avocat annonce un prix pour agir dans une vente, un achat ou un refinancement de résidence.

[3] La présente règle s’applique à toutes les formes d’annonces de prix, y compris dans les médias traditionnels, sur Internet, sur le site Web de l’avocat et dans des listes standardisées de prix. Donner un prix sur un site Web équivaut à annoncer ses prix, que ceux-ci soient annoncés sur un site Web ou seulement disponibles en réponse à une demande faite sur un site Web. Cependant, cette règle ne s’applique pas si une estimation spécifique des honoraires.
est fournie par suite d’une demande sur le site Web selon une évaluation réelle du travail et des débours requis pour la transaction, pourvu que soient divulgués les débours prévisibles et autres frais que le consommateur devrait payer en sus des frais estimés.

[4] Si l’avocat décide d’annoncer un prix pour faire une opération immobilière résidentielle, l’avocat devrait s’assurer de fournir tous les renseignements pertinents. Par exemple, les débours permis ne devraient pas être énoncés en petits caractères ou dans des documents ou pages Web séparés. Il faut porter une attention particulière à la publicité de masse où les consommateurs n’auront pas la possibilité de lire et de comprendre tous les détails du prix. Les avocats devraient tenir compte de l’impression générale transmise par une annonce et non seulement sa signification littérale.

[5] Le prix faisant l’objet du paragraphe 4.2-2.1 a) est un prix forfaitaire. Les seules exclusions permises sont la taxe de vente harmonisée et les débours permis spécifiquement mentionnés dans le paragraphe. Les frais payés au gouvernement, aux municipalités ou à toute autre autorité semblable pour des enquêtes de diligence raisonnable sont des débours permis à titre de droits imposés par le gouvernement. Pour plus de certitude, le prix forfaitaire doit nécessairement comprendre les frais d’administration, de personnel, de messagerie, les frais bancaires, postaux, de photocopie, de recherche de titre ou autre recherche effectuée par un praticien tiers, les frais de clôture et autres dépenses et débours qui ne sont pas spécifiquement mentionnés dans ce paragraphe.
Honoraires et débours raisonnables

3.6-1 L’avocat ne doit pas demander ni accepter des honoraires et des débours qui ne sont ni justes ni raisonnables et qui n’ont pas été divulgués en temps utile.

3.6-1.1 L’avocat ne peut percevoir d’intérêts sur les comptes en souffrance qu’aux conditions fixées par la loi, notamment par la Loi sur les procureurs.

Commentaire

[1] Le calcul d’honoraires justes et raisonnables tient compte des facteurs suivants :

   a) le temps et les efforts consacrés à l’affaire ;

   b) la difficulté de l’affaire et son importance pour le client ;

   c) la prestation de services inhabituels ou exigeant une compétence particulière ;

   c.1) les montants en cause ou la valeur de l’objet du litige ;

   d) les résultats obtenus ;

   e) les honoraires prévus par la loi ou les règlements ;

   f) les circonstances particulières, comme la perte d’autres mandats, les retards de règlement, l’incertitude de la rémunération et l’urgence ;

   g) la probabilité, si divulguée au client, que l’avocat ne puisse accepter d’autre travail s’il accepte ce mandat ;

   h) toute entente pertinente entre l’avocat et le client ;

   i) l’expérience et l’aptitude de l’avocat ;

   j) toute estimation ou échelle d’honoraires donnée par l’avocat ;

   k) le consentement préalable du client relativement aux honoraires..

[2] Le rapport de confiance qui existe entre l’avocat et son client exige la divulgation complète de tous les éléments de leurs rapports financiers et interdit à l’avocat d’accepter le moindre honoraire caché. L’avocat ne peut, à l’insu de son client et sans son consentement, recevoir pour ses services une rétribution quelconque (honoraires, gratifications, frais, commissions, intérêts, escomptes, primes de représentation ou de promotion, etc.) des mains d’un tiers. De même, lorsque ses honoraires ne lui sont pas payés par le client, mais, notamment, par un bureau d’aide juridique, un emprunteur ou un représentant successoral, toute rétribution supplémentaire doit être approuvée par ces personnes.
[3] Avant ou dans un délai raisonnable après le début d’un mandat, l’avocat devrait donner au client autant de renseignements que possible par écrit concernant les honoraires, les débours et les intérêts, selon ce qui est raisonnablement possible compte tenu des circonstances, incluant le calcul qui permettra de fixer les honoraires.

[4] L’avocat devrait être en mesure d’expliquer le calcul des honoraires et des débours demandés au client. Ceci est particulièrement important pour les honoraires et les débours que le client ne pourrait pas raisonnablement prévoir. En cas de situation inhabituelle ou imprévisible pouvant avoir une incidence importante sur le montant des honoraires ou des débours, l’avocat devrait tout de suite expliquer la situation au client. L’avocat devrait confirmer par écrit à son client la teneur de toute discussion concernant les honoraires au fur et à mesure de la progression de l’affaire et peut réviser l’estimation initiale des honoraires et des débours.

[4.1] L’avocat devrait informer son client de son droit de demander la liquidation de son compte conformément à la Loi sur les procureurs.

[4.2] Les avocats doivent respecter les dispositions des règles 4.2-2 et 4.2-2.1 à l’égard de la publicité des honoraires.
FOR INFORMATION

FIFTH REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

SUMMARY OF THE ISSUE UNDER CONSIDERATION

143. In this fifth report to Convocation, the Advertising and Fee Arrangements Issues Working Group ("Working Group")¹ is providing this status report on its work to date and proposed next steps with respect to its review of contingency fees.

144. As described further in this report, the Working Group has received a great deal of information regarding the current operation of contingency fees. Contingency fees remain an important means of facilitating access to justice for individuals who have legal claims and rights which they may otherwise be unable to advance. However, the Working Group has observed significant issues in the current operation of Ontario's contingency fee regime.

145. The Working Group is concerned that there appears to have been widespread noncompliance with the current regulatory requirements governing Ontario's contingency fee regime. Lawyers and paralegals are expected to adhere to the current requirements.

146. The Working Group is also of the view that change is necessary in order to protect consumers.

147. The Working Group recommends requiring a mandatory standard form contingency fee agreement to facilitate client understanding of contingency fee agreements ("CFAs") and facilitate comparison of the cost of legal services being offered.

148. The Working Group is also considering recommendations for reforms to the Solicitors Act, R.S.O. 1990, c. S.15 ("Solicitors Act") to ensure that fees are clear, fair and reasonable. It is currently considering a series of related recommendations, comprised of the following:

¹ The Advertising & Fee Arrangements Issues Working Group ("Working Group") is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.
a. Requesting that amendments be made to the Solicitors Act to require that contingency fees be calculated as a percentage of the all-inclusive settlement amount or all-inclusive amount awarded at trial, less disbursements. This method simplifies the calculation of fees and aligns the interests of clients and licensees. It would replace the current provision that the fee is based on a percentage of the total settlement amounts less recovery on account of disbursements and legal costs, which is difficult to calculate in practice for reasons explained further in the report, and which creates inherent conflicts between the licensee’s interest and the client’s interest.2

b. At the same time, introduce safeguards to ensure that costs are clear, fair and reasonable. The Working Group is considering a range of approaches, including:
   i. A limit on fees by a percentage cap or other means;
   ii. Requiring independent legal advice be provided to a client in certain situations before the fee is paid; and
   iii. Introducing new client reporting requirements to ensure that fees are fair and reasonable.

149. With the agreement of the Committee, the Working Group proposes to seek further input with respect to reforms to Ontario’s contingency fees system. Input will be accepted until Friday, September 29, 2017. The Working Group will then review the feedback it received before returning to Convocation with its recommendations.

BACKGROUND

150. Contingency fee agreements provide that the lawyer or paralegal’s fee is “contingent, in whole or in part, on the successful disposition or completion of the matter for which the services are to be provided.”3

151. The Working Group has been considering contingency fee issues since it was established in February 2016. It held a series of meetings in spring 2016 with plaintiff and defence side personal injury lawyers.

152. In June 2016 the Working Group reported on these meetings, and presented its initial findings with respect to contingency fees to Convocation (“June 2016 Report to Convocation”).4

2 The Working Group continues to consider approaches to ensure that there is access to justice in cases where there is a high likelihood of requiring a trial, but where legal fees under the proposed general approach may not be sufficient for the licensee to take the case to trial.

3 Rules of Professional Conduct, Rule 3.6-2 and Paralegal Rules of Conduct, Rule 5.01(7).

4 The June 2016 Report to Convocation can also be found online at https://www.lsuc.on.ca/advertising-fee-arrangements/.
153. In July 2016, the Working Group sought further input through a Call for Feedback, and at that time asked the following with respect to contingent fees:

   a. How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?

   b. Should lawyers and paralegals typically operating on contingency fee arrangements be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites?

   c. How is the Solicitors Act operating in practice?\(^5\)

154. The Call for Feedback closed at the end of September 2016. In its February 2017 Report to Convocation, the Working Group attached a summary of the feedback it received (“Summary”), attached as Tab 4.6.1.\(^6\) As the Summary notes, the Working Group received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group and insurers.\(^7\) The Working Group again thanks all those who responded to its first Call for Input.

155. In addition to considering the feedback it received directly in 2016, the Working Group has also taken into account recent developments, including the following:

   a. Two private members’ bills which were introduced in the legislature in fall 2016 and in winter 2017, both of which, among other matters, recommended capping contingency fees with respect to motor vehicle actions at 15% and 33% respectively.\(^8\)

\(^5\) Call for Feedback: Advertising and Fee Arrangements, online at http://www.lsuc.on.ca/uploadedFiles/Fact-Sheet-Ad-and-Fee-Consultation-EN-July-2016.pdf.


\(^7\) Summary, at para. 2.


d. Recent cases addressing contingency fee costs, where there have been findings that fees were unreasonable and, in some cases, where the Court found that the lawyer violated s.28.1(8) of the *Solicitors Act* by including costs obtained as part of settlement as part of the lawyer’s fee, without first obtaining approval of a judge of the Superior Court of Justice.


156. The Working Group has also considered academic articles and media reports, and has reviewed the operation of various types of contingency fee models in other jurisdictions, particularly in the United States, England & Wales and Australia.

157. This report provides the Working Group’s analysis, preliminary recommendations and proposed next steps regarding its review of the current operation of contingency fees in Ontario other than in class actions.

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11 For example: *Batalla v. St Michael’s Hospital*, 2016 ONSC 1513 (CanLII), online: http://canlii.ca/t/gnq6b; *Edwards v Camp Kennebec (Frontenac) (1979) Inc.*, 2016 ONSC 2501 (CanLII), online: http://canlii.ca/t/gpfzs; *Hosseini v Anthony*, 2016 ONSC 5405 (CanLII), online: http://canlii.ca/t/gt55s; *Lopresti v Rosenthal*, 2016 ONSC 7494 (CanLII), online: http://canlii.ca/t/gwlvm.


13 In light of the material differences between class actions, including the representative nature of class actions and judicial approval of fees paid to plaintiff’s counsel, this report does not address class action contingency fees.
DISCUSSION

(1) Contingency Fees in Ontario

158. Contingency fees were introduced in Ontario in 1992 with respect to class proceedings and in 2004 with respect to claims being brought by individual litigants.14


160. Ontario was the last Canadian jurisdiction to permit and regulate contingency fees.15

(2) The Policy Rationale for CFAs: Facilitating Access to Justice

161. The basis for permitting contingency fees has been described in various ways, but at its core, CFAs are a means of providing clients with access to justice. As the Court of Appeal of Ontario stated in McIntyre Estate v. Ontario (Attorney General), 2002 CanLII 4506 (ON CA):

There can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. In this regard, Cory J. made the following comments about the importance of contingency fees to the legal system in Coronation Insurance Co. v. Florence, [1994] S.C.J. No. 116 at para. 14:

The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should


15 See McIntyre Estate v. Ontario (Attorney General), 2002 CanLII 4506 (ON CA), <http://canlii.ca/t/1fzl2> at para. 56 (McIntyre Estate).
be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.16

162. The increased access to justice brought about by properly regulated CFAs has also been recognized as providing “compelling” advantages to the administration of justice.17

(3) The Challenge: Balancing Access to Justice and the Cost of Justice

163. The constant challenge is to balance access to justice and the cost of providing access to justice. This is a balance as to how licensees “should be remunerated fairly for their services, whilst simultaneously improving access to justice, but not at public expense.”18

(4) The Current Regulation of CFAs in Ontario

164. There are a range of options available to regulate contingency fees in ways to facilitate access to justice while protecting consumers. Ontario’s current CFA regime is set out in the Solicitors Act and O Reg 195 / 04 (the “Regulation”).

165. Under the Solicitors Act, CFAs are available for any matter except for criminal or quasi-criminal proceedings or family law matters.19

166. A CFA must be in writing.20 The Regulation requires that a CFA must include, among other information, statements:

   a. of the type of matter in respect of which services are being provided;21

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16 McIntyre Estate, supra note 15 at para. 55.

17 Raphael Partners v. Lam, 2002 CanLII 45078 (ON CA), <http://canlii.ca/t/1cnns> at para. 54 [“Lam”]; McIntyre Estate, supra.


19 Solicitors Act, at s.28.1(3).

20 Ibid. at s. 28.1(4).

21 Regulation, at s.2.2.
b. indicating that the client and solicitor have discussed options for retaining the
   solicitor other than by contingency fee agreement, including by doing so by
   hourly rate;\textsuperscript{22}

c. setting out how the fee is to be determined, and a simple example of how the
   contingency fee is calculated;\textsuperscript{23}

d. outlining how the client or solicitor may terminate the contingency fee
   agreement, the consequences of termination and the manner in which the
   solicitor’s fee is to be determined if the agreement is terminated;\textsuperscript{24}

e. informing the client of the right to ask the Superior Court of Justice to review
   and approve of the solicitor’s bill;\textsuperscript{25} and

f. if the client is a plaintiff, that the solicitor shall not recover more in fees than
   the client recovers.\textsuperscript{26}

167. Currently fees under CFAs are regulated by the \textit{Solicitors Act} as follows:

a. Fees shall not be more than the value of the property recovered in the action or
   proceeding, unless, within 90 days of the CFA being executed, the lawyer and
   client bring an application to have the agreement approved by the Superior Court
   of Justice.\textsuperscript{27}

b. The CFA shall not include in the fee “any amount arising as a result of an award
   of costs or obtained as part of a settlement” unless the lawyer and client jointly
   apply to a Judge of the Superior Court of Justice for approval of the costs
   because of “exceptional circumstances”.\textsuperscript{28}

168. CFAs are subject to an assessment of the lawyer’s bill on application to the Superior
   Court of Justice.\textsuperscript{29}

169. The \textit{Solicitors Act} provides that the Lieutenant Governor in Council may make
   regulations governing CFAs, including with respect to:

\begin{itemize}
  \item \textsuperscript{22} \textit{Ibid.} at s.2.3.
  \item \textsuperscript{23} \textit{Ibid.} at s.2.3-2.4.
  \item \textsuperscript{24} \textit{Ibid.} at s.2.9.
  \item \textsuperscript{25} \textit{Ibid.} at s.2.8.
  \item \textsuperscript{26} \textit{Ibid.} at s.3.
  \item \textsuperscript{27} \textit{Solicitors Act}, at s.28.1(6).
  \item \textsuperscript{28} \textit{Ibid.} at s.28.1(8).
  \item \textsuperscript{29} \textit{Ibid.} at s.28.1(11).
\end{itemize}
a. the maximum percentage or amount that may be a contingency fee;
b. the lawyer’s remuneration pursuant to a CFA; and
c. the form of the CFA and terms to be included.30

170. The Law Society’s lawyer and paralegal conduct rules also regulate licensees providing services pursuant to contingency fee agreements. The general conduct rules related to fees and disbursements apply to contingency fees; fees and disbursements must be fair and reasonable and disclosed in a timely fashion.31 In addition, the conduct rules specifically relating to contingency fees and contingency fee agreements apply. The Law Society’s Rules of Professional Conduct provide as follows:

**Contingency Fees and Contingency Fee Agreements**

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the Solicitors Act and the regulations thereunder, that provides that the lawyer’s fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer’s services are to be provided.

[Amended - November 2002, October 2004]

**Commentary**

[1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the written agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer. Such agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

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31 Rule 3.6-1, Rules of Professional Conduct and Paralegal Rules of Conduct Rule 5.01.
171. As paralegals are not included in the Solicitors Act, the CFA regulations provided under it do not apply to paralegals. However, Paralegal Rule 5.01 regarding Fees and Retainers permits paralegals to enter into contingency fee agreements as follows:

**Contingency Fees**

(7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal’s fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal’s services are to be provided.

(8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7), the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded.

(9) The percentage or other basis of a contingency fee agreed upon under subrule (7) shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8).

(5) **The Operation of CFAs in Ontario**

172. The Working Group has considered the following major themes related to the current operation of contingency fee arrangements:

(i) Access to justice;
(ii) Transparency of CFAs;
(iii) Contingency Fees:
   a. Simplification;
   b. Ensuring that licensee and client interests are aligned; and
   c. Ensuring that contingency fees are clear, fair and reasonable.

(1) **Access to Justice**

173. The Working Group reaffirms the Law Society’s support for properly regulated
contingency fee agreements as a means of facilitating access to justice.

174. The Law Society was an early advocate for properly regulated contingency fees as a means of facilitating access to justice. In May 1988, the Law Society first recommended that the Attorney General be urged to permit contingency fee arrangements to facilitate access to justice, and subsequently reaffirmed its support for the regulation of contingency fees.\footnote{See McIntyre Estate v. Ontario (Attorney General), 2002 CanLII 4506 (ON CA), \<http://canlii.ca/t/1fzl2\> at para. 63.}

175. The Law Society was also a participant in the Attorney General’s Joint Committee on Contingency Fees which recommended the introduction of contingency fees on an access to justice basis as follows:

One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries…\footnote{Ibid.}

176. This rationale is as applicable today as it was when contingency fees were first recommended. Contingency fees enable clients to seek redress without incurring the up front costs and risks of litigation.

177. Since contingency fee agreements were introduced in Ontario, the Law Society Act (the legislation granting the Law Society’s statutory authority to license and regulate lawyers and paralegals in the public interest) has been amended such that the Law Society, in carrying out its functions, “has a duty to act so as to facilitate access to justice for the people of Ontario.”\footnote{Law Society Act, R.S.O. 1990, c.L.8, s.4.2(2).} It must also “maintain and advance the cause of justice and the rule of law”\footnote{Ibid. s.4.2(1).} and act in a manner that protects the public interest.\footnote{Ibid. at s.4.2(3).}

178. Given the Law Society's statutory responsibility, the continued access to justice crisis,

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the vital access to justice role played by contingency fees to advance both class action and individual claims, and the related benefits that access to justice brings to the administration of justice, the Working Group continues to support the availability of contingency fees in Ontario.

179. The Working Group also reaffirms that contingency fees must be properly regulated. Contingency fees must be regulated in a way that protects consumers, so that consumers understand contingency fee arrangements, and consumer protections are in place to ensure that contingency fees are transparent, fair and reasonable.

(ii) Transparency of CFAs

180. In June 2016, the Working Group stated that from a policy perspective it “believes that contingent fee structures should be transparent and that the total costs associated with contingent fees should be clear to the consumer at the outset. Consumers should be able to evaluate proposed fees against the fees being offered by others.”37 It further stated as a general principle that “fees should be on an agreed upon and transparent basis.”38

181. The Working Group expressed concern that “contingency fee pricing is not currently sufficiently transparent at the outset to consumers” and that “it is difficult to determine whether a competitive fee structure is being proposed”.39

182. The Working Group reported that it was of the “preliminary view that lawyers and paralegals typically operating on contingency fee arrangements should be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites” on the basis that “This would facilitate greater transparency for prospective clients.”40 The Working Group also indicated that it “welcomes input on other means of enhancing transparency and the availability of information about contingent fees and the contingent fee market.”41

183. The Working Group’s further study of contingency fee issues has reinforced its view that action is necessary to ensure that contingent fee structures are transparent and that the total costs associated with contingent fees are clear to the consumer at the outset. It has, however, shifted its views on what are appropriate actions to foster such transparency and consumer protection.

37 June 2016 Report to Convocation at para. 60.

38 Ibid. at para. 102.

39 Ibid. at para. 61.

40 Ibid. at para. 62.

41 Ibid. at para. 109.
184. The Working Group initially considered requiring the publication of standard contingency and disbursement arrangements on licensee websites. This was intended as a means of fostering transparency. However, in the Call for Feedback, several responses noted that licensees and firms generally do not have one standard contingency fee rate. The rate will depend on a range of factors specific to the particular case, such as the nature of the claim and the risk involved.

185. The Working Group recognizes that a published standard rate could have unintended consequences. If licensees were required to offer services for all matters at their published standard rate, this may limit the types of cases that licensees would be willing to take, or lead to licensees charging a higher standard rate in order to cover high-risk cases. If licensees were permitted to publish a standard rate but depart from it based on the nature of the case, then the published rate would be of little use to consumers. Given the uncertainties of contingent fee files, and the need for licensees with contingent fee practices to be able to manage the risk not only of individual cases but their portfolios of cases, licensees must be permitted to tailor their contingency fees. Ultimately the Working Group believes that requiring the publication of a standard rate would not be an appropriate recommendation.

Recommendation: A Standard Form Contingency Fee Agreement

186. There is nearly universal recognition that contingency fee agreements are unduly complex, and that enhanced transparency is necessary. In the current marketplace, the different approaches make it difficult for consumers to compare services. The Working Group has also heard that current contingency fee agreements are difficult for consumers to understand.

187. In addition, it is the Law Society’s experience that there are a range of contingency fee agreements in use in the marketplace, and many licensees have not complied with all of the technical statutory requirements in their standard contingency fee agreements. In many cases licensees may have inadvertently not complied with all of the technical requirements under the Solicitors Act and the Regulation.

188. Several submissions in response to the Call for Feedback expressed support for an approved standard form contingency fee agreement to be used by all licensees. Under such a model, consumers could more easily compare the cost of legal services between firms.

189. The Working Group sees great value in the development of a mandatory standard form contingency fee agreement. This could be drafted to simplify the agreement to highlight key consumer rights and responsibilities. A mandatory standard form would also ensure that all client retainer agreements meet all of the technical requirements under the Solicitors Act and its Regulation. This would enhance consumer protection, foster consumer choice and ensure that licensees fully comply with the Solicitors Act requirements.
190. The Working Group therefore recommends a mandatory standard form contingency fee agreement to be used by both lawyers and licensed paralegals.

(iii) Contingency Fees

191. The Law Society has observed that the single greatest issue in the operation of contingency fee agreements relates to the calculation of the contingency fees.

192. The Working Group has learned of different practices with respect to the calculation of contingency fees.

193. Currently a range of contingency fee rates are being charged in the marketplace based on a range of factors. The Working Group has learned that contingency fees for tort claims generally range between 25 – 35%. A contingency fee of 15% is often applied by paralegal licensees handling statutory accident benefits schedule (“SABS”) matters; however, that amount can be significantly higher. Different types of claims appear to bear different risk; for example motor vehicle tort claims and medical malpractice claims.

194. In some cases, however, licensees have entered into CFAs whereby they charge a percentage fee but also claim some or all legal costs, without obtaining approval of a judge of the Superior Court of Justice, contrary to s.28.1(8) of the Solicitors Act.

195. The Court of Appeal stated in Neinstein that “it appears that non-compliance with the Act is widespread”. 42

196. The Working Group notes that in some cases non-compliance with all of the regulatory requirements have been inadvertent and with respect to technical areas. However, non-compliance with respect to the calculation of fees is not a minor breach of the requirements. In some cases, the Working Group has learned, licensees shifted to non-compliant practices because of the difficulties created by the current requirements. However, there are also numerous cases, as noted above, where Courts have found that the fees charged were not compliant with the Solicitors Act, were unreasonable in the circumstances, and were accordingly reduced.

197. The Working Group is concerned by noncompliance with the current regulatory requirements governing Ontario’s contingency fee regime. Lawyers and paralegals are expected to adhere to the current requirements. Lawyers and paralegals must follow the Solicitors Act, the Regulation and the professional conduct requirements; failure to do so erodes the public’s respect for the administration of justice.

198. At the same time, as described further below, the Working Group is of the view that the current requirement that legal costs belong to the client has had unintended consequences. The rule results in an unnecessarily complex calculation to determine a client’s net recovery and counsel’s fees. The rule also creates inherent conflicts of

42 Neinstein, at para. 170.
interest for licensees during settlement negotiations and when considering whether to take a matter to trial, and fundamentally misaligns the client and licensee interests at these stages. The requirement increases risks of licensee/client miscommunication, enshrines inherent conflicts of interest between the licensee, and at times has enabled unprofessional conduct by licensees putting their interests above their client’s interest. The Working Group therefore is of the view that change is necessary.

**a) Simplification**

199. In *Neinstein*, the Court of Appeal stated that the *Solicitors Act* language “has created difficulties for lawyers and clients for many years”, and that “much in the Act is not clear [...] This case before this court represents another struggle to make sense of the Act.”

200. The Law Society has seen in the complaints it has received from clients and from its discussions with counsel the difficulties that the *Solicitors Act* language has created for lawyers and clients. The current rule regarding legal costs belonging to the client is difficult to explain at the outset of the retainer, and clients often do not understand the equation when it is applied at settlement. The Working Group is of the view that the calculation of legal fees is unduly complex, and should be simplified.

**b) Ensuring that licensee and client interests are aligned**

201. The Working Group notes that licensee and client interests should be aligned to the greatest degree possible. However, the current *Solicitors Act* structure creates unnecessary inherent conflicts of interest between licensees and clients at key points in the course of a contingency fee matter.

i) Inherent Conflict #1: Settlement Negotiations

202. Many if not most of the complaints received by the Law Society with respect to contingency fee matters relate to issues arising at the time of settlement.

203. Clients often do not appreciate at the time of settlement what net amount they will receive.

204. There are also significant issues which arise at the time of settlement due to the inherent conflict between the lawyer and client interests embedded in the current *Solicitors Act*.

205. Under the current rule, legal costs “belong” entirely to the client and are not included in the calculation of the contingency fee. This creates an inherent conflict that arises during settlement negotiations between the licensee’s economic interests and the client’s interest. During settlement negotiations, defendants regularly offer a global settlement amount, inclusive of legal costs. This leaves the plaintiff’s counsel and the plaintiff to determine what part of the settlement offer amount should be attributed to legal costs. The licensee’s interest and the client’s interests are misaligned at this point,

43 Ibid. at para 12.
as any increase in the licensee’s fee comes from the plaintiff’s net recovery, and vice versa.

206. To further complicate this issue, there are no standard formulae on which the plaintiff’s counsel and plaintiff can calculate the amount of an “all-in” settlement offer that should be treated as legal costs. Some lawyers reported that there is an industry “rule of thumb”, but such standards are unwritten, shifting, and are not prescribed rules.

207. One practical option to attempt to address the inherent conflict is for the plaintiff to ask a defendant to apportion the “all in” settlement amounts, that is, to ask the defendant to set out the amounts intended to cover legal fees, damages, disbursements and other amounts totalling the “all in” amount. But at that point, certain defendants have reportedly sought to take advantage of the inherent conflicting interests of the lawyer and client by deliberately apportioning the amounts in ways that can help realize a settlement. The Working Group heard that in some cases, defendants can use the apportionment of legal fees as a means of seeking to push for a settlement; however, the defendant has no interest or duty in ensuring that the amounts they offer as fees are fair and reasonable. The apportioning of legal fees by the defendant may make the fees transparent, but does little to ensure that the net amount received by the plaintiff is fair and reasonable.

208. In short, the Working Group is concerned that the current Solicitors Act requirement that legal costs belong to the client has caused a significant inherent conflict for lawyers and paralegals during settlement negotiations.

209. The danger of having the licensee and client interests misaligned during settlement is compounded by the fact that the vast majority of matters (>95%) settle before trial. Other than for certain limited circumstances, such as settlements involving a party under disability, which require Court approval, the costs amounts are not subject to judicial review or any review to ensure that they are fair and reasonable.

210. While most licensees attempt to navigate the ethical Catch-22 that the current Solicitors Act requirement creates during settlement negotiations, this has led to instances of unprofessional conduct. The Law Society has been addressing these issues as they arise. At times cases related to CFAs have led to hearings and findings of misconduct.\(^{44}\)

\(^{44}\) The following are recent decisions of the Law Society Tribunal related to contingency fee issues: Law Society of Upper Canada v Jesudasan, 2016 ONLSTH 181 (CanLII), online: <http://canlii.ca/t/gvtf1>. Summary: In finding that the lawyer had engaged in professional misconduct, the Hearing Division of the Law Society Tribunal commented that the contingency fee agreements at issue were not in compliance with the Solicitors Act or the Regulation. The lawyer in this case had, without prior judicial approval, taken costs awarded to his client in addition to a percentage of the damages, contrary to the Solicitors Act. The panel also noted that the lawyer had further contravened the Solicitors Act and the Regulation by failing to ensure that the contingency fee agreements were fully explained to and
Moreover, as the Working Group has previously reported, a specialized investigations team has been established with respect to advertising and fee issues, and there are ongoing investigations.

**ii) Inherent Conflict #2: Whether to Take a Matter to Trial**

211. In its June 2016 Report, the Working Group noted that it had heard from several personal injury lawyers that the current Solicitors Act requirements are unworkable for certain cases, particularly those requiring a trial:

   This is because, under the Solicitors Act, legal costs belong to the client. When a matter goes to trial, and the plaintiff is successful, the licensee is compensated as a percentage of the award alone, and the legal costs, which may be significant given the trial that took place, belong to the client. The result is that in certain cases, the law firm’s time and expertise may dramatically enhance the client’s recovery, at the cost of the law firm’s time and effort.\(^{45}\)

212. In certain circumstances, particularly when there is an existing reasonable offer to settle on the table or the case is a relatively small value case, the client and licensee may have quite divergent incentives.

213. The difficulties arising out of the current contingency fee requirements were summarized by the Canadian Defence Lawyers Association (“CDL”) as follows:

   CDL members have pointed out three (perhaps dissociated) problems with this provision in the Act as currently formulated:

   - The requirement for prior judicial approval interferes with the freedom of contract and creates a disincentive for lawyers to

understood by his client. The lawyer was suspended for one month, and ordered to repay his client $5,750.00 and pay the Law Society’s costs of $3,500.

**Law Society of Upper Canada v Meiklejohn**, 2015 ONLSTH 193 (CanLII), online:<http://canlii.ca/t/gm2qn>. Summary: The lawyer in this case had entered into a contingency fee agreement with his client, at which time it was not contemplated by either party that the lawyer would take all or any portion of any costs award made by the court. The lawyer later disregarded the agreement, choosing instead to charge, as his fee, the sum awarded to his client for costs. The Hearing Division of the Law Society Tribunal ultimately concluded that the lawyer had engaged in professional misconduct by: (1) failing to advise his client of the requirement under the Solicitors Act to obtain prior judicial approval of a contingency fee agreement in circumstances where it was contemplated that the contingency fee would apply to an award of costs; and (2) disregarding a signed contingency fee agreement and charging fees contrary to that agreement. The Tribunal made a finding of professional misconduct, and ordered that the lawyer be reprimanded and that he pay the Law Society $2,500.

\(^{45}\) June 2016 Report to Convocation at para. 48.
work on and advance personal injury claims where liability may be strongly disputed but damages are likely modest. In such instances, the ability to recover a contingency plus partial indemnity costs would reflect fair remuneration for the lawyer’s efforts and allow access to justice for accident clients who do not have permanent or catastrophic injuries. The potential for abuse can be accomplished by reversing the onus from the solicitor to the client, to complain to the court as opposed to requiring prior court approval.

If costs are paid to the lawyer in addition to the percentage of recovery, the practice offends the indemnity principle of court-awarded costs and thus artificially drives up the settlement value of every claim in which there is a contingency fee arrangement. Claimants and lawyers are encouraged to inflate damage assessments, to employ future care and other damage assessors with an incentive to facilitate inflated claims, and to delay the resolution of claims until after lengthy and costly examinations for discovery.

There appears to be no consistent standard on the recovery on which the contingency fee is calculated. Is the rate to be applied to damages and interest only, or is it applied to damages, interest and costs? Whatever solicitors and clients bargain for, the result must be fair and reflect the indemnity principle of costs.

These problems also involve potential conflicts of interest between the lawyer and client between the economic interest of lawyers and their clients’ interest in obtaining fair and prompt settlement of claims. Although the responses from our members are, on the surface, contradictory in some respects, they can be reconciled if the unifying law reform goal is to allow solicitors to be paid for their effort in bringing modest claims, without causing inflation of more significant ones.46

214. The Working Group is of the view that express changes to the fee requirements are necessary to remove the inherent conflict of interest scenarios described above, to protect the public and balance access to justice and reasonable legal costs.

46 Canadian Defence Lawyers, October 3, 2016 Submission to the Advertising and Fee Issues Working Group, Canadian Defence Lawyers online at https://www.cdlawyers.org/?page=16#452.
c) Ensuring that Contingency Fees are Clear, Fair and Reasonable

215. The Working Group stated in its June 2016 Report to Convocation as a general principle that “fees should be on an agreed upon and transparent basis.” As per existing Law Society professional conduct rules, fees and disbursements must be fair and reasonable and disclosed in a timely fashion.

216. As the above discussion highlights, under current requirements:

a. Clients often do not have a full understanding of contingent fees;

b. The current requirement that costs belong to the client creates inherent conflicts of interest for licensees;

c. The current requirements misalign the interests of licensees and clients;

d. There is unnecessary risk that fees will not be fair and reasonable, unfairly compensating a licensee at the expense of the net amount recoverable by a client; and

e. There is also an unnecessary risk that a client may receive a windfall amount for legal costs reflecting work performed by a licensee.

217. The Working Group is also concerned because of the lack of checks on legal fees for matters that settle before trial, and which are not subject to a mandatory Court approval process. Lawyers’ fees are subject to oversight by courts, and clients can have their fees assessed. The Courts will consider whether the fee is fair and reasonable in the circumstances. However, most claims do not require Court approval, and in a properly functioning system, clients should not have to resort to assessment processes to be assured that the fees at the conclusion of the matter were reasonable.

218. The Working Group is therefore considering recommending that the Solicitors Act fee requirements should be amended so as to align licensee and client interests and ensure that contingency fees are clear, fair and reasonable. The Working Group is considering three related recommendations in this regard:

i. Request amendments to the Solicitors Act to calculate fees based on a percentage of the total settlement amount or amount awarded at trial, less disbursements;

ii. Introduce, under the Regulation or the Rules of Professional Conduct as may be appropriate, new safeguards to ensure that fees are fair and reasonable; and

iii. Introduce enhanced client reporting requirements.

47 June 2016 Report to Convocation at para. 102.

48 Rules of Professional Conduct Rules 3.6-1 and 3.6-2; Paralegal Rules of Conduct Rule 5.01.

49 See generally Lam, supra.
(i)  Simplifying the Calculation of Fees

219. Calculating fees based a percentage of the total amount offered on settlement or awarded at trial, less disbursements, is a simple means of calculating fees. Settlement calculations would not be dependent on a preliminary arbitrary determination of what amount from a settlement offer should be treated as legal costs. Any amounts inclusive of legal costs awarded at trial would be included in the calculation of the licensee’s fee. This approach also aligns the interests of clients and licensees.

220. The Working Group recognizes that there are certain cases where there is a high likelihood of requiring a trial, but relatively low to mid value compensatory damages at issue which present a particular challenge to the proposed approach. Under the current regime, where the client receives all of the costs, the limit on compensation may prevent licensees from taking the case to trial. Under the above proposed approach, the award and the costs would be combined, but the legal fees may still not be sufficient for the licensee to take this type of case to trial. Such cases may be logically turned down if the fees are not reasonable given the particular risks, time and effort required to take the matter to trial. The Working Group is seeking input into potential approaches to address this category of cases. One option may be to have the lawyer and client jointly apply for approval to charge a CFA above a prescribed limit if the case goes to trial in order to ensure access to justice in such higher risk cases.

(ii)  New Safeguards to Ensure Fees are Fair and Reasonable

221. The Working Group is unanimous in its view that an amendment to simplify the calculation of fees should be accompanied by new safeguards to ensure that fees are fair and reasonable.

222. The Working Group is considering a range of options, including:
   a. A percentage cap on contingency fees, either on a fixed or sliding scale;
   b. Requiring independent legal advice (“ILA”) before a client agrees to the payment of legal fees in certain circumstances; and
   c. Disclosure before payment of legal fees of the value of the time actually spent on the matter at the licensee’s agreed hourly rates.

223. A review of the history with respect to the consideration of fair and reasonable contingency fees in Ontario and approaches in other jurisdictions is attached as Tab 4.6.2.

224. The Working Group is also considering the appropriateness of different types of safeguards by area. The Working Group is considering the possibility of different approaches to a limitation on fees for tort and other contingency fee matters and SABS cases.

225. Assuming a limit on contingent fees, the Working Group is of the view that there should
still be a means for the lawyer and the client to jointly apply to court for approval to charge a contingency fee rate above any prescribed limit. This will be necessary to ensure that access to justice is still available for higher risk cases, such as medical malpractice claims where liability and/or causation may be at issue.

226. Clients would continue to be able to seek an assessment of their account.

(iii) Enhanced Client Reporting Requirements

227. The Working Group is also considering further transparency measures through new client reporting requirements. Enhanced transparency measures are intended to ensure that clients have a sense of the cost of the services provided, and may act as a further check on the reasonableness of fees.

228. The Working Group is currently considering a range of new regulatory requirements which would promote clear communication to clients about the basis for fees, ensure that the fees charged are related to the value of the services provided and otherwise generally ensure that fees are reasonable. The Working Group is considering a range of measures to enhance transparency and client understanding of fees and their rights, including requiring licensees to:

a. Explain in the client reporting letter the basis for the fee by reference to the agreed percentage under the CFA, and by reference to the factors used to generally consider the reasonableness of a fee. These factors could be those found in the case law assessing contingency fees, and/or pursuant to the factors provided for in the lawyer and paralegal conduct rules, and could include factors such as the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the recovery that was expected, and who was expected to receive an award of costs.50

b. Record the professional and paraprofessional time spent on CFA matters;

c. Report the amount and value of time spent on the matter on the final account to the client; and

d. Advise the client on the final account of the right to apply to have the legal fees assessed.

NEXT STEPS – A CALL FOR FEEDBACK

229. The Working Group is issuing a Call for Feedback with respect to the recommendations contained in this report to Convocation. The Call for Feedback will remain open through to Friday, September 29, 2017. The Working Group will consider the feedback it receives, before reporting to Convocation with its recommendations regarding the operation of the Solicitors Act.

50 These factors are examples taken from the Commentary to Rule 3.6-2 of the Rules of Professional Conduct and Rule 5.01(8) of the Paralegal Rules of Conduct.
230. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services, and will report to Convocation regarding this issue in due course.
(i) Introduction

1. The following memorandum provides a detailed summary of feedback received by the Advertising and Fee Arrangements Working Group (“Working Group”) in response to its July 2016 Call for Feedback.

(ii) Overview of Feedback

2. The Working Group issued a Call for Feedback in July 2016, and requested input by the end of September 2016. It received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group, and insurers.

(iii) Advertising and Marketing

3. The feedback addressed several different issues related to advertising and marketing.

Identification of type of license

Should all licensees be required to identify the type of license they have in their advertising and marketing materials (e.g. lawyer or paralegal)?

4. A significant majority of those who provided feedback on this issue recommended that licensees should be required to identify the type of license they have.

5. Several rationales were provided in support of this measure, including that it would foster transparency, enhance the public’s awareness of the different categories of license and the distinctions between them / reduce confusion in the marketplace.

6. It was also noted that in personal injury this transparency is necessary to protect injured plaintiffs. In certain personal injury cases, a paralegal considering representing a prospective client may be presented with a conflict of interest, and might persuade the client to pursue a smaller claim within the Small Claims jurisdiction notwithstanding that the injuries might warrant an action in the Superior Court. This would be a disservice to the client.

7. Certain submissions also noted that certain licensed paralegal practices may be engaging in misleading advertising that give the impression that the licensee is a lawyer.

8. Submissions also noted that misleading advertising at times targets vulnerable groups, such as linguistic minorities, equity seeking groups and others. Disclosure of the type of license in these settings was supported.
9. Two individuals opposed to the measure noted that (i) certain clients may be prejudiced towards one profession or another and (ii) as most members of the public probably do not know the differences in scope of practice, requiring the licensee to state whether the licensee holds a P1 or an L1 license is unlikely to significantly advance the public interest.

Advertising: General Comments and Regulatory Options

10. The Call for Feedback did not ask about the state of advertising of legal services in Ontario generally, nor did it pose questions related to taste, both of which were addressed in the June 2016 Report. However, these issues were frequently raised in the feedback received.

11. There were different views expressed about advertising in general. As has been a consistent theme heard by the Working Group to date, many individuals and organizations raised concerns regarding the rise of personal injury advertising. Some described personal injury advertisements as misleading / false / embarrassing / degrading and provided specific examples in support of this general concern. A few submissions suggested that the Law Society should ban advertising because it is not helping the public understand the role of lawyers. However, most feedback on advertising principles opined that advertising should remain, but be regulated in the public interest.

12. Certain submissions suggested that although the regulator should not be concerned with matters of taste in advertising, advertising does raise professionalism issues, and the regulator should be ensuring that advertising operates in the public interest. Many noted that advertising should be verifiable and objective, but suggested that the marketplace is currently overrun by big brand advertisers engaging in misleading advertising.

13. The feedback provided a range of regulatory options for the Law Society to consider, including the following:

(i) Determine the total amounts spent on advertising in personal injury matters, require both law firms and licensees to report how much they are spending on advertising, and benchmark these amounts to the broader legal profession and other industries;

(ii) Use existing regulatory tools to address inappropriate advertising, dedicating additional regulatory resources to enforce existing rules if necessary;

(iii) Give further regulatory consideration to misleading advertising that may be targeting equity seeking groups and prospective equity seeking clients who may face additional barriers, such as by engaging in more proactive enforcement, including random periodic checks on racialized or ethnic advertising;

(iv) Regulate personal injury firm advertising in hospital and health care facilities or ban such advertising in or near hospitals;
(v) Engage in “swifter” and “clearer” enforcement of distasteful advertising;
(vi) Engage in enhanced communications with the professions and the public regarding permitted and impermissible advertising. Options include, for example:
a. Developing clear advertising guidelines as have developed by others (e.g. the Real Estate Council of Ontario);
b. Communicating regulatory actions, and publishing determinations and findings related to unacceptable advertising and marketing practices more generally;
(vii) Engage in public education efforts about misleading advertising practices;
(viii) Further consider regulating the use of search engine optimization and Google advertising (as one firm described, the misuse of its firm name and goodwill to redirect searches to competitors); and
(ix) Develop a pre-approval process whereby the Law Society will review advertisements in advance.

Use of Awards

Should the Law Society ban the use of awards and honours, limit the nature of awards and honours that may be included in advertising and marketing, or require full disclosure of the nature of an award or honour, such as on a licensee website, including any fees paid or other arrangements which may have affected the making of the award?

14. A few submissions suggested that the current general rules governing advertising suffice. However, many submissions expressed concerns over the current use of awards and recommended new regulatory responses. Many who provided feedback expressed concern that certain awards being advertised are misleading, bought or do not provide any objectively helpful information for the public.

15. The feedback featured a range of options, including:
   (i) Banning the advertising of awards entirely;
   (ii) Banning advertising of all awards other than the Law Society’s Certified Specialist designation;
   (iii) Banning “bought” awards;
   (iv) Limiting the advertising of awards to those based on peer review;
   (v) Permitting all awards, so long as the law firm’s website provides full disclosure regarding the relationship, if any, between the award recipient and the entity granting the award;
   (vi) Only permitting objectively verifiable awards;
   (vii) Considering the creation of a personal injury designation within the Law Society’s Certified Speciality in civil litigation which could serve as a clear mechanism for assessing the quality and experience of lawyers; and
   (viii) Having the Law Society develop a list of permitted awards that have been granted based on verifiable criteria, which can be used by licensees in advertising and marketing.

16. The Working Group was invited to consider rules from other jurisdictions, such as Rule
7.1 of the New York Rules of Professional Conduct, which permits advertisements to include information as to “bono fide professional ratings” and which defines “bona fide” as follows:

[A] rating is not ‘bona fide’ unless it is unbiased and non-discriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered.

Advertising Second Opinion Services in Personal Injury Law

☐ Do current requirements balance consumer rights with maintaining professionalism around providing second opinions?
☐ If not, should the provider of the second opinion who advertises or markets “second opinion” services be prohibited from taking on the cases where a second opinion is given?

17. A few submissions maintained that current requirements balance consumer rights with professionalism around providing second opinions.

18. However, many submissions expressed concerns over the risks of abuse involved in advertising with respect to second opinion work.

19. Most participants who considered second opinion advertising in personal injury law expressed concerns that current advertising efforts are really an attempt to induce a person who already has counsel to change counsel, and that it would be unethical to advertise in a manner that sows client dissatisfaction with current counsel.

20. Certain feedback submitted that second opinion advertising offends Rule 4.1-2(d) of the Rules of Professional Conduct:

In offering legal services, a lawyer shall not use means […]
(d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer.

21. Submissions generally noted that curtailing advertising in this area would be reasonable in the circumstances. Another noted that there is no evidence of consumers being unaware of their right to consult another lawyer if they have concerns with respect to
their representation. One suggested it would be naïve to believe that second opinion advertising is for any other reason than to obtain a file from an existing lawyer.

22. There were different solutions proposed to address advertising of second opinions in personal advertising, including:

- Clearly banning second opinion advertising;
- Permitting second opinion advertising on the basis that the licensee advertising such services may charge a fee for providing a second opinion, but should not be able to take on the case nor receive a referral fee after a second opinion prompts the client to seek a referral to different counsel; and
- Banning advertising of second opinion services, but permitting the provider of the second opinion to be able to take on the file if requested to do so by the client.

(iv) Advertising and fees in real estate law

o How could pricing in real estate law be made consistent so that consumers may more easily compare services? Should the Law Society take further action regarding “all in” pricing in real estate transactions?

o How can the Law Society eliminate reported issues with respect to “fees” and related practices with respect to title insurance and other services where law firms receive compensation or other benefits related to the purchase of services.

“All in” pricing

23. The feedback received in this area provided divergent views.

24. The input confirmed that “all in” real estate advertising practices present several challenges, including the following:

a. A lack of consistency in the marketplace as to what is included in “all in” pricing. Variations depend, for example, on whether all disbursements are included, whether certain costs are categorized as disbursements and not included in the up-front quote, and how the lawyer decides to treat amounts received from a title insurer or other third party.

b. “Bait and switch” techniques / deceptive “all in” pricing: There is a concern that prospective clients may retain a firm on the basis of one price and then be billed a different amount due to the nature of the transaction or because of disbursements.

c. Threats to ethical and professional practice:

   i. Many expressed the concern that the advertising of all-in fees has fueled price competition that has created disincentives for real estate lawyers to spend money to conduct searches or spend the necessary time on matters.
ii. Many noted that the downward cost pressure and current uneven advertising practices causes a race to the bottom.

d. Focusing solely on price to the detriment of other considerations: Some expressed concern that a regulatory focus on price risks detracting from other important consumer considerations such as professionalism, service and expertise, and consumer evaluation of real estate legal services on price and other considerations.

25. There were differences in approaches regarding how to address the above pricing issues.

26. Some noted that existing rules can be used to enforce transparency in real estate pricing.

27. Certain legal organizations are opposed to permitting any “all-in” fee quotes in real estate transactions unless there are regulatory changes. Another legal organization appeared to take issue with regulation of pricing, stressing that there is no “on size fits all” real estate transaction, and that it would be a mistake to assume that real estate transactions can or should be subject to uniform pricing.

28. In contrast, some of the feedback received generally recognized that if it were possible to easily compare prices on an “all in” basis, this would give prospective clients choice and peace of mind. Some therefore recommend regulating “all in” pricing, with the caution that if the rationale of “all in” pricing is to foster reasonable price comparisons, then any regulatory approach would need to ensure that there are not hidden fees or inconsistencies in approach which could skew the marketplace.

29. Options for considering “all in” real estate pricing include, for example:

   a. Taking no further action with respect to real estate pricing;
   b. Educating consumers on real estate advertising and the costs of real estate transactions;
   c. Regulating what is included in any price quote, and what categories of costs are not included and should be paid by the client;
   d. Regulating whether a lawyer should be required to abide by an all-in legal fee in all cases without exception;
   e. Defining what constitutes disbursements;
   f. Re-introducing a tariff with respect to disbursements or otherwise regulating disbursements; and/or
   g. Developing different “all in” requirements for different types of common real estate transactions; and
   h. Banning “all in” pricing.
Payments / Other Benefits

30. On the issue of other payments or benefits received from title insurers or other vendors, the Working Group received feedback from the two legal organizations and individual lawyers, but did not hear from title insurers. One individual commented that a title insurance legal fee received by the lawyer should be included as a fee rather than as a disbursement. One legal organization suggested it would be unethical and a breach of the lawyer’s fiduciary duty not to disclose fees received from a title insurer. One submission provided a draft rule intended to expressly prohibit a lawyer’s law firm to receive any fee, reward or other compensation from a title insurer, agent or other party relating to the application for or purchase of a title insurance policy.

Advertising of Referral / Brokerage Services

31. Several submissions expressed concern that it is misleading for firms to advertise in order to refer many of the files in exchange for a referral fee.

32. Certain responses also highlighted broader impacts of mass advertising for the sole purpose of obtaining a file to refer out, including that this approach has:
   - fueled litigation generally;
   - increased costs in the personal injury law system; and/or
   - contributed to negative public perception of plaintiff side lawyers, which may impact jury perceptions of plaintiff cases generally.

33. Several submissions advocated for an outright ban on advertising for the sole purpose of obtaining work to be referred to others in exchange for a fee, also referred to as the “brokerage model”. Some were of the view that licensees should not be permitted to advertise for work that they are not permitted to provide, are not competent to provide or do not intend to provide. The practice was described by many as a misleading “bait and switch”, a tactic which is unlawful in consumer law and competition law.

34. A consumer organization submitted “We would be hard-pressed to find an MVA [motor vehicle accident] victim who was pleased to find that their case was taken on by a firm who intends to refer them on for a fee. It would likely be less common if the intended ‘referral fee’ were demanded of the potential client at the time of signing the contract.”
35. Many submissions recommend that if the practice of advertising in order to obtain files to refer to others is to be permitted, then the advertising must be transparent; it must be made clear that the advertising firm intends to or may refer the client out to another firm.

36. Some submissions noted that certain practices refer some files and keep some within the firm, which raises the question as to how to define what constitutes brokerage services and when disclosure of such practices in advertising could / should be required.

(v) Referral Fees

Should the Law Society:
- Ban up-front flat referral fees on contingent fee matters?
- Limit the referral fees that may be charged as a percentage of the ultimate fee in contingent fee and other matters?
- Require referees to fully disclose their standard referral fee arrangements?
- Require the client, the referrer and the referee to enter into a standard form agreement at the time that the referral is made, fully disclosing the nature of the referral and the referral fee?
- Require licensees to record referral fees paid or received in their financial records in a manner to be maintained and accessible to the Law Society on request?

Up-Front Referral Fees

37. Some submissions expressed the view that up-front referral fees are a business transaction between the referrer and referee and should not be banned.

38. However, several submissions expressed support for a ban of all up-front referral fees. Charging up-front fees, it has been suggested, may not align the interests of the referring licensee and the receiving licensee, and also adds economic pressure on counsel which potentially compromise the quality of service the counsel is then able to provide.

Referral Fees Generally

39. There were nuanced and divergent submissions on issues related to the use of referral fees in general.

Expanding Referral Fee Arrangements to Non-Licensees

40. One individual suggested that referral fees should be permitted to be paid to non-licensees.

Support for Referral Fee Arrangements

41. Some submissions favoured the use of referral fees for a variety of reasons, including the following:
a. The rules are clear and sufficient;
b. Paid referrals can align the interests of the licensee and the client;
c. Paid referrals for sole and small lawyers provide the same benefit that lawyers in a large firm receive from internally transferring matters;
d. Paid referrals help sole and small lawyers: For some licensees, particularly sole and small practitioners, paying for referrals is a vital way to attract business. Moreover, a ban may disproportionately burden sole and small practitioners, and as equity seeking groups are more likely to be in sole practice, this raises equity-related concerns;
e. Freedom of contract of licensees: According to some, licensees (who are sophisticated parties) should be able to make referral arrangements and should not be subject to additional Law Society regulation, as long as the referrals do not increase the cost to the client. As one organization put it, payment of a referral fee “is a business transaction, nothing more or less”;
f. There is no consumer risk: The client in practice does not care about the referral arrangement because it will not add to the cost of the legal services received. Moreover, consumers can choose whether or not to accept the practice, if fully disclosed.
g. Paid referrals enhance access to justice:
   i. According to some submissions, the service of providing a proper referral is, in and of itself, a valuable service. The development of effective systems to identify legal issues and refer prospective clients to licensees is a valuable service, and one that depends on paid referrals.
   ii. A mass advertising personal injury firm similarly noted that its referral of a wide range of inquiries to competent lawyers serves a valuable access to justice goal.

42. Several licensees submitted that the referral system as currently permitted works well. According to these submissions, there are costs to finding clients. Not every firm, particularly small firms, have the resources to seek business on their own and rely on referrals to maintain a client base. For some licensees, referral fee arrangements are viewed as economically efficient and fair. One firm reported that referral fees had contributed to that firm’s growth.

43. One licensee explained that decisions with respect to the amount to pay for a referral fee are complex. The factors considered in negotiating the fee for a particular case include, for example, the complexity of the case, the volume of cases in the office, and staff availability. Certain responses therefore cautioned against regulatory micromanagement of this area.

44. Finally, certain submissions highlighted that paid referral fees reduce the incentive for licensees to hold onto cases that they are not competent to handle.
Support for Banning or Capping Referral Fees

45. Others support banning or capping referral fees.
   
   (i) **Banning referral fees**

46. Some licensees submitted that referring matters as required is a professional obligation and should not be something for which the referring professional receives payment. Some suggested that the time and effort to refer a matter is typically minimal and does not warrant a fee.

47. Many submissions taking issue with referral fees in general or their amounts were concerned by brokerage practices. One submission described the practice as advertising in order to have a client's issue "sold off" in a manner that is unprofessional and that should be prohibited. Another submission stated that referral fees disempower consumers to make informed choices about their legal representation.

48. One legal organization concluded that permitting referrals to other firms for a fee as long as this is disclosed in marketing materials would be too difficult to enforce and therefore recommends banning referral fees outright (although further consideration of such a rule in the class action litigation would need to be undertaken). It also supported a ban in part because:

   a. referral fees are a factor driving the increase in volume of advertising in personal injury law and creating an economic incentive for law brokerages; and
   b. referral fee structures have also negatively impacted the professions, as they discourage co-counsel opportunities, which provide a means to mentor less experienced counsel.

49. One submission put the issue as follows:

   We would be very content to see the 15-year experiment with referral fees end, as the negatives outweigh the positives. Referral fees were allowed to provide a public service and to increase access to justice. This goal has not been achieved. If we reflect on the health of the profession in 2000, before referral fees were permitted, and contrast it with the current state of affairs, we can only conclude that the profession was healthier before referral fees arrived. There is no risk that the elimination of referral fees will in any way harm the public or create any limitation on access to justice. We believe the public would be best served with an outright ban on referral fees. To the extent however that the Law Society concludes there is some remaining role for formal referral fees, we would recommend a referral fee cap of 10% of the overall fees generated in the action, coupled with an outright ban on upfront referral fees.
50. The submissions from the insurance industry suggested that referral fees should be banned or made more transparent on the theory that referral fees are a factor driving up settlement costs which, in turn, is increasing insurance costs.

(ii) **Banning flat fees**

51. One consumer organization recommended banning flat fees, on the assumption that such fees create a cost that is ultimately incurred by the client regardless of outcome.

(iii) **Capping referral fees**

52. Several submissions supported a cap on referral fees, with the recommended cap ranging from 5-30%, with different ranges supported as follows:

- **5-10% cap**
  - A law professor noted that excessive referral fees may reduce the net fee to the paying firm to the point that quality of service may be impacted in some cases. He recommended the 5-10% cap. He also recommended changes to, *inter alia*, expressly require that all paid referrals are made solely on the basis of the best interests of the client; expressly prohibit choosing a referral based on the referral fee offered; and requiring the referring firm to identify at least three firms that could competently assist the client, together with service price information regarding each, as well as advantages and disadvantages of each, in order to facilitate client choice.

- **10-15% cap**:
  - Some supported a cap at 10% or 15% of the fee charged on a file as a form of “modest” compensation for referring lawyers without exceeding the value to the client. Some noted that it would also discourage the operation of brokerage firms.

- **30% cap**:
  - One law firm recommended a cap on referral fees of 30% of the net legal fee to promote access to justice for the public and align financial incentives with the goal of referring a matter to a capable licensee at no cost to the client.

**Enhancing Transparency Related to Referral Fees**

53. Several submissions supported enhanced transparency. As one submission noted, “in any referral situation the net cost to the client – has to be readily apparent and fully explained to the client before the retainer is finalized. If the lawyers / paralegals involved
are unwilling to do this openly – it should cause concern. It isn’t rocket science nor should it be. A simple requirement that any and all referral fees be broken out and shown separately ought to do it.”

54. One stakeholder’s survey found that over three-quarters of respondents supported requiring licensees to record referral fees paid or received in their financial records in a manner that would allow review by the Law Society. Similarly, a consumer organization noted that such fees “should be recorded as such and clients should be advised before such costs are paid out, as any other disbursement on their account should be, and to whom”.

55. In contrast, one legal organization noted that more information is required as to what use the Law Society would make of data collected before endorsing such a measure.

Other Issues: Paid Referrals from Non-Licensees

56. Certain submissions cautioned that non-licensees are referring cases to licensees in exchange for payment, despite the prohibition against licensees paying referral fees to non-licensees. This practice was reported to be used in various equity seeking communities.

57. The Working Group also received feedback from a therapist who reported a law firm referring their personal injury clients to particular health professionals, and only submitting invoices from the therapists to whom they referred clients.

58. These submissions recommended that the Law Society be more active in addressing licensee arrangements / paid referrals with non-licensees. It was suggested that the Law Society could do more to educate licensees about the prohibition against paying referrals to non-licensees, and should participate in initiatives to educate health care facilities and health care providers about the prohibition through collaborative, interdisciplinary regulatory efforts.

(vi) Contingent Fees

_o How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?
_o Should lawyers and paralegals typically operating on contingency fee arrangements be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites?
_o How is the Solicitors Act operating in practice?

59. Although the Call for Feedback sought input on the use of contingency fees in all areas, virtually all of the feedback received focused on the personal injury sector. The
submissions noted that the introduction of contingency fee arrangements in personal injury was intended to provide access to justice. As described further below, most submissions addressing this area described issues related to the transparency of contingency fee arrangements, and the costs arising in this model.

Transparency and Potential Disclosure of Standard Arrangements

60. The responses to the Call for Feedback nearly universally confirmed that contingency fee agreements are complex and that enhanced transparency is necessary. The submissions did not generally support disclosure of standard arrangements, although other options were suggested to enhance transparency.

(i) Disclosure of Standard Contingent Fee Arrangements, Including Rates and Disbursements

61. There were divergent views as to whether standard contingency arrangements, including rates and disbursements, should be disclosed. While there was some support for requiring the publication of standard contingency and disbursement arrangements on websites, and one law professor recommending required disclosure of pricing and disbursements of all firms, and disclosing this information to the Law Society, several submissions noted that transparency initiatives alone will not necessarily lead to increased public understanding around fees arising in personal injury matters. Contingency fee agreements are complex documents and simply requiring their publication online would not necessarily sufficiently address issues related to consumer education and empowerment. Moreover, as some law firms, (particularly in remote and rural areas) may not have websites, this requirement could raise accessibility concerns.

62. Several submissions noted that there simply is no standard contingency fee rate. The rate will depend on a range of factors. Moreover, requiring plaintiff firms to publish their fees would risk providing defendants with access to privileged information and a tactical advantage. One consumer group cautioned that there does not appear to be a “usual rate” and that requiring the publication of such a rate could lead to higher prices for consumers.

63. Insurers generally recommend that contingency fee arrangements should be filed with the Law Society, the Court, the Financial Services Commission of Ontario (FSCO) or a ministry within government.

(ii) Other Options

64. Other potential means of enhancing transparency include the following:
a. **Public education efforts:**

Some suggest that the regulator must engage in greater public legal education efforts around the use of contingency rates. For example, the Law Society could develop brochures for use in law offices that explain the contingency fee system.

b. **Licensee education efforts / ongoing monitoring of compliance with the Solicitors Act:**

It has been suggested that the Law Society could develop educational tools to assist licensees in meeting the requirements under the *Solicitors Act* and pay particular attention to contingent fee agreement practices when conducting spot audits. It could also review contingency fee agreements to monitor levels of compliance under the *Solicitors Act*.

c. **Encourage Clients to Compare Rates and Services**

Another organization suggested that the Law Society should educate consumers on the importance of meeting with several lawyers before deciding on who to retain. This is a way to compare contingency fee rates and consider different approaches to service delivery.

d. **Development of a Standard Form Contingency Fee Agreement Approved by the Law Society**

Several submissions expressed support for a standard form contingency fee agreement that would be approved by the Law Society and used by the entire profession. Under this model, consumers could easily compare the cost of legal services between firms.

In addition, a consumer group recommended developing a standard list of potential disbursements and requiring lawyers to discuss specific disbursements before spending funds which would come out of final settlement funds.

**The Solicitors Act in Practice**

65. Certain submissions noted that while there may be difficulties in the operation of the *Solicitors Act*, the introduction of contingency fee arrangements has ensured that there is access to legal services in personal injury.

**Gaps in Data**

66. Both the Ministry of Finance and insurers expressed concern that there are gaps in the available data, making it difficult to determine how much money in the personal injury...
system is being paid to accident victims. There is an incomplete picture as to how the Solicitors Act is working as an access to justice tool.

Potential Abuses of the Solicitors Act

67. Insurers and defense counsel raise concerns about the Solicitors Act being abused. What was established to facilitate access to justice has, according to some, been used by plaintiff personal injury lawyers to improperly and excessive bill clients. Several submissions noted that the troubling facts alleged in the case of Hodge v. Neinstein, 2015 ONSC 7345.

68. Insurers expressed concern that a high percentage of total damage awards would go towards legal and other costs instead of directly to the plaintiffs, and suggested that more research is necessary in this regard.

Difficulties in the Treatment of Legal Costs under the Solicitors Act

69. Several submissions addressed s.28.1(8) of the Solicitors Act and s.6 of the regulations made pursuant to it. These key provisions are as follows:

Solicitors Act, s.28.1(8):

A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of the settlement, unless,

(a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and

(b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a portion of them.

O.Reg. 195/04: Contingency Fee Agreements, s.6:

A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

70. Read together, these provisions indicate that, as a general rule, the legal costs incurred belong to the client under a contingency fee agreement, unless a Court orders otherwise.

71. Plaintiff-side lawyers raised concerns with the current requirements under the Solicitors Act
They note that in some cases, this creates an imbalance and potential inherent conflicts between counsel’s interest and their client’s interest.\(^1\) For the purpose of settlement, it creates an incentive for the lawyer to treat little of the all-inclusive settlement amount as costs. Some raised the concern that it also creates the risk of lawyers settling cases heading for trial for lower amounts to avoid, as one submission put it “their own economic disaster”. They also note that this raises access to justice issues, as injured persons may risk losing the “leverage of taking a matter to trial”.

To address this issue, plaintiff-side counsel made different recommendations, including the following:

- Set a sliding scale with a maximum contingency fee, increasing the contingency fee from something less than the maximum for cases that settle at stages prior to trial, to a maximum fee for matters that proceed to trial;
- Permitting a “fees plus costs” model, with a cap on the total percentage fee lawyers may charge in excess of the cost contribution;
- Amending the Solicitors Act and regulations concerning contingency fee rates to consider the total recovery, after deduction of disbursements, rather than distinguishing between damages and legal fees; and
- Amending the Solicitors Act to permit contingency fee retainer agreements based on percentage-of-the-total agreements if the case settles, and costs-plus arrangements if costs are adjudicated by a court or tribunal.

Certain legal organizations support the Law Society proposing changes to the Solicitors Act and regulations in order to maintain access to justice for modest value cases.

In contrast, insurers take a markedly different approach. For example:

a. One insurer recommends amending s.28.1(8) of the Solicitors Act in order to eliminate the ability of lawyers to apply for court approval of contingency fee agreements, including the award of costs as part of the settlement.

b. One insurance association submits that “the government should consider the appropriateness of [contingency fee] arrangements to compensate legal representatives for work relating to the no-fault medical and income replacement benefits provided through Ontario’s automobile insurance system”.

The Law Society is also urged by the insurance industry to apply additional resources to ensure high compliance with the current rules governing contingency fee agreements.

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\(^1\) One example provided by a legal organization is illustrative: The lawyer and client enter into a 30% contingency fee. The matter goes to trial, where the Court awards $100,000 in damages and a further $100,000 for costs. In this situation, the lawyer receives $30,000, while the client receives $170,000.
Capping Contingent Fees

76. In light of these issues, several submissions suggested that there should be a cap on contingency fees. Some endorsed amounts under 25%. One insurer recommended a 25% cap as found in New Brunswick, with controls so that this does not become the new floor. Others suggested 33% as proposed in BC and more recently in Ontario by Tim Hudak in Bill 12, Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016.2 One law firm suggested a cap could be 33% up to trial, and 45% at trial.

Other Options

Use tools already within the Solicitors Act Regulation

77. One insurer suggested that consideration should be given to using tools already provided for in the Solicitors Act Regulation.

Simplify the Solicitors Act

78. Several submissions noted that contingent fee arrangements and the Solicitors Act requirements are complex. Some encourage the Law Society to work with the Ministry of the Attorney General to simplify the legislation.

Other Factors Requiring Further Consideration

79. A few submissions noted the rapidly changing environment for funding cases. In Ontario, adverse costs insurance is available. This product reduces plaintiff counsel’s risk and may reduce the justification for high contingency fees. Third party litigation financing is also available in certain instances. Consideration of potential changes to the Solicitors Act may require consideration of other means of seeking to facilitate access to justice, and the relative costs and risks related to these other options.

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A History of the Consideration of Contingency Fee Rates in Ontario and Approaches in other Jurisdictions

Early Consideration of Appropriate Contingency Fee Rates

1. The notion that contingency fee agreements ("CFAs") should be capped or otherwise prescribed in Ontario is not new.

2. In July 1992, a Law Society Special Committee on Contingency Fees recommended (and Convocation subsequently approved) a maximum cap of 20%, with party and party costs awarded to the client to go to the lawyer. Notwithstanding the cap, a lawyer would be permitted to apply to court, at the time of entering the CFA for approval to charge a higher contingency fee rate.\(^1\)

3. In June 2000, a Joint Committee on Contingency Fees comprised of representatives from the Advocates’ Society, the Canadian Bar Association (Ontario), the Law Society and the Ministry of the Attorney General recommended a 33 1/3 % cap, and that the client alone should be entitled to receive the award of costs. Under this approach the lawyer could apply to court for approval to charge a contingency fee in excess of the cap.\(^2\)

4. In September 2002, the Professional Regulation Committee again recommended that the maximum contingency fee rate should be capped at 20%, with the lawyer entitled to receive the costs award. The lawyer could apply to court to charge a fee in excess of the cap. However, with the Court of Appeal’s *McIntrye v. Attorney General of Ontario* decision being released thereafter, this proposed approach was tabled.\(^3\)

5. In October 2002, the Professional Regulation Committee ultimately recommended new rules that did not specify a maximum percentage or require that costs be either included in or excluded from the lawyer’s fee. The rule simply required fees to be fair and reasonable.\(^4\)

6. The *Solicitors Act* did not set a maximum percentage cap. However, costs belong to the client, and a lawyer’s fee cannot exceed the amount paid to the client.

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\(^1\) Report to Convocation June 23, 2000, Report from Society’s Representative on Joint Committee on Contingency Fees at para. 14.


\(^3\) Report to Convocation on Regulation of Contingent Fees, Professional Regulation Committee, October 10, 2002, at paras. 14-17.

Recent Calls for a Cap

7. There have been recent calls to cap CFA fees. For example:
   - In submissions to the Working Group, one insurer recommended a cap of 25%;
   - The Insurance Bureau of Canada recommends a sliding cap;
   - The Hutchison Study similarly recommends that if a fee-multiplier for successful cases is not adopted, then a maximum percentage of 25% may be appropriate;\(^5\)
   - Bill 12, *Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act*, 2016, introduced by Tim Hudak, would introduce a 33% cap;\(^6\)
   - Bill 103, *Personal Injury and Accident Victims Protection Act*, introduced by Mike Colle, proposes an amendment to the *Solicitors Act* to cap CFAs in personal injury claims to no more than 15% of the value of the property recovered in the action or proceeding.

Approaches to Caps / Limiting Fees in Other Jurisdictions

8. A comparative approach provides some assistance in considering options. The following are examples from Canada, the United States, Australia and England and Wales.

Canada

9. There are limits for contingency fees in British Columbia and New Brunswick.

10. In British Columbia, CFAs for motor vehicle accident claims are capped at one third of the amount recovered. In all other personal injury / wrongful death claims, the cap is 40% of the amount recovered. There are no other CFA caps.\(^8\)

11. In New Brunswick, there is a CFA cap of 25% of the amount recovered, exclusive of costs, taxes and disbursements, which increases to 30% if the matter proceeds to appeal. If a lawyer and client wish to enter into a CFA with a higher contingent fee amount, they must apply to the Law Society and file a $150 deposit. An appointed reviewing officer will provide written reasons approving or denying the request.\(^9\)

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\(^{8}\) Law Society of British Columbia, “Lawyers’ Fees”, online at [https://www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees/](https://www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees/).

USA: CFAs and Percentage Caps

12. In the United States contingency fees are permitted, but given high damage awards in areas such as medical malpractice, fees have been capped in certain States for personal injury or solely for medical malpractice claims on a flat or sliding basis. Flat fee caps are generally 1/3 of the amount recovered (although in Oklahoma the cap is 50%). Sliding fees range by State, as demonstrated in this chart providing a few examples of sliding caps for medical malpractice claims:¹⁰

<table>
<thead>
<tr>
<th>STATE</th>
<th>CAP</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>40% of first $50k, 1/3 of next $50k, 25% of next $500K, 15% of amounts &gt;$600K</td>
</tr>
<tr>
<td>Delaware</td>
<td>35% of first $100k, 25% next $100K, and $10% thereafter</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>40% of first $150k, 1.3 of next $150k; 30% of next $200k, and 25% thereafter</td>
</tr>
<tr>
<td>New York</td>
<td>30% of first $250k; 25% of second $250k; 20% of next $500k; 15% of next $250k; 10% over $1.25M</td>
</tr>
</tbody>
</table>

Australia

13. In Australia, while CFAs are prohibited, conditional cost agreements are permitted in certain states. Conditional cost agreements are agreements where payment of some or all of the legal cost is conditional upon the successful outcome of the matter.¹¹ A conditional cost agreement may include an “uplift” fee, an additional amount payable on successful outcome of the matter. However, an uplift fee can only be included in litigation if the lawyer has a reasonable belief that a successful outcome of the matter is likely, and must not be more than 25% of the legal costs payable, excluding disbursements.¹²

England and Wales

14. In England and Wales, following the Jackson reforms, lawyers may enter into conditional fee agreements, where the lawyer can claim costs plus a “success fee”, which can be up

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¹⁰ Hyman, David A., Bernard Black, and Charles Silver. “The Economics of Plaintiff-Side Personal Injury Practice”. *University of Illinois Law Review*, vol. 2015, no. 4, pp. 1563-1603, at Table 1, page 1574. Further examples are provided in Table 1 of this article.

¹¹ *Legal Profession Uniform Law*, s 181(1),(6); Western Australia Legal Profession Complaints Committee, “Fact Sheet: Types of Costs and Costs Agreements” (updated 23 May 2014), online: <https://www.lpbla.org.au/Documents/Complaints/Information-for-Consumers/Fact-Sheet-Types-of-costs.aspx>.

¹² *Legal Profession Uniform Law*, s.182(1).
to 100% of the lawyer's regular fees. For personal injury cases, the “success fee” remains up to 100% of the lawyer’s regular fees, but is also subject to being capped at no higher than 25% of the damages awarded.\(^{13}\)

15. Contingency fees (known as “Damages-Based Fees”) are permitted such that clients do not pay legal fees unless they are successful in their matter. These are capped at 50% in certain areas, 35% for employment tribunal cases, and 25% on personal and clinical negligence claims. There is no cap for appeal proceedings.\(^{14}\)

**Ratio Based on the Net Amount to the Client**

16. Another potential option could include, for example, setting a percentage or comparative ratio of the net amount that will be paid from the settlement funds to the client to the gross amount of the lawyer’s fees.

**Summary of Options to Limit Fees**

17. As the above jurisdictional scan indicates, there are a range of approaches taken in different jurisdictions, including:

i) A straight cap on the contingency fee percentage;

ii) A sliding cap based on the stage of proceedings;

iii) Limiting the contingency fee to a multiple of the “normal fee”;

iv) Permitting a “success fee” that is tied to the “normal fee” and that can only be provided if the lawyer has a reasonable belief that the outcome will likely be successful for the client (thereby aligning plaintiff counsel screening functions with risk and reward);

v) Setting a cap based on a ratio of the net amount that will be paid to a client out of settlement funds to the lawyer’s fees; and

vi) Setting a cap based on the type of legal matter (ex. Tort, employment).

**Potential benefits to limiting legal fees**

18. Proponents of a cap generally argue that they “fix” the problem of high legal fees, and make sure that more settlement or awarded amounts end up in the hands of plaintiffs.

**Potential risks to limiting legal fees**

19. “Fixing” legal fee issues by capping them comes with the risk of creating an imbalance impacting the entire CFA system to the detriment of those who rely on it to be able to access the justice system.

20. Studies have shown that there are important indirect effects to caps. Where there are damage caps, for example, which effectively limit the lawyer’s contingency fee amount, the evidence is that this causes lawyers who rely on contingency fees to stop


representing certain clients in such cases, and to handle fewer malpractice cases generally. Tort reforms based on caps may “disproportionately reduce contingent fee lawyers’ willingness to represent lower-income groups” due to the lower potential recovery.\textsuperscript{16}

21. This research is particularly salient to the Ontario experience, as new caps in auto insurance benefits were recently introduced, taking effect on June 1, 2016. The impact of these new caps have yet to be determined. The key changes to Ontario’s Statutory Accident Benefits Schedule (“SABS”) include a reduction in standard medical, rehabilitation and attendant care benefits for non-catastrophic injuries from $86,000 in total to $65,000 in total, and a reduction in these benefits for catastrophic injuries from $2 million to $1 million.\textsuperscript{17}

\textsuperscript{15} Stephanie Daniels & Joanne Martin, “It is No Longer Viable from a Practical and Business Standpoint”\textsuperscript{\textregistered}: Damage Caps, “Hidden Victims,” and the Declining Interest in Medical Malpractice Cases, 17 INT’L J. LEGAL PROF. 59 (2010).

\textsuperscript{16} Joanna Shepherd, “Uncovering the Silent Victims of the American Medical Liability System”, 67 VAND. L. REV. 151, 154 (2014). While a bodily injury may be identical in two cases, the claim by a lower-income person will be lower than that of a higher-income person if there is a loss of income claim that can be advanced. For the lower-income person, the loss of income is either zero (not working) or lower compared to that of the higher-income person.

XIV. Professional Regulation Committee: ABS Working Group Report: Next Steps

FOR INFORMATION

ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT – NEXT STEPS

INTRODUCTION

53. This status report from the Alternative Business Structures (ABS) Working Group ("Working Group") provides Convocation with the initial conclusions and intended next steps of the Working Group as it continues its study of ABSs in Ontario.¹

SUMMARY OF INITIAL CONCLUSIONS AND NEXT STEPS

54. On September 27, 2012, the Working Group’s Terms of Reference were reported to Convocation. The Terms of Reference appear at Tab 2.5.1. The Terms of Reference provided, amongst other things, that the Working Group would:
   a. inform itself on developments in Canada and abroad including on new and existing alternative legal service delivery models and structures;
   b. develop a set of criteria to assess and prioritize new models and structures;
   c. determine the range of legal service delivery models and financing arrangements that should be explored;
   d. identify legal services delivery models and regulatory changes that should be considered by the Law Society for possible implementation based on initial assessment of their impacts and consultation; and
   e. report the results of its work to Convocation, including, as appropriate, proposals and recommendations for next steps.

55. In September of 2014, the Working Group released a Discussion Paper on potential models for ABS in Ontario. In the Discussion Paper, the Working Group introduced the following four models ("the Four Models"):

   Model #1: Business entities providing legal services only in which individuals and entities who are not licensed by the Law Society can have up to 49 per cent ownership;

   Model #2: Business entities providing legal services only with no restrictions on ownership by individuals and entities who are not licensed by the Law Society;

¹ The ABS Working Group members are Susan McGrath (Co-Chair), Malcolm Mercer (Co-Chair), Marion Boyd, Ross Earnshaw, Carol Hartman, Jacqueline Horvat, Brian Lawrie, Jeffrey Lem, Jan Richardson and Peter Wardle.
Model #3: Business entities providing both legal and non-legal services (except those identified as posing a regulatory risk) in which individuals and entities who are not licensed by the Law Society would be permitted up to 49 per cent ownership; and

Model #4: Business entities providing both legal and non-legal services (except those identified as posing a regulatory risk) in which individuals and entities who are not licensed by the Law Society would be permitted unlimited ownership.

56. Based on its work to date, the Working Group does not propose to further examine any majority or controlling non-licensee ownership models for traditional law firms in Ontario at this time. Such non-licensee ownership levels do not appear to be warranted based on current information when the potential benefits to such external ownership levels are weighed against the regulatory risks and regulatory proportionality. However, the Working Group will continue its mandate by exploring and assessing other potential ABS options.

57. There are further legal service delivery models and financing arrangements that remain to be explored and assessed for possible implementation. Specifically, the Working Group believes that more limited non-licensee ownership models for traditional law firms merit further study, and that there are certain tailored ABS models which should be considered in depth, based on criteria identified by the Working Group and in consideration of the responses to its September 2014 Discussion Paper.

58. Accordingly, the Working Group will continue its work by:

   a. Informing itself on on-going developments in Canada and abroad on new and existing alternative legal service delivery models and structures, financing arrangements, and the related regulatory processes;

   b. Considering the level, if any, and nature of non-licensee minority ownership of law firms and entities, including those offering enhanced multi-disciplinary services, that should be permitted;

   c. Considering the nature, if any, of franchise arrangements that should be permitted;

   d. Considering whether there may be an opportunity to develop an access to justice focused ABS framework (sometimes called ABS+) to enable civil society organizations, such as charities, not-for-profits, and trade unions, to become owners of entities in order to facilitate access to legal services;

   e. Considering how the Law Society may facilitate innovation in the delivery of legal services by permitting alternative business structures where legal services are not generally being provided by lawyers and paralegals with the goal of enhancing access
to justice for Ontarians and regulating more effectively and efficiently and in proportion to the Law Society’s regulatory objectives; and

f. Considering the criteria that should be considered when determining whether a particular business structure should not be permitted taking into account regulatory risk and advancement of the public interest.

g. Consulting further with the professions and other interested parties at the appropriate time including on:

i. the appropriate level and nature of minority ownership that might be generally permitted;

ii. the appropriate types of franchise agreements that might be available;

iii. a possible framework or frameworks for permitting majority external ownership for civil society entities delivering services dedicated to facilitating access to legal services; and

iv. a possible framework or frameworks for permitting alternative business structures in areas not generally being served by lawyers and paralegals.

59. The Working Group will continue to report to Convocation through the Professional Regulation Committee with information updates on its continued study and consultation. If appropriate, any proposals for consideration will also be brought to Convocation for its consideration.

BACKGROUND

60. As reported to Convocation in its earlier reports, the term “alternative business structures” may be used to refer to any form of non-traditional business structure, as well as alternative means of delivering legal services, and may include, for example:

a. alternative ownership structures, such as non-lawyer or non-paralegal investment or ownership of law firms, including equity;

b. firms offering legal services together with other professionals; and

c. firms offering an expanded range of products and services, such as “do it yourself” automated legal forms as well as more advanced applications of technology and business processes.

61. The Working Group was created in 2012 to study business structures and law firm financing, which was identified as a priority by Convocation for the 2011-2015 bencher term. As Convocation’s April 2012 work plan for this priority highlighted, rapid changes in legal regulation, and the emergence of ABSs in other jurisdictions prompted consideration
by the Law Society of ABSs and law firm ownership and financing.

62. Since then, the Working Group has engaged in an extensive review of the issues related to ABS by:
   a. engaging in an ongoing fact-finding exercise that has included studying reports and scholarly articles, and meeting with ABS experts from various jurisdictions, including Australia, England and Wales and the United States;
   b. meeting with members of the professions (Summer 2013);
   c. commissioning a paper by Professors Edward M. Iacobucci and Michael Trebilcock of the University of Toronto Faculty of Law entitled *An Economic Analysis of Alternative Business Structures for the Practice of Law* for a symposium on ABS (October 2013);
   d. holding a symposium on ABS attended by lawyers and paralegals from diverse practices and regions (October 2013);
   e. seeking input from the professions on potential models for ABS through the release of a Discussion Paper (September 2014);
   f. meeting with numerous legal groups, organizations and associations (August 2013 to February 2015); and
   g. considering the over 40 responses received in response to its Discussion Paper and reporting on the call for input in February 2015.

63. A selection of background reading materials, the Iacobucci and Trebilcock paper, the webcast of the October 2013 ABS Symposium, the September 2014 Discussion Paper and responses and previous reports of the Working Group to Convocation can be found on the Law Society’s ABS webpage at http://lsuc.on.ca/abs/.

DISCUSSION

Criteria for Analyzing ABS Options

64. As the Working Group reflected on the responses to the Discussion Paper and considered next steps, it returned to the criteria, established to guide its study of potential models for ABS, which are set out in the Working Group’s February 2014 Report to Convocation (the “February 2014 Report”). The criteria, which are considered below, are as follows:

   a. Access to justice: Any structural and related regulatory changes concerning alternative business structures should be reviewed to determine their effect on access to justice. Solutions that provide potential improvements for access to justice should be given more weight on that basis.

   b. Responsive to the public: In promoting access, the new structures and processes should be responsive to the needs of the public for legal services including greater flexibility in cost, location and availability of legal and other services with appropriate quality and adequate financial assurance of legal services.
c. **Professionalism:** The fundamentals of professionalism, including independence, confidentiality, avoidance of conflict of interest, and candour should be safeguarded in any move to liberalize ownership and structure.

d. **Protection of Solicitor-Client Privilege:** Any change proposed to implement alternative business structures must not jeopardize the protection of solicitor-client privilege.

e. **Promote Innovation:** New business structures and processes should be designed to promote innovation which may include, among other things, the adoption of technology and/or other business processes that will enable them to adapt to the legal services marketplace and to better serve the public.

f. **Alignment of requirements with new directions taken:** The Law Society’s current rules and by-laws should be aligned with the objective to promote innovation and flexibility in the provision of legal services to the public. Rules and other requirements should be proportionate to the significance of the regulatory objectives.

g. **Orderly Transition:** The preferred alternative business structures or related solutions options should be amenable to an orderly and thoughtful transition to new regulatory models. Any plan for new structures or service models should be inclusive, responsible, and mindful of any necessary disruptions that may be occasioned.

h. **Efficient and Proportionate Regulation:** Any changes should improve the Law Society’s ability to effectively protect and promote the public interest in competent and ethical practices, including appropriate responses to client complaints. Restrictions on who may provide legal services should be proportionate to the significance of the regulatory objectives.

65. The Working Group reviewed these criteria and determined that they remain relevant and appropriate, with two modifications. First, the Working Group considers that “competence” “integrity”, and “service to the public good through client relationships and responsibilities to the administration of justice” should expressly be included among the indicia of “professionalism”. Second, it concludes that paragraph f. should be removed as innovation and proportionality are already stand-alone criteria.

66. As a result, the revised criteria to evaluate ABS are:
   a. Access to justice
   b. Responsive to the public
   c. Professionalism

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d. Protection of Solicitor-Client Privilege  
e. Promote Innovation  
f. Orderly Transition; and  
g. Efficient and Proportionate Regulation.

67. As the Working Group indicated in its February 2014 Report, "not all criteria will apply to all options, or they may apply at different stages of the ABS project, however, where relevant, they are of assistance to ensure a comprehensive analysis."³

**The Four Models**

68. In the September 2014 Discussion Paper, the Working Group set out the Four Models as options for consideration as permissible regulatory structures, and issued the Discussion Paper to obtain feedback on whether the Law Society should undertake any change respecting ABS, particularly with respect to the degree to which non-licensees should be permitted ownership in the business structure and/or the extent to which non-legal services might be provided to clients within the business structure.

69. The Four Models, which were presented to stimulate discussion and which were not exhaustive,⁴ offered different options on ownership levels and multidisciplinary practice, which are the two major policy issues arising in the consideration of ABS. Each of the Four Models would either permit minority ownership by non-licensees up to 49% or unrestricted ownership. Two of the models would permit the provision of both legal and non-legal services.

Non-Licensee Ownership Issues for Consideration

70. There are two main potential benefits to external ownership that the Four Models sought to explore: increased access to expertise, and increased access to capital.

71. New non-licensee owners can bring new expertise in areas such as marketing, new client development, design, project management, information technology or strategic planning.

72. Permitting non-licensee ownership increases access to capital. As the Working Group’s prior Reports to Convocation note, with increased capital should come the increased ability to:  
a. Invest in talent by hiring new licensees and non-legal staff, and/or rewarding key employees, including non-licensees;  
b. Expand (through opening of new locations, acquiring other firms, and/or entering new practice areas);

³ February 2014 Report to Convocation at para. 90.  
⁴ Discussion Paper at page 22.
c. Invest in knowledge management, technology, and business process innovations to enhance quality and/or scale operations; and

d. Otherwise market and professionalize the business processes of law.\(^5\)

73. Franchise arrangements offer similar opportunities by allowing access through the franchise system to legal, technological, business and marketing expertise, processes and brand by franchise fee payments rather than through equity investment. Currently franchise arrangements are not permitted in Ontario under either the Law Society Act or the By-Laws. Traditional franchise arrangements involving non-licensee ownership likely offend various professional conduct rules, such as, for example, referral fee and fee sharing rules.

74. In England and Wales, Quality Solicitors provides an example. The potential benefits of franchise systems for licensees and the general public were first raised at the summer 2013 meetings with the professions and its October 2013 ABS Symposium.\(^6\) The franchise model was expressly recommended by one response to the Discussion Paper.

75. However, as the Working Group recognized in its February 2015 Report to Convocation, most responses to the Discussion Paper expressed major concerns about introducing certain types of ABSs in Ontario, such as publicly listed law firms and other types of firms owned or controlled by non-licensees. Some were opposed to majority or unrestricted non-licensee ownership, but would consider relatively small minority ownership levels.

76. There were many different rationales provided by the professions as to why law firms with greater than 49% non-licensee ownership levels should be rejected for Ontario. The concerns and risks identified by the responses included the following:

a. External ownership emphasizing profits over professionalism (with detrimental effects potentially including decreases in pro bono initiatives, commoditization of legal work eroding the quality of the work, downloading significant responsibilities onto lower cost clerks or junior counsel, etc.);

b. Difficulties preserving client confidentiality and solicitor-client privilege due to pressure by non-licensee owners to learn about the firm's cases;

c. Increased risks of conflicts, including conflicts inherent to the structure of certain ABSs when they are owned by non-licensees (such as the example provided by Nick Robinson of the inherent conflict of having an insurance company own a law firm practicing in insurance related areas);\(^7\)

\(^5\) February 2014 Report to Convocation at paras. 127-128.
d. Market consolidation, which could, among other impacts, limit the choice of the public
to counsel in certain areas.

77. Several responses cautioned that if any level of non-licensee ownership is permitted,
regulation would be required to address areas where non-licensee ownership could create
high risks of conflict of interest, such as in personal injury and real estate law.

Non-legal services

78. Two of the Four Models also presented options for providing non-legal services together
with legal services. Ontario is well situated to consider further liberalization of the types of
non-legal services which may be provided together with services provided by lawyers and
paralegals. As the Working Group previously noted, 8 Multi-Discipline Practices ("MDPs")
are already permitted in Ontario, enabling the combination of the provision of legal services
and other professional services. 9 Further expanding the types of other services that may
be provided to consumers of legal services would represent an incremental development.

79. By expanding on the MDP model, and combining it with greater access to capital, the Law
Society could facilitate innovation, the development of more comprehensive and client-
tailored services, and new means of addressing access to justice.

80. However, any Law Society effort to unlock gains from enhanced multidisciplinary structures
must also consider the attendant risks, which primarily relate to avoiding conflicts of
interest, protecting confidentiality and privilege, and protecting the independence of the
legal service provider.

Discussion of the Four Models

81. The challenge in exploring ABS ownership models is how to maximize the benefits from
external ownership and/or the provision of interdisciplinary services while minimizing
regulatory risks. In addressing this challenge, the Working Group considered its criteria
against the Four Models.

"Access to Justice" criterion

82. In its study of ABS, the Working Group has given significant consideration to the
relationship between the introduction of ABS and access to justice. Its February 2014
Report considered this issue in detail, and noted, inter alia, the following:
a. Many legal needs are not being effectively met through existing business structures.

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b. Access to justice is a matter both of the costs of legal services currently being provided and of the legal needs that are not being served ("latent demand for legal services").
c. Enhancing existing practices could provide the public with better access to legal services. New business models could provide the public with new means of accessing legal services.

83. The Working Group concluded that:

While it would be wrong to suggest that ABSs are a panacea, ABSs may play a part in addressing these legal needs. ABSs may also more efficiently serve these legal needs by allowing clients to better access existing legal services together with other needed services such as, for example, social work and psychological services.

Permitting new models for the delivery of legal services and the practice of law is not the sole, nor likely the most important, solution to issues of access to justice. Lawyers and paralegals will still need to spend time to provide services for their clients, with an attendant cost. ABS models, however, have the potential to enhance access by providing new means of access in addition to the current models, and by providing lawyers and paralegals with additional means to gain efficiency and flexibility, with possible impacts on cost.\(^\text{10}\)

84. In the Working Group’s view, the potential that ABS may facilitate access to justice, even in a limited way, is a reason to continue to consider some type of ABS.

85. One of the access to justice challenges is that the legal nature of everyday legal problems frequently goes unnoticed by Ontarians. In enhanced multidisciplinary service settings, clients seeking assistance in non-legal areas may benefit from the “one stop shop” experience to learn about, and possibly benefit from, legal services available. Multidisciplinary ABSs could provide one avenue to attempt to address Ontario’s unmet civil legal needs challenges.

86. Enhanced multidisciplinary structures may also facilitate access to justice by better serving clients’ legal and non-legal needs. In family law in particular, as responses to the Discussion Paper indicated, there may be opportunities to combine family law services with related services such as financial and counselling services. These models could foster early resolution of disputes where possible, engaging legal, financial, counselling and other services as appropriate.

\(^{10}\) February 2014 Report to Convocation at paras. 119-120.
87. As such, expanding the non-legal services available in a firm structure with appropriate regulatory controls could have positive access to justice impacts. This supports further consideration of interdisciplinary ABS models.

88. However, based on the experience to date in other jurisdictions, the likely access to justice impact does not appear to be sufficient to justify majority non-licensee ownership or effective control, for practices generally.

89. Professors Trebilcock and Iacobucci cautioned at the October 2013 ABS Symposium that introducing ABS options in Ontario likely would not cause dramatic change in how legal services are currently provided by law firms in Ontario.

90. Significant enhanced access to capital would not necessarily mean that innovation will facilitate access to justice. Changed ownership may not change the service delivery model. New investors may find existing well served areas of practice to be more attractive for investment than unserved or underserved areas. Investment in profitable areas of practice may simply result in shifting profits between service providers rather than cost reduction for clients.

91. The experiences in Australia and in England and Wales demonstrate that, while there have been ABSs which facilitate certain forms of access to justice, generally, non-lawyer ownership of law firms in those jurisdictions does not appear to have caused transformative change to facilitate access to justice. To date, ABS has not served as a major catalyst to spark transformative access to justice innovations by regulated entities. In fact, in many instances, non-regulated entities (such as LegalZoom, Axiom, and Neota Logic in the United States) have been major innovators.

92. The regulatory changes required to permit and the consequences of permitting non-lawyer ownership, or effective control, for any and all legal practices do not appear to be justified at least from the perspective of the potential access to justice benefits.

93. ABS is still unfolding in England and Wales, but given what the Working Group has observed to date there and in Australia, there does not appear to be sufficient evidence to warrant introducing transformative change to existing Ontario legal practices in an attempt to achieve major access to justice gains.

94. Access to justice objectives could, however, be pursued through more incremental changes. There are models arising in England and Wales in particular that might be appropriate for Ontario, and which might be achievable through some level of non-licensee minority ownership. Franchise models such as Quality Solicitors, for example, might offer access to justice and other benefits to Ontarians and licensees.
"Responsive to the public" criterion

95. Changes to law firm ownership rules could also lead to the delivery of new responsive means of delivering legal services to the public. While there are some more significant innovators, it is notable that most ABSs in Australia and in England and Wales are existing practices that have taken on limited non-lawyer ownership in order to innovate in ways that may be described as evolutionary rather than revolutionary. From this experience, it appears that innovation in legal service delivery does not depend on non-license majority ownership or control. It is not surprising that service innovation by existing practices is more likely to be gradual than transformative. On the other hand, more significant innovations do appear to be tied to substantial new investment.

96. Enhanced multidisciplinary practices could be more responsive to the public by offering new ways for the public to learn about and use legal services. The "one stop shop" model may also be efficient for consumers of legal and other services.

"Professionalism" criterion

97. The Working Group has heard concerns from some individuals that external ownership would necessarily emphasize profits over professionalism. However, the experiences in Australia and England and Wales to date show that the regulators have developed innovative approaches to safeguard the administration of justice and client interests, such as maintaining confidentiality and solicitor-client privilege, over the interests of shareholders. Similar regulatory structures could be implemented in Ontario to safeguard the unique professional obligations that lawyers and paralegals must fulfill in our justice system.

98. That said, the Working Group agrees that there is not yet sufficient evidence from other jurisdictions from which to make proper judgments about the effect of public ownership on professionalism. The Working Group is of the same view with respect to the effect of substantial market consolidation. While some consider that very large non-license owned law firms can deliver more effective and efficient services, others have expressed concern that professionalism will be impaired where individuals are served by such firms. The Working Group considers that the better course is to wait for further experience to develop in other jurisdictions before attempting to reach conclusions as to the effect of public ownership and consolidation on professionalism. In taking this approach, we have recognized that public ownership and consolidation appear to particularly arise in sectors, such as personal injury, where access to justice is more readily available.

99. The Working Group also agrees that the nature of the investor may affect the risk to professionalism. For example, casualty insurers in England have invested in personal injury law firms which could compromise the general approach taken in the representation of injured persons. The same issue is raised in real estate practice if other market participants, such as title insurers and mortgage lenders, were to acquire an interest in real estate practices. An inherent conflict could arise even from a minority interest in the law firm. The
Working Group therefore considers that any shift to permit some level of non-licensee ownership should be accompanied by restrictions that protect against inherent conflicts in certain areas of law. The issue of inherent conflict could also apply to franchises, if other market participants with an inherent conflict of interest came forward to establish a franchised network of legal (and possibly other) services.

100. The professionalism issues that may arise in interdisciplinary settings was addressed in the Working Group’s February 2014 Report. At that time the Working Group acknowledged that an expanded MDP model may not be appropriate in all circumstances because there “may well be types of services that are inappropriate and likely to increase risk.”

101. Having benefitted from the thoughtful responses to its Discussion Paper, the Working Group remains of the view that enhanced multi-disciplinary models should be explored, with further consideration given to the types of services which might not be appropriate to offer in tandem with legal services.

"Protection of Solicitor Client Privilege" criterion

102. The Working Group notes the concerns raised that client confidentiality and solicitor-client privilege would be placed at risk in a firm with non-licensee ownership. While the Working Group continues to believe that appropriate regulatory structures can be developed to address these concerns, experiences in Australia and in England and Wales demonstrate that protecting client confidentiality and solicitor-client privilege in law firms that are majority owned or controlled by non-licensee owners requires significant regulatory resources. Based on currently available information, the benefits of broadly permitting such levels of non-licensee ownership do not appear to justify such intricate regulatory requirements.

103. The Working Group believes that further consideration should be given to whether more proportionate types of regulation might be tailored to permit structures with minority non-licensee ownership, and franchises. The Working Group queries whether such structures might enable licensees and the public to realize some of the benefits of ABS structures in a manner that protects confidentiality and solicitor-client privilege.

104. The Working Group does not have major concerns regarding maintaining solicitor client privilege in multi-disciplinary practices. The Law Society already permits Multi-Discipline Practice and Multi-Discipline Partnership models. Under these existing structures, lawyers and paralegals may form an MDP with professionals who practice a profession, trade or occupation that supports or supplements their services. This structure has not resulted in any difficulties in protecting solicitor-client privilege or client confidentiality. As noted above, however, expansion of the multidisciplinary model would require further consideration regarding how to address the risk of inherent conflicts arising, such as prohibiting some specific combinations of services.

117
"Promoting Innovation" criterion

105. A key component of ABS is the potential to facilitate innovation, both for access to justice and to enhance the delivery of legal services generally. Indeed, innovation is a necessary driver of advancing access to justice and responsiveness to the public. While many have fairly observed that transformative change has not been experienced as a result of permitting ABS, it does appear that increased innovation has occurred both by ABSs and in reaction to ABSs.

106. The recent 2015 Innovation in Legal Services Report for the Solicitors Regulatory Authority and the Legal Services Board recently conducted the largest study of innovation of legal services of its kind. It concluded that "All else being equal, ABS Solicitors are 13-15% more likely to introduce new legal services." 12 It concludes that "The implication is that the wider adoption of ABS status would be likely to increase the range of legal services on offer." 13

107. The study noted that the "major effects of innovation are in extending service range, improving quality, attracting new clients, and improved tailoring of services." 14 This research therefore suggests that ABS models appear to be the structures that are more likely to bring about such enhancements to the delivery of legal services.

108. However, in England and Wales, the shift towards ABS has been resource intensive for the regulator. To date there are fewer than 500 ABS entities in a market of over 15,000 providers. 15

109. Moreover, the type of innovations occurring are generally moderate. As the 2015 Innovation in Legal Services Report noted:

Innovation is more often than not incremental in nature with very few providers consider[ing] themselves to be radical innovators [...] Overall, the impression is of a profession in which ideas for new services and new ways of working are internally generated and rarely radical in nature. 16

110. Perhaps most importantly from the Working Group’s perspective, the innovation observed to date has focused on areas where legal needs are now being served. The Chair of the

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13 Ibid.
14 Ibid.
15 Neil Rose, The innovation game, Legal Futures, July 7, 2015, online: <http://www.legalfutures.co.uk/blog/the-innovation-game>.
16 2015 Innovation in Legal Services Report, at
Legal Services Board has stated that he is “disappointed” that there has been little evidence of legal services providers trying to meet unmet legal needs.\textsuperscript{17}

111. Although ABSs appear to be innovating more than their non-ABS counterparts, the Working Group is of the view that it is too early to determine whether the levels of innovation taking place in England and Wales support a shift to majority or controlling non-licensee ownership of traditional law firms in Ontario.

112. Nevertheless, the Working Group believes that there are other types of ABS models which warrant exploration and assessment. Consideration should be given to whether a shift to some level of minority non-licensee ownership can facilitate innovation by access to new expertise and additional capital. This is consistent with the observation that innovation by existing practices is likely to be evolutionary and in respect of existing service provision rather than transformative and in unserved areas.

113. It is significant that there is significant ABS innovation occurring in England and Wales involving not-for-profit organizations. For example, a trade union, the British Medical Association, and a charity are all providing legal services through ABSs.

114. Unionline is an ABS that was created by two unions, in order to provide legal services to nearly one million union members. It has a legal advice helpline, provides certain legal services in-house, and will use the unions’ existing panel law firms to serve as the ABS’s agents to deliver more complex legal services to union members.\textsuperscript{18} Similarly, the British Medical Association set up an ABS to provide a “one-stop shop” to its 154,000 members.\textsuperscript{19}

115. As one response to the Discussion Paper highlighted, in Australia the Salvation Army owns two firms. Salvos Legal offers commercial and property legal services. The fees from this practice support its humanitarian law practice, Salvos Legal Humanitarian. Salvos Legal Humanitarian operates as a charity, and provides free legal advice and legal services to vulnerable populations. It has provided legal service in over 7,600 cases.\textsuperscript{20} It does so while recognizing client confidentiality, and taking steps to avoid conflicts of interest.\textsuperscript{21}

\textsuperscript{17} Neil Rose, \textit{ABSs delivering on the promise of innovation, major research concludes}, Legal Futures, July 7, 2015 online: <http://www.legalfutures.co.uk/latest-news/abs-delivering-on-the-promise-of-innovation-major-research-concludes>.


\textsuperscript{19} Neil Rose, \textit{The solicitor will see you now: British Medical Association sets up ABS for doctors}, Legal Futures, May 6, 2015, online: <http://www.legalfutures.co.uk/latest-news/the-solicitor-will-see-you-now-british-medical-association-sets-up-ABS-for-doctors>.


116. Salvos Legal Humanitarian describes its clients and approach as follows:

Almost all of the people whom Salvos Legal Humanitarian act for are on Government pensions or are from low income backgrounds and have been unable to access Legal Aid. Certainly none of these people could afford a Lawyer to act on their behalf and in most cases without one, they would very likely be unable to properly fight for their rights in Court.

Salvos Legal Humanitarian has also assisted many families from war-torn and troubled nations around the world to be reunited and to come to a peaceful new home here in Australia.

The aim of Salvos Legal Humanitarian is not only to exist as a law firm. We recognise that the clients who come to us don't only have a legal need but that there are often other complicating factors in their lives.

To this end, Salvos Legal Humanitarian exists to be able to help our clients with their legal needs and to help them engage with other Salvation Army social and pastoral services, such as drug & alcohol recovery, employment assistance, welfare, counselling, financial management and aged care.

Salvos Legal Humanitarian exists to give people a helping hand when they need it most.\textsuperscript{22}

117. England and Wales also permits legal franchises, such as Quality Solicitors, which provide another means of delivering legal services to clients. Quality Solicitors is a network of local law firms. It has over 200 branches, and makes services accessible through telephone and online access points and extended hours. It provides certain fixed fee services, and up front cost estimates for other legal services. It focuses on legal issues facing individuals, as well as business services.\textsuperscript{23}

118. These innovations through ABSs are aimed at providing affordable, accessible legal services. The Working Group is of the view that certain types of ABS may facilitate innovation in the provision of legal services in Ontario, and that this is an important consideration for the future delivery of legal services to those who are currently not served or underserved and in circumstances where geography can affect access to services.

119. Inviting licensees to consider working with a broader range of non-licensees than currently permitted would likely also initiate and facilitate innovation.

\textsuperscript{22} \textit{Ibid.}
\textsuperscript{23} See Quality Solicitors online at \langle http://www.qualitysolicitors.com/\rangle.
“Orderly Transition” criterion

120. The Working Group agrees that preferred ABS models would need to be introduced in a manner that is mindful of any disruption that a new scheme may cause. Permitting majority non-licensee ownership would represent a major change, requiring significant resources to implement, including legislative reform. The Working Group considers that this criterion militates against implementation of majority or controlling non-licensee ownership levels.

121. On the other hand, some level of minority non-licensee ownership should require more gradual and less resource intensive work to implement. Moreover, and as noted above, a shift towards broader multidisciplinary practice options represents an incremental next step from the current MDP model, which should facilitate an orderly transition to a new regulatory framework.

“Efficient and Proportionate Regulation” criterion

122. As described above, the Working Group is concerned that a shift to generally permitting non-licensee majority ownership or control likely creates disproportionate regulatory complexity and risk when weighed against the likely benefits as currently observed through the ABS experiences in Australia and England and Wales to date.

123. The Working Group also has concerns that a shift to majority external ownership would, if circumstances warranted, be difficult to reverse. For example, it would be difficult, if not impossible, to replace equity investment in a publicly listed law firm, or majority non-licensee owners of a law firm. Indeed, it might not be possible to do so. Replacing minority ownership interests would not present the same degree of difficulty, and could presumably be replaced with licensee equity or with new debt financing.

124. Generally permitting non-licensee majority ownership or control would create a more complex environment with different risks including with respect to supervision, control and liability. Consideration of the issue of client protection through financial assurance would be necessary and would be potentially complex both in terms of minimum mandatory insurance levels as well as coverage where the practice ceases to operate. The burden of designing and implementing new approaches to financial assurance is a regulatory cost to be considered in the balance.

125. In addition, as described in the Professionalism section above, the Australian and England and Wales experiences demonstrate that when 100% non-lawyer ownership occurs, there has been significant market consolidation in the personal injury sector. However, the long term impact of consolidation, both positive and negative, is uncertain. It is difficult to imagine reversing market consolidation if the long term impact is unfavourable. Waiting for evidence to develop in other jurisdictions before making irreversible decisions appears to be the prudent course where the net advantage of broad change is not yet apparent.
126. The Working Group recognizes that while there may be opportunities to expand the range of services provided with legal services through ABSs, there may be circumstances where regulatory risk would necessitate restrictions. For example, a service that offers real estate brokerage, mortgage lending or title insurance and related legal services would create inherent conflicts with the interests of real estate clients. A company specializing in funding bail bonds also offering criminal defence services would also create inherent conflicts. However, the Working Group is of the view that there may be an opportunity to achieve the numerous benefits that may derive from offering legal services and non-legal services together to the public, in a manner that proportionately regulates the accompanying risks.

**Summary**

127. The Working Group evaluated the Four Models in its Discussion Paper based on the criteria established to consider ABSs. Based on the above considerations, which were informed by the responses it received to its Discussion Paper, the Working Group is of the view that majority or controlling non-licensee ownership should not be examined further at this time for traditional law firms. Such non-licensee ownership levels do not appear to be warranted based on current information when the potential benefits to such external ownership levels are weighed against the regulatory risks and regulatory proportionality.

128. While the Working Group does not rule out the potential of majority non-licensee ownership or control of traditional law firms at some later date, it does not intend to address this more fundamental structural shift at this time. Rather, the Working Group considers that waiting for further evidence from other jurisdictions to develop is the better approach.

**Exploring More Targeted ABS Models**

129. Having concluded that generally permitting non-licensee majority ownership or control of traditional law firms should not be further examined at this time, the Working Group considers it appropriate to explore and assess a subset of ABS models which might be applicable to Ontario.

(a) **Non-Licensee Minority Ownership of Law Firms and Entities**

130. The Working Group considers that appropriate levels of non-licensee minority ownership of law firms and entities, including those offering expanded multi-disciplinary services, should be explored and assessed. This would include considering whether introducing some level of minority ownership with appropriate regulation may facilitate ABS benefits.

131. With respect to expanded multi-disciplinary services, the Working Group believes that criteria should be established that would assist in determining which multidisciplinary structures would present unacceptably high regulatory risk taking into account the inherent conflicts and other regulatory issues that arise in specific areas of law.
132. The experience in Australia and in England and Wales is that most ABSs are traditional legal practices that have taken on minority non-lawyer ownership. Minority non-licensee ownership of traditional practices appears to be associated with increased innovation but has not given rise to regulatory issues or the issues raised by publicly owned ABSs or ABSs owned or controlled by non-licensees.

133. While the Working Group is aware of innovations among licensees who are offering new ways to meet the legal needs of individual and corporate clients, it seems appropriate for the Law Society to find ways to encourage further innovation through proportionate regulation.

(b) Franchise Models

134. Similarly the Working Group considers that franchise models should be explored and assessed. Like minority non-licensee ownership of law firms and entities, a franchise model may offer opportunities to traditional practices to innovate, enhance competency, enable a more dedicated focus on the practice of law rather than the business of law and encourage licensees to develop new legal services.

135. For example, a law firm franchisee may benefit from back office support, enhanced referral networks, marketing, and access to specialized expertise. Enabling licensees to access services and expertise through a franchise arrangement without effective loss of control of their practices could be in the public interest, without appearing to raise the regulatory and other issues raised by majority non-licensee ownership models.

(c) ABS+ : Civil Society ABS Owners to Facilitate Access to Justice

136. The Working Group also believes that an ABS+ approach which could permit greater external ownership levels to civil society entities to facilitate access to legal services merits consideration.

137. Some responses to the Working Group’s Discussion Paper suggested that ABS regulation could be developed in a manner to facilitate access to justice and those most in need of legal services. One submission coined the phrase “ABS+”. An ABS+ regulatory approach would build on the following statement by Nick Robinson that was adopted by many responding to the ABS Discussion Paper:

For policymakers the goal should not be deregulation for its own sake, but rather increasing access to legal services that the public can trust delivered by legal service providers who are part of a larger legal community that sees furthering the public good as a fundamental
commitment. Carefully regulated non-lawyer ownership may be a part of achieving this larger goal, but only a part.\textsuperscript{24}

138. Although ABS efforts in Australia and England and Wales have not yet led to systemic transformation, there are nevertheless practices which have emerged to provide legal assistance to vulnerable persons, such as Salvos Legal Humanitarian, described above.

139. The adoption of ABS in Australia and in England and Wales was not intended to facilitate access to justice \textit{per se}. Yet, as the Salvos Legal Humanitarian example demonstrates, ABS created an opportunity for new means of delivering legal services to marginalized, vulnerable populations.

140. The Working Group recognizes that there may be an opportunity to build on the Australia and England and Wales experience in a way that expressly seeks to harness ABS as one means of addressing the major access to justice issues facing Ontario.\textsuperscript{25}

141. Specifically, the Working Group intends to consider whether there may be circumstances where permitting non-licensee ownership from the civil society sectors would open new opportunities for the delivery of legal services, or encourage new ways of delivering legal services to those who are currently unable to access legal services. The issue for the Working Group is whether certain civil society entities, such as charities, not-for-profits, and trade unions, should have the ability, subject to conditions, to own a law firm in order to better serve the needs of those they serve.

142. External ownership by particular civil society groups may be one way of leveraging non-legal networks and expertise to facilitate access to legal services provided by licensees.

143. In addition to changes in ownership levels, the "one stop shop" model, if adopted by civil society organizations, might enable those they serve to access legal services at the same time that they access other services or resources.

144. The Working Group therefore intends to consider eligibility criteria, and how an ABS+ regulatory structure could facilitate access to justice while protecting core professional values.

\textsuperscript{24} Robinson, at page 53.
\textsuperscript{25} For a description of the access to justice issues in Ontario, see generally the Working Group's February 2014 Report to Convocation, as well as the February 2014 Report of the Treasurer's Advisory Group on Access to Justice Working Group, online at: <http://isuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_TAG_no_appendices.pdf>.
(d) **ABS+: Promoting Innovation where legal services are not generally being provided by lawyers and paralegals**

145. Certain innovations are occurring outside what may be described as the "regulatory sphere". The *Law Society Act* provides that, except as permitted by the Law Society, only licensees may provide "legal services" which is a broadly defined term. Section 1(5) of the Act provides that "a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person". Given the broad definition of legal services and the few exceptions to the licensing requirement, the regulated sphere is very wide but is not fully served by licensees.

146. Certain services are already readily available in Ontario, but are operating outside or on the margins of the regulated sphere. As certain responses to its Discussion Paper note, major disruptive innovations occurring outside of the regulated sphere from outside Ontario are expected to eventually come to Ontario.

147. Moreover, in 2015 Ontario became the home to two legal innovation zones, which will facilitate the development of "radical" or "disruptive" innovations to the provision of legal services. Ryerson launched its Legal Innovation Zone ("LIZ") in 2015. It is "Challenging the status quo of Canada's legal system". Its goal is to "foster, support and develop innovative solutions and technologies that will help make Canada's legal system smarter, faster, better and more accessible." In launching Ryerson's LIZ, Ryerson President Sheldon Levy stated "Who knows what the Uber of law will be? No one knows what that will be. But if it happens, I am absolutely sure that it will be here."26 In launching Ryerson's LIZ, Ryerson President Sheldon Levy stated "Who knows what the Uber of law will be? No one knows what that will be. But if it happens, I am absolutely sure that it will be here."27

148. Toronto's MaRS Discovery District launched The MaRS LegalX cluster in 2015, which it describes as follows:

> The MaRS LegalX cluster team is dedicated to moving the legal sector forward through enterprises — whether startup or established corporates and law firms. Working at the intersection of high-growth ventures, technology, design and the legal industry, LegalX connects the technologists, designers, engineers and lawyers who are driving change.28

149. The Working Group is well aware of the rapid changes taking place in the legal sector, primarily due to technological innovations. Ross Intelligence, for example, is developing a

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26 The Legal Innovation Zone at Ryerson, online: <http://www.legalinnovationzone.ca/>.
"digital legal expert" that is powered by Watson, IBM’s “cognitive computer". The company, which grew out of a University of Toronto / IBM student competition, now has the support of Dentons, a global law firm with offices in Ontario. Just as disruptive technology may enter Ontario’s legal services markets, Ontario based disruptive technologies could enter Ontario’s legal services markets, and permeate globally.

150. Two issues broadly arise. The first is that the providers outside of the regulated sphere may be well positioned, if permitted, to provide legal services that are not currently being provided. The second is that the public interest may be served by allowing new providers into the regulated sphere thereby permitting supervision in the public interest. The question is what the Law Society should do to proactively consider their impacts, assess their merits for Ontario's legal services market and the public interest implications of allowing that to happen.

151. While the Working Group reaffirms its view, first expressed in its February 2014 Report, that these issues be considered separate from consideration of ABS, there is merit in considering whether permitting alternative business structures in unserved and underserved areas usefully addresses these issues.

NEXT STEPS

152. At this point, the Working Group has fulfilled much of the mandate established for its work under its Terms of Reference and by subsequent decisions of Convocation. It has:

   a. Informed itself on developments in Canada and abroad on new and existing alternative legal service delivery models and structures, financing arrangements, and the related regulatory process (Terms of Reference (a));
   b. Considered these developments in light of regulatory requirements and developed criteria to assess and prioritize these new models and structures (Terms of Reference (b)); and
   c. Followed a Work Plan in order to conduct an initial assessment of the impacts of potential ABS arrangements that could be explored, held a high level consultation (as well as other educational and outreach initiatives), and reported its findings to Convocation (Terms of Reference (d)).

153. The Working Group has carefully considered majority non-licensee ownership and control as well as different levels of multidisciplinary and now reports its conclusions to Convocation having explored, assessed and consulted in accordance with the Terms of Reference.

29 Ross Intelligence, online: <http://www.rossintelligence.com/>.
Reference in this regard. The Working Group intends to continue its work in accordance with the Terms of Reference as described above.

154. Specifically, the Working Group will monitor on-going ABS developments in Canada and abroad (Terms of Reference (a)) and continue to determine a range of legal service delivery models and economic arrangements that should be explored in more depth and the existing regulatory constraints on delivery models and economic arrangements (Terms of Reference (c)). This exploration will necessarily include consideration of the current regulatory structure and the related Rules and By-Laws regarding fee-sharing, referral fees, direct supervision and ownership restrictions, using the lens of proportionate regulation for the risk the regulatory structure seeks to mitigate.

155. The Working Group in particular will consider minority ownership by non-licensees in law practices, with attention paid to implications for certain areas of law, possible franchise arrangements, and a potential expanded multi-discipline practice scheme to be considered and discussed with the professions. In addition, the Working Group will consider majority ownership by civil society organizations focused on facilitating access to justice and discussed with civil society sectors and with the professions. The Working Group will consider potential alternative business structures in unserved and underserved areas to be considered and discussed with the professions and other interested parties.

156. The Working Group will continue to consider and apply the criteria set above and continue to pay close attention to the potential benefits and costs/risks and rewards of alternatives under consideration.
TERMS OF REFERENCE OF THE LAW SOCIETY OF UPPER CANADA WORKING GROUP ON ALTERNATIVE BUSINESS STRUCTURES

On September 27, 2012, the Working Group reported its Terms of Reference to Convocation. These Terms of Reference provide that the Working Group will

(a) inform itself on developments in Canada and abroad on new and existing alternative legal service delivery models and structures, financing arrangements, and the related regulatory process;

(b) consider these developments in light of regulatory requirements and develop a set of criteria to assess the prioritize these new models and structures. Criteria may include access to the services by the public (access to justice), public protection (risk assessment of various models), and other principles that inform the Law Society’s public interest mandate, including the requirement that standards of professional conduct be proportionate to the significance of the regulatory objectives sought to be realized; and

(c) determine the range of legal service delivery models and financing arrangements that should be explored and examine the existing regulatory constraints on delivery models and financing arrangements;

(d) create a Work Plan that will include identification of the legal services delivery models and regulatory changes that should be considered by the Law Society for possible implementation based on

(i) an initial assessment of their impacts based on the criteria developed earlier;

(ii) a high level consultation; and

(iii) report the results of its work to Convocation, including, as appropriate, proposals and recommendations for next steps.
When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism

Nick Robinson

Abstract: With multiple countries now allowing for non-lawyer ownership of legal services, and other jurisdictions considering a similar shift, the legal profession is in the midst of a global regulatory moment. Where non-lawyer ownership has been allowed, personal injury firms have listed on stock exchanges, major insurance companies have bought law firms, and brands best known for their grocery stores have started offering legal services. Proponents argue that these developments will spur investment and innovation, promoting access to justice by making legal services more affordable and reliable. However, there has been little empirical research to test this proposition.

This article draws on case studies and quantitative data from the United Kingdom and Australia, where non-lawyer ownership has been allowed, as well as the United States–where parallels to such ownership have emerged in online and administrative law legal services. Based on this evidence, it argues that the benefits of non-lawyer ownership have been oversold with respect to access to civil legal services for poor and moderate-income populations and it identifies serious new professionalism challenges such ownership can create. While some form of non-lawyer ownership is likely to continue to spread, these conclusions cast doubt on the ability of non-lawyer ownership to substantially improve access to legal services, suggesting that alternative access strategies should be prioritized. They also point towards the need to carefully regulate non-lawyer ownership in some contexts.

Traditionally, academics have been wary that lawyers will capture the regulation of legal services, but non-lawyer ownership, which allows for others to profit from legal services as well, raises the likelihood that new actors may also capture the profession’s regulation. Given this environment, the article recommends that going forward a diverse set of stakeholders, drawing on as much empirical data as possible, develop a tailored approach to the regulation of non-lawyer ownership.

Introduction

In the name of protecting the independence and standards of the legal profession, lawyers have traditionally been restricted in the types of commercial activity they are permitted to undertake. However, more recently the profession has witnessed a push to ease these restrictions and make legal services more similar to other services in the market, whether this has been through lifting limitations on lawyer advertising, allowing for lawyer owned limited liability enterprises, or banning bar-mandated minimum fee schedules. Perhaps most notably, some jurisdictions have begun to allow non-lawyers to

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1 For a classic history and defense of the organization of legal services as a profession, not a trade, see Roscoe Pound, The Lawyer From Antiquity To Modern Times: With Particular Reference to the Development of Bar Associations in the United States (1953) (noting that while in a business or trade the primary purpose is to gain a livelihood that in a profession this is an incidental purpose, "pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing a calling are to be directed primarily, and by which the individual activities of the practitioner are to be restrained and guided." Id. at 5)

2 For a brief overview of the history of restrictions on lawyer advertising in the United States, see Deborah L. Rhode and David Luban, Legal Ethics 622-25 (1995)


4 In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1979) the U.S. Supreme Court ruled that lawyers were engaged in a "trade or commerce" and that bar mandated minimum fee schedules violated anti-trust rules.
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own enterprises that provide legal services (although it is still only licensed legal practitioners that can actually perform restricted legal activities).

Australia was an early mover in this change, with several of its states allowing for largely unlimited non-lawyer ownership of legal services in the early 2000s. In 2007 the Australian law firm Slater & Gordon made headlines by becoming the first publicly traded law firm in history. The same year, on the other side of the world, the British Parliament adopted the Legal Services Act, which opened up the legal profession in England and Wales to outside ownership. Nicknamed the “Tesco law”, proponents argued that an infusion of outside capital and entrepreneurship would create a “legal silicon valley” whose innovations would soon make the buying of legal services as convenient, and perhaps even as affordable, as supermarket shopping.

These regulatory shifts have been watched closely in other jurisdictions. Under pressure from Australian and British law firms, Singapore announced in early 2014 that it would allow for minority non-lawyer ownership, and that it may liberalize these regulations further. The United Kingdom’s membership in the European Union may eventually force other European countries to also open up their legal service markets (Spain, Italy, and Denmark already allow for minority non-lawyer ownership). Meanwhile, regulatory bodies in countries such as the United States, Canada, and

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8 ‘Tesco Law’ allows legal services in supermarkets, BBC NEWS, March 28, 2012


11 NEW YORK STATE BAR ASSOCIATION, REPORT OF THE TASKFORCE ON NONLAWYER OWNERSHIP 2 (2012) (hereinafter NYSBA REPORT) (recommending that New York not adopt nonlawyer ownership absent compelling need, pressure to change, or empirical data); James Podgers, ABA ethics opinion sparks renewed debate over nonlawyer ownership of law firms, ABA JOURNAL, Dec. 1, 2013 (describing debate created when the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that would permit a law firm to split fees with a law firm that is non-lawyer owned in a jurisdiction that allows for non-lawyer ownership). Daniel Fisher, North Carolina Bill Would Let Non-Lawyers Invest in Law Firms, FORBES, March 11, 2011 (describing legislation introduced in North Carolina that would have allowed non-lawyers to buy up to 49% of a law firm)
Hong Kong are all actively considering whether to allow non-lawyer ownership in legal services.

The current wave of liberalization regarding restrictions on ownership has largely been justified on competition grounds: that allowing non-lawyer ownership will lead to higher quality, cheaper legal services for consumers, and that there is no compelling reason to bar it. The claim that outside ownership will increase access to justice by making legal services more affordable has been particularly central to this debate. In light of the perceived limitations of pro bono assistance and stagnant or declining legal aid budgets, proponents argue that non-lawyer ownership may be one of the most impactful and realistic ways to increase access to legal services. In the United States, this argument has been taken up by civil society, numerous legal academics, and is a key

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15 As one observer of legal services in the UK put it, “an increase to the legal aid budget is just not a politically realistic option. We should fiddle with the supply side to make prices more affordable.” Interview 6 (Jan. 11, 2014); Gillian Hadfield, Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets, 143(3) DAEDALUS 1 (2014) (finding that perhaps the largest barrier to access in the U.S. is an overly restrictive approach to regulating legal markets, including barring non-lawyer ownership).

16 RESPONSIVE LAW, TESTIMONY TO THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL AID SERVICES ON ALLOWING INNOVATION TO MEET UNMET LEGAL NEEDS, available at http://responsivelaw.org/files/Responsive_Law - NY_Task_Force_2013.pdf

17 For an early example of the argument that non-lawyer ownership will increase access, albeit by two Canadians, see, Robert G. Evans and Alan D. Wolfson, Cui Bono-Who Benefits from Improved Access to Legal Services, in LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES 3, 24-26 (Robert G. Evans & Michael J. Trebilcock eds., 1982). In the run-up to the consideration of multi-disciplinary practice by the American Bar Association several prominent academics wrote in support of non-lawyer ownership, albeit mostly on efficiency, not access grounds. See, e.g., Larry Ribstein, Ethical Rules, Agency Costs, and Law Firm Structure, 84(8) VIRGINIA L. REV. 1707, 1721-25 (1998); Edward Adams and John Matheson, Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms, 86 CALIFORNIA LAW REVIEW 1 (1998). More recently, a number of articles have appeared arguing for non-lawyer ownership on access grounds, including some that argue restrictions on non-lawyer ownership should be struck down as unconstitutional. See, e.g., Renee Newman Knake, Democratizing the Delivery of Legal Services, 73(1) OHIO ST L. J. 1 (2012) (arguing for non-lawyer ownership on first amendment and access grounds); Gillian Hadfield, The cost of law: Promoting access to justice through the (un)corporate practice of law, 38 INT’L REV. OF L. AND EC. 43 (2013) (arguing that abandoning restrictions on the corporate practice of law in the U.S. can significantly increase access to justice); Cassandra Burke Robertson, Private Ordering in the Market for Legal Services, 94 BOSTON UNIV. L. REV. 179 (2014) (arguing that restrictions on non-lawyer ownership reduce access and should be struck down as unconstitutional).
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claim in a legal challenge to restrictions on non-lawyer ownership brought by the law firm of Jacoby & Meyers in a New York federal court.18

Meanwhile, opponents of reform, including decision-makers in state bar associations and the American Bar Association (ABA), assert that opening up the profession to non-lawyer ownership will undercut lawyers’ independence and professionalism with adverse consequences to all clients, including under-served populations.19 Although the debate between these two competing sides has often been fierce, it has also been almost entirely theoretical with the New York State Bar Association Taskforce on Non-Lawyer Ownership recently noting “there simply is a lack of meaningful empirical data about non-lawyer ownership . . .” (partly because of this dearth of data, the Taskforce went on to recommend not adopting such ownership).20

This article steps into this hole in the political debate—and the existing academic literature—to undertake the most extensive empirical investigation to date on the impact of non-lawyer ownership by focusing on its effects on civil legal services for poor and moderate-income populations. It draws on qualitative case studies and other available empirical data from Australia (where non-lawyer ownership has been allowed for over ten years), England and Wales (where it has been allowed for three years) and the United States (where non-lawyer ownership is generally barred, but close parallels are present in online legal services and social security disability representation).

After briefly describing how non-lawyer ownership functions in Australia and the United Kingdom, Part I lays out the most common justifications of those who claim such ownership of legal services will either increase access or undercut professionalism. It then argues that those on both sides of this debate have mischaracterized its probable impact in at least three ways. First, their claims are frequently overly abstract. Not only do they not ground their claims empirically, but they generally ignore how the impact of non-lawyer ownership will likely be affected by contextual factors, such as the type of non-lawyer owners, the legal sector at issue, or regulatory and economic variations between jurisdictions. Second, although non-lawyer ownership has spurred new business models as predicted by its advocates, it is unlikely these innovations will significantly increase access in most legal sectors for reasons that are underexplored in the literature. Finally, while non-lawyer ownership probably will not lead to the nightmare scenarios in relation to professionalism that some suggest,21 it can create new conflicts of interest and

18 See infra note 189
19 New York has been particularly active in considering non-lawyer ownership. See, NYSBA SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, Ch. 12, § 5 (2000) (describing how outside investment could undercut lawyers’ independence); NYSBA REPORT, supra note 11 at 73-76 (citing amongst other concerns that non-lawyer ownership might undercut professionalism before ultimately recommending that New York not adopt nonlawyer ownership).
20 Id. at 11 (The report continued “... we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force’s ability to study the issue as it was difficult to assess past experience.” Id. at 72)
21 For the recounting of actual nightmares inspired by the fear of partial non-lawyer ownership in the United States, see Lawrence Fox, Written Remarks of Lawrence J. Fox to the ABA Commission on Multidisciplinary Practice (Feb. 1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/fox1.html (“Along the way to this presentation I also had nightmares. It was five years from now, the ABA was in steep decline . . . after an exhaustive search [of the ABA meeting] no programs
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undermine the profession’s public spiritedness and professional standards, often in ways even critics have failed to appreciate.

Part II illustrates these arguments through available quantitative data and case studies of prominent instances of non-lawyer ownership in the United Kingdom, Australia, and the United States. Part III uses these country and case studies to support and expand the arguments about non-lawyer ownership’s likely impact laid out in Part I. Part IV ends by exploring some of the access and regulatory implications of the article’s findings. Given the questionable impact of non-lawyer ownership on access, it suggests that the attention of access advocates is better turned elsewhere, particularly to strengthening and broadening legal aid. To address concerns about professionalism, it advocates a multi-stake holder process to appropriately tailor the regulation of non-lawyer ownership, weighing its costs and benefits in different contexts.

The professions were once celebrated by the likes of Durkheim and Parsons for their ability to help create order in modern society, but in more recent decades the academic literature has become persistently critical of them, including the legal profession, for their perceived rent seeking behavior and attempts to monopolize cultural capital.23Partly as a result of these criticisms and partly because of a transformed commercial, social, and technological environment, legal services have increasingly become less distinct and more integrated into the rest of the economy.24Yet, the rules that the legal profession created to regulate itself were often adopted to address real problems and uphold worthy values.25

The delivery of legal services certainly needs new organizing principles. They should not be the often self-serving principles of the past. However, in embracing an ideology of competition or deregulation too strongly there is a danger that other goals and new hazards may be glossed over or unduly dismissed. Reforms like non-lawyer ownership raise the possibility for new conflicts between the interests of clients and the potentially diverse interests of non-lawyer owned commercial enterprises. With new

22 For an overview of the academic literature on the professions, see Tanina Rostain, Professional Power: Lawyers and the Constitution of Professional Authority, in THE BLACKWELL COMPANION TO LAW AND SOCIETY (Sarat ed., 2004); TALCOTT PARSONS, ESSAYS IN SOCIOLOGICAL THEORY (1954); EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIL MORALS (1957)

23 ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (1988); RICHARD ABEL, AMERICAN LAWYERS (1991) (arguing lawyers use professional ideology to gain market control); RICHARD ABEL AND PHILIP S.C. LEWIS, LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 22-24 (1988, vol. 2) (noting that while professional associations played a dominant role in restricting entry into the legal services market in the common law world that in the civil law world this was less prevalent).

24 These transformations are not new even if they continue. As Nelson and Trubek noted in the early 1990s “The predominant sense seems to be that lawyers, both individually and collectively, have lost control over forces that are reshaping the markets in which they compete, the law firms to which they traditionally devoted their careers, the pace and quality of their work lives, and their status in society.” Robert L. Nelson and David M. Trubek, New Problems and New Paradigms in Studies of the Legal Profession, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1 (Robert L. Nelson, David M. Rrubek, and Rayman L. Solomon eds., 1992)

25 Classic justifications for the development of a profession, including the legal profession, include creating incentives for practitioners to invest in skills and ensuring quality. See, MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 7-8 (2006)
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groups of non-lawyers profiting from legal services, regulation may become less susceptible to capture by interests inside the legal profession, but more susceptible to capture by actors outside of it. More generally, by becoming more like other services in the market the profession risks losing the public spiritedness that draws socially committed individuals into its ranks and supports its ability to promote public ideals within the legal system and more broadly.26 These concerns should not lead to a dismissal of non-lawyer ownership out of hand, but instead this moment should be used to assess how best to regulate both non-lawyer ownership as well as the profession more broadly in the wake of new forces transforming the delivery of legal services.

I. Non-Lawyer Ownership of Legal Services

Like any enterprise, the ownership of an entity providing legal services can be viewed as a bundle of rights and duties. These rights and duties may be unbundled and apportioned to different owners. For example, one party may claim profits produced by a business enterprise, while the right to manage that enterprise may be claimed by another. In practice, if one has significant profit rights in a business one will generally desire a stake in how it is controlled, but the two types of rights can be unbundled, such as in the case of non-voting stock in a public company.27

A commercial enterprise delivering legal services has an added element of complexity surrounding its ownership. Only lawyers are allowed to practice law, so an enterprise offering restricted legal services must do so through lawyers. Lawyers though do not have an unlimited right in the legal services they sell. Instead, like other licensed occupations, they have a conditional use right given by the state, usually through one or more regulators. These regulators not only determine the conditions required to become a lawyer, but also can withdraw a lawyer’s right to practice if they violate certain professional rules, such as lying to a court or misappropriating a client’s funds.28

Significantly, regulators of legal services have traditionally limited the ability of lawyers to be part of a commercial enterprise in which non-lawyers share profits in or manage the business entity.29 These restrictions have largely been justified on the premise that non-lawyers may attempt to inappropriately influence how legal services are offered either to increase profits or out of a lack of appreciation of the duties imposed on one offering legal services.30

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26 Robert Gordon, *The Independence of Lawyers*, 68 B. U. L. REV. 1, 9, 32 (1988) (arguing that many are attracted to the profession for its independent, collegial, and intellectually stimulating environment or its publicly minded goals); David Wilkins, *Partner Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1273-77 (2007) (detailing the “paradox of professional distinctiveness”, which is that as law firms attempt to model themselves more on other types of businesses to attract clients and increase efficiency that they lose their professional uniqueness which both justified the profession’s self-regulation and attracted talented students to firms in the first place).

27 HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 12 (2000) (noting that if those with control rights have no rights to residual earnings they will have little incentive to make a profit).


29 See, e.g., Id. at Rule 5.4 (2009) (declaring that a lawyer shall not share legal fees with a non-lawyer or practice law in an organization where a non-lawyer owns or is the director of or can control the professional judgment of a lawyer).

30 See infra Part I(B)
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The recent reforms in Australia and England and Wales have relaxed or ended these restrictions on lawyers’ commercial relationships with non-lawyers. These reforms open up new potential ownership structures for legal services. For example, non-lawyers can now join law firms as partners, law firms may become publicly owned, or legal services may be offered alongside other non-legal services or products offered by a larger commercial enterprise. While lawyers could previously only sell their law firm to other lawyers, who would then themselves have to become part of the firm, lawyers in this more liberalized environment can sell their firm, or part of it, to lawyers or non-lawyers whether they are active managers or passive investors.

Unbundling Ownership of an Entity Selling Legal Services

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Governments and regulators in jurisdictions where they have allowed non-lawyer ownership have been clear that control over the right to actually practice law has to remain with licensed legal professionals, even if the profit rights of the business can be shared more broadly. To accomplish this, jurisdictions like Australia and England and Wales have required that a lawyer be responsible for ensuring professional rules of conduct are abided by in legal service enterprises owned by non-lawyers. England and Wales have mandated compliance officers for legal practice, while in jurisdictions like New South Wales in Australia a legal practitioner director performs a similar role. If the business enterprise, or those in it, violate rules of professional conduct these compliance lawyers have a duty to correct the misbehavior, and the business entity may be disciplined or barred from offering legal services in the future if it is not corrected. In Australia, the legal practitioner director also manages the entity’s legal services, while in England and Wales one of the managers of the enterprise offering legal services must

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31 SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies 2011, Rule 8.5 (hereinafter SRA Authorisation Rules) (A second compliance officer for finance and administration, who may be either a lawyer or non-lawyer, must also be appointed.)


33 See SRA Authorisation Rules, supra note 31 at Rule 8.5 (finding compliance officers must take all reasonable steps to ensure compliance and report any failures); New South Wales Legal Profession Act 2004 § 141(2) (stating that a legal practitioner director must take all reasonable action to correct the misbehavior of a legal practitioner employed by the practice); New South Wales Legal Profession Act 2004 §153 (listing conduct of legal practitioner director as grounds the Supreme Court can disqualify an Incorporated Legal Practice);

34 New South Wales Legal Profession Act 2004 § 140
be a lawyer. Further, all lawyers working in any entity must abide by professional rules of conduct and may be open to professional discipline if they do not. Whether it is through mandated compliance lawyers, lawyers involvement in the management of legal services, or continued individual professional liability, it is licensed legal professionals that bare primary responsibility for ensuring that legal service enterprises that may be owned by non-lawyers are not in violation of the rules of the profession.

While non-lawyer ownership allows non-lawyers to share profit rights, as lawyers at least formally maintain control over legal services themselves, debates over whether or not to adopt such ownership have frequently been polarizing. Advocates have claimed non-lawyer ownership will transform legal services, increasing access to justice in the process, as opponents have maintained that this transformation will undercut professionalism. The next two sections sketch the most common arguments of those who advocate each of these positions.

A. Ownership and the Traditional Argument for Access

As Miller and Sarat famously showed more than thirty years ago cases that come to court represent only a small number of the possible legal disputes in a society. More recent research from Australia, the United Kingdom, and the United States all indicate that most individuals with a legal problem do not go to court, nor do they even generally seek the help of a lawyer. For example, a 2008 study of almost 21,000 Australians found that when faced with legal problems only half the time did the respondent seek any type of advice. In instances where advice was sought, it was far more common to seek help from a non-lawyer, such as a medical professional, a financial advisor, the police, a social worker, an employer, a union representative, or a government department. However, this was contingent on the type of problem. For a self-described “substantial” legal problem, instead of a “minor” one, 73% of those seeking advice sought the help of a lawyer. The primary complaint for those who used lawyers was that they were too

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36 New South Wales, Legal Profession Act (2004) § 143(1)(a)

37 As John Flood has noted reforms like the Legal Services Act 2007 in the United Kingdom may outwardly seem to liberalize the profession, but they also re-regulate it, furthering the interests of some actors, like large law firms, within the legal profession. John Flood, The re-landscaping of the legal profession: Large law firms and professional re-regulation, 59(4) CURRENT SOCIOLOGY 507 (2011)

38 Richard E. Miller and Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 115(3/4) LAW & SOCIETY REV. 525 (1980-81) As Miller and Sarat show legal disputes can be visualized through a pyramid, with a set of grievances at the bottom only some of which are acted upon to become claims, some of these claims will manifest into actual disputes, of which only some involve the use of a lawyer, of which still fewer result in litigation. Id. at 544. Note that not all legal problems involve a dispute. For example, the creation of a will or the transfer of property.

39 LAW AND JUSTICE FOUNDATION, LEGAL AUSTRALIA-WIDE SURVEY LEGAL NED IN AUSTRALIA 96 (2012) (18% of the time the respondent took no action regarding the problem and 31% of the time they handled it without advice.)

40 Id. at 112 (noting only 30% of the time did the respondent seek advice from a lawyer).

41 Id. at 117
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expensive. 42 Findings from an American Bar Association study from 1994 found similar rates of the use of lawyers to address legal problems in the United States, as well as similar concerns about their cost. 43 A 2012 study from the United Kingdom reported higher rates of seeking assistance to address a legal problem, but slightly lower use of lawyers.44 While often a lawyer is unnecessary to resolve a legal problem, these studies all indicate that there are likely a significant number of people who could benefit from the help of a lawyer, but do not hire one because they are either unaware of how a lawyer could assist them or cannot afford one.45 A 2009 Legal Services Corporation survey of its funded programs in the United States found that for every client they served for a civil legal problem another potential client was turned away due to insufficient resources.46

Prominent legal scholars like Gillian Hadfield in the United States and regulators in the United Kingdom have contended that non-lawyer ownership will help overcome this problem by increasing access to legal services.47 They support this claim primarily through three inter-related arguments examined briefly below.

Outside Capital: Economies of Scale, Technology and Specialization

Law firms that provide legal services for individuals have generally been small, consisting of solo practitioners or partnerships of a few lawyers.48 Critics claim this form

42 Id. at 123 (noting 23% of respondents claimed legal advice was too expensive).
43 AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994) [hereinafter ABA LEGAL NEEDS] Of respondents who identified a legal need in the past year 38% of low income individuals and 26% of moderate income took no action, about 41% of these two groups handled the need by their own initiative, and 29% of low income and 39% of moderate income turned to the civil justice system. 13% and 21% respectively consulted a non-legal third party. Id. at 17. The predominant reason given for not turning to the civil legal system given was that it would not help or would cost too much. Id. at 20. Almost 75% of those who turned to the civil justice system did so with the help of a lawyer. Id. at 24.
44 BDRC CONTINENTAL, LEGAL SERVICES BENCHMARKING REPORT (2012) About 13% of respondents facing a legal problem did nothing, 26% dealt with it themselves, and 54% received help. Id. at 14. 42% of those who sought help sought the advice of a solicitor and 12% used a Citizen Advice Bureau. Id. at 28
45 Id. at 15 (finding in the UK that those from the working class and those not working were the more likely to take no action when faced with a legal problem). Law and Justice Foundation, supra note 39 at 142 (finding that in Australia that 30% of those who began to address a legal problem ended up not pursuing it further (perhaps because of lack of money)); ABA LEGAL NEEDS, supra note 43 at 28 (noting that “fear of the cost” was one of the principal reasons given by low income respondents for not using the civil justice system). For an overview of 26 large-scale legal needs surveys undertaken across two decades in 15 separate countries, see PASCOE PLEASANCE AND NIGEL J. BALMER, HOW PEOPLE RESOLVE ‘LEGAL’ PROBLEMS 4 (2014), available at https://research.legalservicesboard.org.uk/wp-content/media/How-People-Resolve-Legal-Problems.pdf (amongst other findings is that cost is a primary barrier to accessing lawyers).
47 See Hadfield, supra note 15; MARKET INTELLIGENCE UNIT, supra note 14
48 For a classic description of the two hemispheres of the bar in America – those who service large organizations like corporations and those who service the majority of individual consumers – see JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, AND EDWARD LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005)
of service delivery is inefficient, as each lawyer or small legal practice invests independently in office space, administrative systems, advertising, and finding solutions to routine legal problems.\(^{49}\) For them, outside capital allows legal services enterprises to achieve larger economies of scale allowing them to invest more in technology, administrative systems, and research into more efficient ways to deliver legal services.\(^{50}\) This larger size also arguably allows lawyers within the firm to specialize more in different areas of law.\(^{51}\) These efficiencies created by greater sized firms can then be passed along to the consumer.\(^{52}\)

**Rewarding Skills: Spurring Innovation and Promoting Efficiency**

Non-lawyer ownership is seen as a way not only to address perceived under-capitalization in law firms, but also to recruit and retain high-value employees with different skill sets than lawyers. Law schools generally do not train lawyers in management, technology, marketing, or other fields that are critical for running many legal service enterprises. Non-lawyer ownership allows firms to provide equity (instead of just salaried compensation) to non-lawyers with skills not as readily available in the legal profession.\(^{53}\) Attracting those with this expertise can lead to more innovative or efficient legal services with the resulting savings passed on to consumers.\(^{54}\) Investor ownership may also improve leadership transitions in some situations, as removing poorly performing management will generally be easier if management is also not significant co-owners of the firm as are managing partners in most law firms.

**Economies of Scope and Branding**

An enterprise offering multiple types of services, including legal services, may create new efficiencies that may then be passed on to the customer.\(^{55}\) For example, it might be more convenient for a customer to be able to access banking and legal services through one company. The company offering these multiple services may also be able to

\(^{49}\) Hadfield, *supra* note 17 at 49-50
\(^{51}\) Hadfield, *supra* note 17 at 52
\(^{52}\) Traditional law firms can, and do, expand through bank loans or saved profits. However, loans frequently come with high interest rates that must be repaid by the firm and many partners may not want to forgo profit disbursements in order to expand.
\(^{53}\) See, Steven Mark and Tahlia Gordon, *Innovations in Regulation-Responding to a Changing Legal Services Market*, 22 Georgetown J. of Legal Ethics 501 (2009) (noting that in a publicly listed firm can be more efficiently organized and that employees can be better remunerated in relation to their contribution to the success of the firm); Ribstein, *supra* note 17 at 1723 (commenting that law firms may use the tournament of lawyers model because of the lack of options to reward employees with anything else, but the promise of management and financial rights combined with tenure); Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63(4) Hastings L. J. 953, 1010 (2012) (arguing non-lawyer ownership will allow these firms to attract other talented professionals).
\(^{54}\) In particular, non-lawyer management may use different, and more innovative, management techniques than a traditional law firm. Clementi Report, *supra* note 50 at 115, 139
\(^{55}\) Interview 10 (Feb. 4, 2014)
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save on shared overhead costs or by engaging in joint advertising campaigns for their products.

While traditional law firms already have brands that consumers may recognize (particularly within their local community), the relatively small size of these firms has limited the ability of customers, particularly those who use legal services infrequently, to use brands to make informed consumer choices. Outside investment may allow legal service providers to scale and their brands to become better recognized so that consumers can more efficiently navigate the legal services market. If an already well-known brand offering other services begins to offer legal services a consumer can use their perception of the quality of the larger brand as a proxy for the quality of the legal services they provide. Concerns about protecting the reputation of their larger brand may also create an added incentive for legal service enterprises to provide a quality product.

B. Ownership and the Traditional Argument for Professionalism

Criticism of non-lawyer ownership is perhaps most developed in the United States where such ownership has been considered, and rejected, by regulators on several occasions. Prominent critics have included the New York Bar Association’s Taskforce on Non-lawyer Ownership, decision makers at the American Bar Association, and vocal members of the profession such as Lawrence Fox. Notably, few academics have publicly opposed non-lawyer ownership outright, although some have expressed notes of caution. Critics of non-lawyer ownership claim that its access benefits are unproven and that it will undermine professionalism, imposing unreasonably high costs on clients, including low-income ones, as well as society as a whole. Non-lawyer ownership is seen to undercut professionalism in three primary ways briefly detailed below.

Commoditization

Opponents of non-lawyer ownership argue that lawyers, and their firms, are acculturated towards a different set of goals than those owned by non-lawyers. Like Anthony Kronman’s “Lawyer Statesman” legal professionals in this vision work to earn a living from their trade, but also to promote ideals that encourage public-spirited devotion

56 Hadfield, supra note 17 at 49-50
57 Id.
58 See infra Part III(C)
59 NYSBA REPORT, supra note 11; ABA COMMISSION ON MULTI-DISCIPLINARY PRACTICE, REPORT (1999) available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpreport.html; Fox, supra note 21
60 Robertson, supra note 17 at 180-81 (claiming that “few onlookers have attempted to defend the corporate practice doctrine” and citing to a handful of partial defenses. While such a broad claim is likely too strong, as there have been many members of the bar who have argued against non-lawyer ownership, it is accurate to portray the academic literature as overwhelmingly supportive of non-lawyer ownership.)
61 NYSBA REPORT, supra note 11 at 72 (noting lack of empirical data on impact of non-lawyer ownership).
62 Id. at 73-74 (expressing concerning that non-lawyer ownership will undermine professionalism).
to the law. These critics contend that non-lawyer owners, in particular investor-owners, seek only to maximize the return on their investment because, unlike lawyers working in a firm, they are not personally invested in the labor of the enterprise. Investor owned firms might focus exclusively on enhancing profits with little regard for the public good, which not only could cause harm to the community, but could also undercut one of the historical sources for the profession’s institutional legitimacy. While these critics generally acknowledge that law has become more like a business in recent years, with lawyers themselves seemingly more and more motivated by profit alone, they want to protect what remains of the profession’s value system from further decline. They worry that non-lawyer owners will seek only the most profitable work and that their firms will be less likely to act as an independent check on state or corporate power. In this view, legal services should not be thought of as a product that can be bought and sold like car radios or toothpaste, but instead a culturally embedded practice whose practitioners must uphold and further professional ideals and norms.

Conflicts of Interest

Non-lawyer ownership brings the potential for lawyers to be caught in a conflict between their duties to investors and their duties to their clients or the justice system. For example, Shine Lawyers, which is a publicly owned law firm in Australia, makes clear in its prospectus to potential investors that their first duty is to the court, then to their client, and then to their shareholders. These duties, in this order, are also laid out in Australian law. The Australian example signals there is a potential regulatory solution to this conflict, but it also suggests that non-lawyer ownership creates conflicts of a new kind than those previously faced by the profession. Before non-lawyer ownership, it may have been in lawyers’ self-interest to take actions that would further the financial interests of the firm, but a sense of professional duty or the firm’s culture may have tempered such actions when they conflicted with the interests of the client. In a

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64 See, Benedict Sheehy, From law firm to stock exchange listed law practice: an examination of institutional and regulatory reform, 20(1) INT’L J. OF THE LEGAL PROFESSION, 3, 7 (Oct. 28, 2013) (noting that the one of the major concerns of non-lawyer ownership was that these businesses would “focus excessively on enhancing members’ economic benefit without regard for the public good.”)
65 See, Adams and Matheson, supra note 17 at 23
66 See, CLEMENTI REPORT, supra note 50 at 116 (noting that one concern raised by opponents of non-lawyer ownership is that non-lawyer owned firms would skim the most profitable work leaving others in need with few options).
67 Fox, supra note 21 (noting lawyers working for non-lawyer owned companies would be less likely to work on death penalty or other high profile and controversial pro bono matters).
68 Arthur J. Ciampi, Non-Lawyer Investment in Law Firms: Evolution or Revolution? 247(56) NEW YORK LAW JOURNAL 3 (2012) (arguing that non-lawyer ownership places lawyers in a conflict between the best interests of their clients and having to answer to their non-lawyer partners).
69 SHINE LAWYERS, PROSPECTUS 40 (2013) [hereinafter SHINE PROSPECTUS] (“Shine has a paramount duty to the court, first, and then to its clients. Those duties prevail over Shine’s duty to Shareholders.”)
70 New South Wales Legal Professions Act 2004 §§ 161-163. (noting that the legislation is given precedence over the company’s Constitution and allows the regulations associated with the Legal Profession Acts to displace the operation of the Corporations Act).
world of non-lawyer ownership, stockholders may try to create new demands on the firm, and the lawyers within it, to prioritize commercial interests.

Training in Professional Responsibility and the Unauthorized Practice of Law

While many criticisms of non-lawyer ownership are directed at non-lawyer owners, others are directed more specifically at the dangers of having multiple kinds of employees, often offering multiple services, in the same firm. Some argue that non-lawyer managers and other employees may be more likely to violate legal ethics, not because lawyers have superior morality, but because lawyers are trained and duty-bound to look for conflicts, prize confidentiality, and uphold other professional rules.71 As legal and non-legal work becomes more integrated, and entangled, within the firm employees may also be more likely to inadvertently, or advertently, engage in the unauthorized practice of law or share confidential client information across different departments of the company.72

C. Towards a New Understanding of Non-Lawyer Ownership

Participants in the debate over non-lawyer ownership have argued for two dueling, if not necessarily conflicting, claims: (1) that non-lawyer ownership will significantly increase access to legal services; and (2) that such ownership will negatively impact professionalism. While both sides to the debate bring useful insights, the actual effect of non-lawyer ownership is likely to be quite different than either of these traditional accounts suggest in at least three ways that are briefly laid out in this section, before being returned to again in more detail in Part III where they are supported by the country studies presented in Part II.

First, arguments over non-lawyer ownership tend to be too abstract. Non-lawyer ownership should not be thought of as having the same impact in every context—it matters who are the non-lawyer owners and what legal sector or jurisdiction is at issue. A legal services firm owned by consumer owners or worker owners is likely to respond to a different set of incentives and have a different set of potential conflicts of interest than a firm owned by investor owners or owners that also offer other services in the market. Some sectors of legal services may be perceived to be more lucrative or easier to standardize or scale and so attract more non-lawyer investors than other sectors. Countries with larger capital and legal services’ markets could see more and a greater variety of types of non-lawyer ownership. Meanwhile, jurisdictions with regulation that makes the adoption of non-lawyer ownership more bureaucratic may deter non-lawyer ownership, while a jurisdiction’s other professional rules, such as restrictions on advertising or referral fees, may also influence whether and how non-lawyer ownership develops. Accounting for these variables can help predict the impact non-lawyer ownership will have in different situations. For example, non-lawyer ownership may

71 ABA COMMISSION, supra note 59 (“The Commission is particularly mindful that the principal arguments . . . for retaining such prohibitions relate to concerns about the profession’s core values, specifically professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest.”)

72 Adams and Matheson, supra note 17 at 21
have little impact in the immigration sector in a relatively small jurisdiction where such ownership is highly regulated, but it may have a transformative impact that requires regulatory attention in the personal injury sector in a large jurisdiction where major commercial conglomerates enter the market.

Second, even though non-lawyer ownership may lead to more innovation in legal services, greater competition, larger economies of scale, and other changes predicted by some of its advocates, there is reason to doubt that these changes will lead to significantly more access to legal services for poor and moderate income populations. Non-lawyer owners are likely to be attracted to legal sectors, like personal injury, that are relatively easy to commoditize and where expected returns are high, but where there may not be as much of an access need because of long-standing practices like conditional or contingency fees. More generally, many other areas of legal work may be difficult to scale or commoditize, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits. Even where commoditization is possible, persons with civil legal needs frequently have few resources and complicated legal problems. In this context, non-lawyer ownership is unlikely to provide these persons with significant new legal options, as they will still be unable to afford legal services. Finally, because of cultural or psychological barriers some persons may be resistant to purchasing some types of legal services, meaning that for these services there may not be as much price elasticity in the market as advocates of deregulation suggest.

Third, those who oppose non-lawyer ownership on the grounds that it will undercut professionalism tend to make arguments that are both too wide and too narrow. Many non-lawyer owned firms are likely to operate in ways quite similar to lawyer owned firms or at least not in ways that create serious new professionalism concerns. This though does not mean that no new professionalism concerns arise with non-lawyer ownership. The interests of clients and non-lawyer owners are likely to sometimes conflict, placing new pressures on lawyers. These conflicts seem most likely to occur, and be most serious, where non-lawyer owners have other well-defined commercial interests, such as in the case of a large corporation that offers multiple other services in the market. In some situations, non-lawyer ownership may also undermine the public-spirited ideals of the profession, making it less likely lawyers in these firms will engage in pro bono or take on riskier cases that may have a broader social benefit. At the same time, while some have claimed that non-lawyer ownership will lead to an increase in quality of legal services, it is not obvious this will be the result and pressure for investors for profits may actually undercut standards in the profession.

II. Country Studies

To illustrate the arguments laid out at the end of Part I, the three country studies in this Part explore the impact of non-lawyer ownership on access and professionalism

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Perhaps the most obvious example of such a conflict, albeit in the criminal context, would be a company that offers criminal defense services and also runs prisons. See, e.g., ABA Model Rule 1.8a ("A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client...")
for civil legal services for poor and moderate-income populations. While non-lawyer ownership may have access benefits for other groups as well, it is poor and moderate-income individuals that are often excluded from legal services altogether and have justifiably been the primary focus of access advocates. Meanwhile, legal aid is more prevalent for criminal legal services and so non-lawyer ownership is more frequently seen as a remedy for access challenges for civil legal services. For the sake of space constraints, the country studies also only focus on non-lawyer ownership’s potential impact on professionalism for civil legal services for poor and moderate-income individuals.

In the three countries studied, the available quantitative data on legal services is limited. Importantly, none of the jurisdictions has reliable or systematic data on the price of civil legal services, although England and Wales is beginning to collect some of this information. Given these restrictions, in each country examined the article first attempts to determine where there has been significant investment in legal services by non-lawyers. If there is no significant non-lawyer ownership in a sector it is unlikely that such ownership is having a large impact on access or professionalism, particularly if there is no readily apparent evidence to the contrary. In sectors where there has been significant non-lawyer ownership it undertakes qualitative case studies of particularly prominent instances of non-lawyer ownership in enterprises that provide services that are aimed, at least in part, at low or moderate income populations. These case studies focus on examining new models of delivering legal services seemingly spurred by non-lawyer ownership, as it posits this type of innovation is most likely to lead to significant gains in access or raise new professionalism concerns. Data was collected from public sources, including through special requests to regulators and government agencies, as well as through institutional review board (IRB) approved interviews with key participants.

Given the limitations of the available data, and the complexity of the functioning of legal markets, it is almost impossible to conclusively demonstrate non-lawyer ownership’s precise impact on access or professionalism. However, the available evidence does allow one to make plausible arguments about such ownership’s most likely influence. Focusing on concrete examples also forces all sides in the debate to more

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74 The article examines how non-lawyer ownership may increase access for this population by increasing awareness of relevant legal options, reducing their price, or increasing their quality at the same or a lower price.
75 See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 187 (2004) (for an overview of efforts to increase access to civil legal services in the United States and a proposed agenda).
76 The article takes a somewhat broad view of what professionalism constitutes, looking not just at the impact of non-lawyer ownership on the formal disciplining of lawyers, but also how it may create new conflicts of interest, undercut professional rules, or effect the larger public-spirited role of the profession.
77 Pricing data has been collected for conveyancing, divorce, and probate services in the UK for 2012. BDRC CONTINENTAL, supra note 44
78 CLAYTON M. CHRISTENSON, THE INNOVATOR’S DILEMMA (2011) (describing how disruptive technology can lead to large new efficiency gains, undercutting earlier models of doing business)
79 To capture a more complete view—which included minority and contradictory perspectives—executives at non-lawyer owned legal service providers, regulators, competitors, representatives of the bar, academics, and those in non-profit organizations offering services to under-served populations were interviewed. The author chose initial interview subjects through publicly available information on non-lawyer ownership and then followed a snowball interview method of selection.
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carefully develop, and limit, their claims, and reexamine both their analytical and normative commitments in the light of potentially contradictory evidence.80

A. England and Wales

Some background is helpful to appreciate the momentous regulatory changes in the legal services market in England and Wales over the last several years. While in some jurisdictions there is only one type of legal professional – i.e. lawyers – in England and Wales there are eight types of licensed legal professionals: barristers, solicitors, notaries, conveyancers, legal executives (a type of para-legal), patent attorneys, trade mark attorneys, and costs lawyers (who can settle the legal costs of a court case).81 While the division between barristers, solicitors, and notaries is old, the other types of licensed legal professionals are of generally more recent origin and were created in part to provide more affordable services by allowing individuals to specialize in areas of legal practice without as much training as a solicitor or barrister.82

The liberalization-minded government of Margaret Thatcher in many ways planted the seeds for the recent deregulatory push in legal services.83 In 2004, a report by Sir David Clementi, which built on a previous study by the UK’s competition agency,84 recommended a series of regulatory changes to the legal profession.85 These proposals culminated in Parliament passing the Legal Services Act in 2007.

The Act implemented two primary changes. The first concerned regulatory agencies. The Act separated the advocacy and disciplining functions of the bar by creating an independent Legal Ombudsman to address consumer grievances.86 It also separated the advocacy and regulatory functions of the bar by, for example, creating the Solicitor Regulatory Authority (SRA) as the independent regulatory arm of the Law

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80 Case studies in particular can be used to present us “with unfamiliar situations that inspire tentative moral judgments, which may destabilize the web of normative conviction we bring to them when we examine the connections among its elements.” David Tacher, The Normative Case Study, 111(6) AM. J. OF SOCIOLOGY 1631, 1669 (2006)
81 Legal Services Board, Approved Regulators, available at http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm (These eight types of licensed legal professionals each have their own regulator. Two accountant associations are also authorized to license accountants for special probate activities, but currently do not do so.)
82 Some of these other professions also formalized the role non-licensed individuals were already sometimes playing in legal services. For a short history of the origins of these licensed legal professionals and the reserved legal activities they are allowed to perform, see LEGAL SERVICES INSTITUTE, THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES – HISTORY AND RATIONALE (2010) available at http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf
83 For an excellent history of the reforms that were instituted in the English legal profession in the 1980s and 1990s, see RICHARD ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2003)
84 In a 2001 report the Office of Fair Trading pointed to uncompetitive practices in the legal profession that it argued needed to be reformed. OFFICE OF FAIR TRADING, COMPETITION IN PROFESSIONS (2001), available at http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf
85 CLEMENTI REPORT, supra note 50
86 Legal Services Act 2007, Part 6
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Society. To oversee the eight independent frontline regulators of each type of legal professional in England and Wales the Act created the Legal Services Board (LSB), which acts as a “meta-regulator”. Second, the Legal Services Act allowed for Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs). LDPs, the first of which were licensed in 2009, permit different types of legal professionals to own and manage law firms together (for example, solicitors and barristers can practice together in a LDP, while previously they had to practice in separate firms). ABSs began to be licensed in 2011 and can be fully owned by non-lawyers as well as offer non-legal services alongside legal services.

These reforms were brought about to increase competition, make the market more consumer friendly, and increase access to legal services for those without them. Although most ABSs licensed so far are traditional law firms simply adopting a new business form, many are new actors in the legal services market or are firms that promise a new way of delivering legal services. The reforms have also caught the attention of foreign investors. The publicly listed Australian law firm, Slater & Gordon, became an ABS in 2012 and subsequently bought several personal injury and general service law firms across the country to become a major market player. U.S. legal service providers like Jacoby & Meyers, a large personal injury law firm, and LegalZoom, an online legal services company, have also applied for ABS licenses.

Deciphering the impact of non-lawyer ownership of legal services on the legal market in England and Wales can be challenging. Not only did ABSs begin to be licensed only in late 2011, but shortly after the Legal Services Act was passed the 2008 financial crisis undercut the demand for legal services, especially in certain sectors such as real

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87 Solicitor Regulatory Authority, How We Work, available at http://www.sra.org.uk/sra/how-we-work.page
88 Legal Services Board, Approved Regulators, available at http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm
89 Legal Services Act 2007, Part 5 (setting out the legal basis for ABSs); The Law Society, Legal Disciplinary Practice, available at http://www.lawsociety.org.uk/advice/practice-notes/legal-disciplinary-practice/#ldp2 (describing the legal basis for LDPs)
90 Id.
92 MARKET INTELLIGENCE UNIT, supra note 14; CLEMENTI REPORT, supra note 50 at 105
93 As of 2014 about a third of licensed ABS firms were new entrants, while the others were law firms that had already been in existence and converted to ABSs. SOLICITORS REGULATORY AUTHORITY, RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES: FINDINGS WITH SURVEYS OF ABSS AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS 10 (2014)
95 Interview 14 (April 15, 2014); Interview 11 (Feb. 7, 2014)
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Due to increased pressure on the budget and longstanding belt-tightening trends, the government implemented major cuts to the legal aid system in April 2013 (the UK has traditionally spent more per capita on legal aid than most other countries). These cuts reduced fees paid to lawyers for legal aid and eliminated legal aid for many family law, housing, employment, welfare, debt, and immigration matters, as well as created a residency test and a more stringent means cutoff for beneficiaries. Since legal aid has traditionally been through government contracting with private lawyers these cuts have had a dramatic impact on the legal services market overall.

Despite this turmoil, the available data does allow us to see where Alternative Business Structures have and have not entered the market. As of August 2014, there were over 360 ABSs, most of which had been licensed by the Solicitor Regulatory Authority (SRA). The ABS firms licensed by the SRA are disproportionately concentrated in certain sectors, particularly personal injury, where in 2012-2013 ABS firms accounted for 33.5% of the market share.

Legal Services Regulated by Solicitor Regulatory Authority:

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<th>Sector</th>
<th>ABS market share (%)</th>
<th>Number of ABSs</th>
<th>Number of ABSs &gt; 50% of Business in Sector</th>
<th>Number of ABSs &gt; 80% of Business in Sector</th>
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<td>Children</td>
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<td>33</td>
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<td>0</td>
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<tr>
<td>Consumer</td>
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<td>6</td>
<td>0</td>
<td>0</td>
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<td>Criminal</td>
<td>2.87%</td>
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<td>7</td>
<td>6</td>
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<td>Debt Collection</td>
<td>3.73%</td>
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<td>3</td>
<td>0</td>
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<td>Employment</td>
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<tr>
<td>Family/Matrimonial</td>
<td>5.27%</td>
<td>76</td>
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</table>


98 John Flood and Avis Whyte, What’s Wrong with Legal Aid? Lessons from Outside the UK, 25 CIVIL JUSTICE QUARTERLY 80, 84 (2006)


100 For the first time in their history barristers in the country went on strike in January of 2014 to protest the changes, indicating both the perceived severity of the cuts to the legal system and the profession. Owen Bowcott, Barristers and solicitors walk out over cuts to legal aid fees, THE GUARDIAN, Jan. 5, 2014, available at http://www.theguardian.com/law/2014/jan/05/barristers-solicitors-walkout-legal-aid-cuts

101 Nick Hilborne, SRA now licensing more than 300 ABSs, LEGALFUTURES, Aug. 6, 2014, available at http://www.legalfutures.co.uk/latest-news/sra-now-licensing-more-than-300-abss

102 SOLICITORS REGULATORY AUTHORITY, supra note 93 at 12 supplemented with data provided in email correspondence with SRA (June 13, 2014).
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<tr>
<th>Category</th>
<th>Percentage</th>
<th>Cases</th>
<th>Partners</th>
<th>Solicitors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intellectual Property</td>
<td>2.46%</td>
<td>16</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Landlord/Tenant</td>
<td>3.45%</td>
<td>57</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Litigation (Other)</td>
<td>4.26%</td>
<td>112</td>
<td>18</td>
<td>13</td>
</tr>
<tr>
<td>Mental Health</td>
<td>23.49%</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Non Litigation Other</td>
<td>16.80%</td>
<td>64</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>33.53%</td>
<td>102</td>
<td>53</td>
<td>43</td>
</tr>
<tr>
<td>Probate Estate Administration</td>
<td>4.78%</td>
<td>67</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Property Commercial</td>
<td>3.19%</td>
<td>73</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Property Residential</td>
<td>3.03%</td>
<td>78</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Social Welfare</td>
<td>11.96%</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Wills Trusts Tax Planning</td>
<td>3.35%</td>
<td>89</td>
<td>7</td>
<td>4</td>
</tr>
</tbody>
</table>

Following personal injury, ABSs seem to have had the biggest share of revenue in consumer, social welfare, and mental health law, although each of these sectors had a relatively small number of actual ABSs (and for only one ABS did this work constitute over 50% of their business). The category of consumer law includes product liability, mental health contains mental health malpractice, and social welfare law includes disability benefits, so these may be legal services being offered by larger personal injury firms. Corporate law, financial advice, civil liberties and immigration are left out of the above table because in these categories less than 2% of market share were with ABSs.

i. Personal Injury and the Insurance Industry

The rush of ABS licensed firms into the personal injury market has created new innovations, brought in new types of investors, and generated larger economies of scale. However, the access benefits so far have been questionable and some of these ABSs have also created the possibility for new types of conflict of interest and helped actors bypass professional regulations.

The rapid growth of non-lawyer ownership in personal injury is not particularly surprising. The personal injury market is both historically large and, at least in recent years, disproportionately profitable, making it a clear target for outside investors.

103 “Non Litigation Other” is a catchall category that includes work that does not fit neatly into other categories when they self-report. It is unclear what types of work firms might be including in this category. Email correspondence with SRA (June 13, 2014)
105 Email correspondence with Solicitor Regulatory Authority (June 13, 2014)
106 Previous research found firms that were more productive were most likely to operate in the injury market segment. LEGAL SERVICES BOARD, EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS 6 (Oct. 2013) [hereinafter LSB 2013] The sector accounted for £1.8 billion in 2011 or about 12% of all legal turnover for solicitors in the UK. The entire solicitors’ market was about £18.7 billion in 2012/13. Id. at 4.
Personal injury firms also require capital-intensive upfront costs, both to solicit claims through advertising and then to screen those claims.\(^{107}\)

There are regulatory reasons unique to the UK as well that likely helped spur non-lawyer investment. The government banned referral fees in April 2013 after a report recommending their prohibition by Justice Rupert Jackson to the Ministry of Justice.\(^{108}\) This ban, and its anticipation, arguably sped the entry of ABSs into the personal injury market. Large insurance companies had previously made money off of the referral of their customers to personal injury lawyers after they had been in auto accidents.\(^{109}\) Instead of losing this lucrative source of revenue, insurance companies have instead invested in their own law firms to which they can refer cases without charging a fee, but still benefit from the subsequent profits.\(^{110}\) Meanwhile, large personal injury law firms, like Slater & Gordon, have bought law firms with well recognized brands and invested in advertising to ensure a steady supply of clients in the wake of the referral fee ban.\(^{111}\)

Some have criticized insurance companies for bypassing restrictions on referral fees by setting up their own legal practices. As one prominent UK personal injury lawyer noted, “The referral fee ban was ostensibly at least a principled one, i.e. distaste in selling the right to act for an injured person. It seems a strange solution to that problem, to allow those referrers now to own [a solicitor’s practice] rather than simply be paid by a solicitor’s practice a referral fee, and to somehow conclude this is better.”\(^ {112}\) Indeed, beyond a general “distaste” for referral fees, the Jackson report criticized the referral system for not helping consumers find the best quality lawyer for their claim, but rather guiding them towards the lawyer who would pay the referrer the highest price.\(^ {113}\) Consumers that are referred to an ABS because their insurance company owns the ABS similarly seem to be referred simply because of the monetary benefit to the referrer (i.e. the insurance company) and not because the referral is necessarily in the consumer’s best interest.

One ABS, Quindell, which is listed on the AIM on the London Stock Exchange, has bypassed the referral ban even though it is not owned by an insurance company.\(^ {114}\)

\(^{107}\) The need for larger investment in advertisement led to the growth of claims management firms in the UK before the 2013 ban on referral fees. LONDON ECONOMICS, ACCESS TO JUSTICE: LEARNING FROM LONG TERM EXPERIENCES IN THE PERSONAL INJURY LEGAL SERVICES MARKET 17 (2014) [hereinafter LONDON ECONOMICS]


\(^{109}\) Before the referral fee ban over 15% of personal injury solicitor firms received over 50% of their business through referrals. LSB 2013, supra note 106 at 53


\(^{111}\) Interview 1 (Jan. 9, 2014)

\(^{112}\) Interview 21 (April 7, 2014)

\(^{113}\) Jackson, supra note 108 at 203-206. Importantly, the report also criticized referral fees for increasing the price of the overall personal injury litigation process by adding more players and costs. Id.

Instead, Quindell sells claims management services. Its agents staff telephone hotlines that are the first point of contact for customers when they call insurance companies after an auto accident. The agent then alerts the insurance company to the claim, but also offers a package of other services to the customer including roadside assistance, vehicle repair, car rental, rehabilitation medical support, and legal services. Since Quindell agents are the first point of contact with customers, recommending them to their legal services arm is not technically a banned referral. This strategy has been profitable and Quindell went from a reported £163 million in revenue (and £52 million in profit) in 2012 to £380 million of revenue (and £137 million in profit) in 2013. Some though have questioned whether the company is subverting the referral fee ban or whether having medical evidence for a personal injury client provided by the same company that provides legal representation for the client creates a conflict of interest. One particularly critical report of Quindell’s business strategy (written by a firm short selling its stock) led Quindell’s shares to lose almost half their value, or about £1 billion, in one day in April 2014.

While it is in the short-term interest of insurance companies, or companies they contract with like Quindell, to have those they insure succeed in claims against third party insurance companies, it is in the interest of the insurance industry overall to keep the cost of claims down. This raises questions about whether there is an inherent conflict in having personal injury firms owned by insurers even if they do not bring cases against the insurers that own them. Before the ban on referral fees some personal injury firms had bulk contracts with insurance companies to provide them cases and this perhaps meant these law firms were careful not to be too aggressive against the insurance industry overall. However, such an arrangement still created some distance between insurance companies and personal injury law firms.

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115 Quindell, Quindell Portfolio PLCInvestor and Analyst Teach-In 21 (2013) (describing how Quindell pays to be first notice of loss contact point). Quindell also receives a significant portion of its clients through direct customer outreach and other intermediaries. See, Neil Rose, Quindell targets huge staff growth and higher value cases, LEGALFUTURES, June 19, 2014


118 Interview 18 (July 7, 2014)

119 Although this report seems to have been produced by an American trading firm shorting Quindell’s stock the market’s reaction may indicate a larger unease about their business model. Neil Rose, Quindell launches legal action over ‘shorting attack’, Legal Futures, April 25, 2014, available at http://www.legalfutures.co.uk/latest-news/quindell-launches-legal-action-shorting-attack

120 There is no outright prohibition on an insurance company owned ABS bringing an injury case against the insurance company that owns them. However, the SRA Handbook provides a set of principles that all solicitors must follow. Principle 3 states “You must not allow your independence to be compromised” and Principle 4 states “You must act in the best interests of your client.” Both of these principles would seem to bar solicitors from acting against the insurance company that owns their firm on behalf of their client. SRA, SRA Principles 2011, available at http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page

121 Interview 17 (July 3, 2014)
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In February 2014, many of the major insurance companies with ABSs signed a voluntary code of conduct. Amongst other provisions, in the code they agreed that they and any party they might refer customers to would whenever possible settle their customers’ claims through a government and stakeholder sanctioned claims portal and in a manner that does not unreasonably increase legal costs for the at-fault insurer. Such codes of conduct raise concerns that the insurance industry is actively trying to shape their ABS’s legal practice to keep insurance companies costs as low as possible, which may, or may not be, in the best interests of those who have been injured. More generally, it is insurance companies that have traditionally lobbied for regulation to limit the amount of compensation paid in personal injury cases, while personal injury lawyers have lobbied for regulation that would allow for greater compensation. Having insurance companies capture a large part of the personal injury sector upsets this political balance and could lead to regulation more favourable to insurance companies in the future.

While ABSs owned by insurance companies raise a number of potentially serious conflicts of interest, the access benefits of ABS’s in the personal injury market have yet been demonstrated. In fact, there has been a decline in personal injury claims made in the United Kingdom from 2011/12 to 2013/14. This recent drop has been led by motor claims, which account for about three-quarters of all personal injury claims and reduced 7% from 2011/12 to 2013/14 to 772,843 claims. Although it is important to note that between 2011/12 and 2013/14 there has been a 36% jump in clinical negligence claims (which numbered 18,499 in 2013/14) and a 21% jump in claims against employers (which numbered 105,291 in 2013/14). While this data indicates that the entry of ABSs

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123 Id. In the code of conduct signatories also agreed to alert customers they were referring of their relationship with their ABS and also not to pressure customers into making claims or refer clients to third parties who might.
124 The Association of Personal Injury Lawyers (APIL) undertakes multiple lobbying efforts on behalf of UK personal injury lawyers. Highlights of these activities can be found at APIL, Parliamentary Room, available at http://www.apil.org.uk/parliamentary-room; The Association of British Insurers undertakes lobbying efforts for the UK insurance industry. See Association of British Insurers, What We Do, available at https://www.abi.org.uk/About/What-we-do
125 LONDON ECONOMICS, supra note 107 at 38 (“It is clear that ABSs have already had a big impact on the personal injury market. However, it is not yet possible to assess whether this had led to an increase in access to justice.”)
126 All parties in the UK who receive a claim against them for a personal injury matter must register with the government’s Compensation Recovery Unit (CRU), which recovers social security and National Health Service costs in certain compensation and personal injury cases. Compensation Recovery Unit, Collection, available at https://www.gov.uk/government/collections/cru; Data on the number of personal injury claims taken from excel file available CRU’s website, cases-registered-cru-2013-14-3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286107/Number_of_cases_registered_to_Compensation_Recovery_Unit.csv.csv/preview
127 Id. For a discussion of what might be causing the trends in different categories of personal injury, see LONDON ECONOMICS, supra note 107 at 25
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into the market have failed to halt a decline in the overall number of injury claims, and motor accident claims in particular, without further information it is not possible to speculate about ABSs impact. The decline in motor vehicle claims and the recent rise of claims in clinical negligence and against employers could be caused by the emergence of ABSs, but also the recent referral fee ban, broader reforms in the personal injury sector, a change in the number of motor accidents, or other factors.

Yet, there are other reasons to believe that ABSs may not be having a significant direct impact on access in personal injury matters. In 2010/11, before ABSs began to be licensed, 97% of those who brought a personal injury matter in England and Wales reported they did not pay for their solicitor because the solicitor was compensated by their insurance company, was contracted under a no win no fee arrangement, or was provided through legal aid, a trade union, or some other source. Given the nature of this market, it would seem that large shifts in the number of people who can make personal injury claims are more likely to be driven by changes in the structure of conditional fee arrangements or calculations within the insurance industry on when they should fund claims, rather than by the emergence of ABSs.

ii. Family Law and Cooperative Legal Services

Cooperative Legal Services is part of the Cooperative Group, which was founded in 1863, is owned by its almost 8 million members, and has 4500 retail outlets throughout the country. The Group is known in particular for its grocery stores, pharmacies, banks, and services in funeral care and farming. In 2006 the Cooperative began offering legal services to its members and in 2012 they were granted an ABS license to provide these services to the general public. Cooperative Legal Services is one of the most prominent examples of an ABS offering a broad range of civil legal services to a diverse customer base. Many observers, including those inside the Group, see Cooperative Legal Services as a way to increase access through economies of scale and scope. However, it is unclear how much the Coop has been able to actually increase access and its larger business model is still unproven.

In 2014, Cooperative Legal Services had a staff of 560 (including 120 solicitors) and a £33 million annual turnover. Its major areas of work were probate, personal injury,

128 Road injuries and deaths have been steadily declining in the United Kingdom in recent years (on average down 4.7% each year since 2006, including 2012 and 2013). See Dept. for Transport, Reported accidents and casualties, vehicle population, index of vehicle mileage, by road user type and severity, Great Britain, from 1930, available at https://www.gov.uk/government/statistical-data-sets/ras40-reported-accidents-vehicles-and-casualties
129 Mark Sands, 25% of UK workforce at risk of noise induced hearing loss, THE POST, May 27, 2014 (noting a 40% increase in hearing loss claims since the introduction of the Jackson Committee reforms in 2013).
130 LONDON ECONOMICS, supra note 107 at 31-32
131 The Co-Operative Group, About Us, available at http://www.co-operative.coop/corporate/aboutus/
132 Supermarket Sweep: The cold wind of competition sweeps the legal services market, THE ECONOMIST, April 27, 2013
133 Interview 10 (Feb. 4, 2014)
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and family law. The Cooperative’s funeral, financial, and other arms are able to refer clients to its legal services, and Cooperative Legal Services advertises heavily in the Group’s chain of grocery stores. Cooperative Legal Services primary offices are in London, Manchester, and Bristol, but they service many of their customers via phone. They claim that by investing in infrastructure and quality control systems they can provide a better service at a more affordable price.

The Cooperative is unique in being member owned and committed to a larger social mission. The Cooperative does not necessarily feel the need to make a profit from its legal services as they are interested in offering a “social good” both to their members and the community at large. Several of the senior lawyers who helped build Cooperative Legal Services joined from the social welfare sector of the legal profession when steep cuts in legal aid were announced in the early 2010s. They came in part because they saw the Cooperative as a viable platform to provide low cost legal services through a trusted brand to not only the middle class, but also to low income populations who no longer had access to legal aid.

This sense of social mission is particularly true in regard to family law. While family legal aid had previously been offered to those who were income eligible in most private family law matters, including divorce and custody battles, after the cuts in April 2013 legal aid was only available in private family law disputes involving domestic abuse, forced marriage, or child abduction. Within this reduced ambit of covered services Cooperative Legal Services in 2014 was the largest provider of family legal aid in the UK, having won 78 government contracts across the country. They serviced these contracts with peripatetic teams of lawyers that share office space in 23 of the Cooperative’s bank branches. They also have one of three national telephone contracts for family legal aid.

Beyond these government contracts, the Cooperative provides family legal services to the public at fixed rates. Some lawyers have expressed hope that Cooperative will be able to provide these services at a low enough price so as to meaningfully address access needs created by legal aid cuts.

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134 Id.; 2013 THE CO-OPERATIVE GROUP, ANNUAL REPORT 16 (2013)
136 Id. at 16
137 Interview 10 (Feb. 4, 2014)
139 Interview 10 (Feb. 4, 2014)
140 Interview 10 (Feb. 4, 2014)
142 Interview 10 (Feb. 4, 2014)
143 Id.
145 Interview 10 (Feb. 4, 2014)
Yet Cooperative Legal Services has so far consistently lost money, with operating losses of £9.1 million in 2013, including a fall in sales of 1.2% from the year before.\(^{146}\) At the same time, the larger Cooperative Group has suffered major losses as a result of trouble in their banking services, which has limited the ability of Cooperative Legal Services to expand as planned and raised the prospect that the Group’s problems with their financial services could force their legal services arm to be shut down or sold off.\(^{147}\)

Although the Cooperative is one of the largest providers of family law services to the public they have not been able to halt a massive increase in the number of unrepresented litigants in UK family courts as a result of legal aid cuts that took effect in 2013. Between 2011 and the first quarter of 2014 the per cent of private family law disputes where neither party was represented by a lawyer more than doubled, and the per cent of cases where both parties were represented by a lawyer dropped from 49.7% to 26.3%.

<table>
<thead>
<tr>
<th>Per Cent of Parties with Legal Representation (Private Family Law Disputes)(^{148})</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>2011</td>
</tr>
<tr>
<td>2012</td>
</tr>
<tr>
<td>2013</td>
</tr>
<tr>
<td>2014 Q1</td>
</tr>
</tbody>
</table>

Just because new ABSs like Cooperative Legal Services have not been able to fill the gap created by reductions in legal aid, does not mean they have not helped mitigate the impact of these cuts or will not play a larger role in the future.\(^{149}\) However, at least in the short term, by far the predominant driver of changes in access to representation in

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\(^{146}\) 2013 Co-op Annual Report, supra note 134 at 11 and 16. Interview 10 (Feb. 4, 2014) (The Cooperative claims these losses were anticipated – part of initial advertising, training, and overhead costs).

\(^{147}\) 2013 Co-op Annual Report, supra note 134 at 10 (reporting losses of about 2.1 billion pounds); Interview 10 (Feb. 4, 2014)

\(^{148}\) This data is taken from Ministry of Justice, Main Tables: January to March 2014, Table 2.4 (2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323503/court-statistics-main-tables-jan-mar-2014.xls The raw number of private law family disputes has so far held steady over this three year period at about 96,000 per year, perhaps indicating that a lack of representation did not deter people from still seeking remedies in court. Id.

\(^{149}\) The number of respondents who reported that the family law services they received in the past two years represented value for money increased from 51% to 63% between 2011 and 2014. There was also an increase of fixed fees in the family legal services market from 12% to 45%. The entry of Co-Operative Legal Services into the market may have helped spur these changes. However, these changes may have also been caused by an increasingly competitive market in the run up to legal aid cuts. ABSs, including Co-Operative, are reported to have only about 5% of the family legal services market so, while it is possible that they have spurred some of these changes, it seems unlikely that they are solely responsible for the adoption of flat fees or increases in consumer satisfaction. LEGAL SERVICES CONSUMER PANEL, TRACKER SURVEY 3 (2014) available at http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2014%20Tracker%20Briefing%201_Changingmarket.pdf
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family law disputes in the United Kingdom is not the rise of ABSs like Cooperative Legal Services, but cuts in legal aid. Much like in personal injury, the emergence of ABSs in family law representation seems at best a sideshow with unclear effects in the larger access story.

B. Australia

Like in the United Kingdom, Australia’s competition authority played a key role in advocating for the adoption of non-lawyer ownership in the country. Under this pressure, and with little input from regulators or the bar, in the early 2000’s the New South Wales government adopted a set of reforms that allowed for Incorporated Legal Practices (ILPs) and Multi-Disciplinary Partnerships (MDPs). ILPs and MDPs are corporations and partnerships respectively that can offer legal services, along with almost any other non-legal service, and are allowed unlimited non-lawyer investment. Other Australian states undertook similar reforms around the same time.

Each ILP or MDP has a designated legal practitioner director or partner, who manages the firm’s legal services and ensures compliance with professional obligations. The firms must also create and implement their own “appropriate management systems” to ensure compliance with professional rules. However, unlike ABSs in England and Wales, ILPs and MDPs in Australia do not have to be licensed by a legal regulator although the Supreme Court may disqualify them for violating certain conduct rules. In other words, it is essentially a registration process.

While the United Kingdom has seen significant outside investment since allowing for non-lawyer ownership, the impact of similar reforms on the relatively small Australian legal services market have been more subdued. ILPs, and to a lesser extent MDPs, have become quite common in the Australian legal scene, but actual outside ownership outside a small handful of prominent examples is still rare and instead these forms are largely adopted because of perceived tax and succession benefits. Indeed, the large majority of ILPs are still solo practitioners and most other ILPs are organized along the lines of traditional law firms.

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151 Id.; Legal Profession Amendment (Incorporated Legal Practices) Act 2000; Part 2.6, New South Wales Legal Profession Act 2004; For a short history of when states allowed for incorporation of legal practices, see, Parker, supra note 5 at 5-6.
152 An ILP may not conduct a managed investment scheme. NSW Legal Profession Act 2004 § 135(2)
155 Legal Profession Act 2004, § 140 and § 169
156 Id at § 140; Sheehy, supra note 64 at 16-18
157 New South Wales Legal Profession Act 2004 § 153
158 Parker, supra note 5 at 12 (ILPs are taxed at the corporate tax rate and it is arguably easier to transfer shares of an ILP to younger colleagues than in a traditional partnership.)
159 See, e.g., VICTORIA LEGAL SERVICES BOARD, ANNUAL REPORT 58 (2013) (In the state of Victoria there were 921 ILPs in 2013 of which 715 were solo practitioners). In New South Wales as of 2014 there were just 85
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i. Personal Injury and Class Action: The Story of Three Firms

Although there has not been a rush of non-lawyer owners into the legal services market in Australia, three law firms, including two major personal injury firms, have now listed on the Australian Securities Exchange. The two listed personal injury firms – Slater & Gordon and Shine Lawyers – are two of the three largest personal injury law firms in the country. The other large personal injury law firm, Maurice Blackburn, has not gone public and continues to be lawyer owned. A comparison of these three personal injury law firms suggests that while publicly listing in the Australian context may not create readily apparent new conflicts of interest, it could more subtly undermine the public-spirited ideals of these firms, influencing the types of cases they choose and the pro bono they undertake. A study of these three firms also casts doubt on whether outside ownership is necessary to achieve large economies of scale, even it may be advantageous, or whether such size in the end improves access to legal services.

In 2013, the personal injury market in Australia was estimated at somewhere between $550 and $700 million (AUD). Contingency fees are not allowed in Australia, but states have varied types of conditional fee arrangements. For example, Victoria and Queensland allow for a 25% increase to a winning solicitor’s hourly fees, but New South Wales does not allow for a similar “uplift” upon winning. Firms with deep pockets are better placed to offer conditional no win no fee arrangements, while tort reform in the early 2000s that included restrictions to the type of advertising allowed in personal injury has tended to favor established brands. This environment has helped lead to consolidation in the personal injury market, and as of 2013 the three largest players were Slater & Gordon (with 20-25% of the market), Maurice Blackburn (with a bit over 10%), and Shine Lawyers (with almost 10%).

Slater & Gordon, founded in Melbourne in 1935, was already a well-known personal injury law firm when it was the first law firm to list on a stock exchange in ILPs with 10 or more lawyers. Interview 20 (March 25, 2014) From the websites of these firms none were offering fundamentally different services than traditional law firms although two, Slater & Gordon and Shine Lawyers, were publicly owned companies.

162 The lack of allowed “uplift” has led firms to complain that in New South Wales they cannot offer legal services for cases they would be able to represent in other states. MAURICE BLACKBURN LAWYERS, RESPONSE TO THE ACCESS TO JUSTICE ARRANGEMENTS ISSUE PAPER 3-4 (Nov. 2013) available at http://www.pc.gov.au/__data/assets/pdf_file/0007/129337/sub059-access-justice.pdf
163 SHINE PROSPECTUS, supra note 69 at 10 (“Tort reform also presents opportunities, particularly in the acquisition of smaller practices which do not have the systems in place to deal with complex regulatory changes.”)
164 SHINE PROSPECTUS, supra note 69 at 10 (estimating Shine had no more than 10% of the personal injury market); RBS Morgans, supra note 161 at 1 (estimating Slater had 20-15% of personal injury market); Interview 16 (June 11, 2014) (noting Maurice Blackburn has slightly larger share of the personal injury market than Shine).
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Australia in 2007.165 At that time it had revenues of $55 million a year, 400 staff in 15 offices,166 and an estimated 10% of the personal injury market.167 However, by 2014 it had expanded to have revenue of $234 million in Australia and employed 1200 people in 70 locations across the country, in addition to having extensive operations in the UK.168 It spends heavily on advertising and in 2014 had about 75% brand awareness across Australia.169 Slater & Gordon is now also the largest provider of family law services, with plans to expand to become a general all-purpose consumer law firm.170

While Slater & Gordon has been able to grow rapidly since it went public, it is worth noting that it was already expanding before it listed.171 Similarly, Shine Lawyers was already well known across the country and had grown markedly before it went public in 2013.172 Maurice Blackburn, the second largest personal injury firm in the country, is not publicly owned. From 2005 to 2013 it expanded at a similar rate to Slater from 10 to 27 offices and from 120 to 800 staff.173 However, most of this growth was internal and it may be that publicly owned firms are at an advantage in acquiring other law firms since they can often offer generous equity packages to incoming partners.

Some have claimed that access to investor capital allows firms like Slater & Gordon to achieve a large enough size so that it can engage in more pro bono work and fund riskier class actions that may further the public interest.174 It is unclear though whether investor capital is necessary for either of these aims and it may even undermine them. Both Shine Lawyers, which only listed recently, and Maurice Blackburn, which is not publicly listed, are better known for their pro bono work than Slater & Gordon.175 Maurice Blackburn and Slater & Gordon are by far the two largest law firms for plaintiff class action work in the country with Maurice Blackburn claiming to be the largest.176 Third party litigation funders (who are able to charge contingency fees in Australia,

166 SLATER PROSPECTUS, supra note 165 at 11. According to its management team Slater pursued a public listing rather than private equity because it provided more money, was easier for mergers, and allowed for better management systems. Andrew Grech and Kirsten Morrison, Slater & Gordon: The Listing Experience, 22 GEO. J. LEGAL ETHICS 535 (2009)
167 SLATER PROSPECTUS, supra note 165 at 23.
168 SLATER AND GORDON ANNUAL REPORT 2 (2014)
169 Id. at 11; In 2004 (before Slater went public) a survey found that the firm had 60% national brand awareness. SLATER PROSPECTUS, supra note 165 at 24.
170 SLATER PROSPECTUS, supra note 165 at 10
171 Interview 16 (June 11, 2014); Shine Prospectus, supra note 69 at 14-15
173 Sheehy, supra note 64 at 24 (“With its increased financial power supplemented by the litigation funders, Slater has been able to prosecute actions against large MNCs more effectively.”)
174 Interview 15 (April 18, 2014); Interview 16 (June 11, 2014) (Independent observers of the Australian market both noting that Maurice Blackburn and Shine Lawyers had stronger reputations for pro bono work than Slater & Gordon.)
175 Maurice Blackburn Lawyers, supra note 173 at 16; VINE MORABITO, AN EMPIRICAL STUDY OF AUSTRALIA’S CLASS ACTION REGIMES – FIRST REPORT 28 (2009) (finding that Slater & Gordon (49 proceedings) and Maurice Blackburn (33 proceedings) were involved in the most class action proceedings between 1993 and 2009)
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unlike solicitors) finance a large percent of the class actions of both these firms.¹⁷⁷ These third party litigation funders favor securities class actions and are less likely to fund consumer and product liability class actions, which must instead be funded directly by the law firms themselves.¹⁷⁸ Slater & Gordon may actually be less likely than Maurice Blackburn to directly take on the costs of these class actions because it must answer to the market, instead of the firms’ partners.¹⁷⁹ For example, when Slater & Gordon lost a major consumer drug class action in 2012 it led to a 10.5% profit loss for the firm that year. This very public defeat led its chairman to reassure the market that most of the rest of its class action portfolio was funded by third-party litigation funders.¹⁸⁰

Indeed, critics of non-lawyer ownership in Australia argue that publicly listing orients the culture of a firm towards investors’ expectations. The chairman of Maurice Blackburn has announced his firm's intention to stay privately owned, claiming that it does not “. . . want to compromise the quality of [its] work . . . If you are a publicly listed company, then you will have to grow according to market forecast[s].”¹⁸¹ To meet these projections some maintain that publicly listed firms do not take on riskier cases (such as large consumer class actions), shun pro bono (particularly controversial cases), and that they may even pressure their lawyers to settle cases to meet fiscal targets (although such claims have not been proven).¹⁸²

Even though the listing of law firms in Australia has not created the same types of clear conflicts of interest, as other types of non-lawyer ownership, such as insurance companies owning personal injury firms in the UK, the Australian experience does suggest that listing publicly could undermine some of the public spiritedness of these firms. This could reduce access for certain groups that would benefit from pro bono or certain kinds of class actions. The rapid growth of Maurice Blackburn and Shine Lawyers (before it went public) should also lead one to question whether non-lawyer ownership is necessary to achieve large economies of scale, even if it may give these firms a competitive advantage in acquiring other firms. Finally, some have expressed concern

¹⁷⁷ For an overview of the reasons behind the development of litigation funders in Australia, see Samuel Issacharoff, Litigation Funding and the Problem of Agency Cost in Representative Actions, New York Univ. Law and Economics Working Papers 7-13 (2013); For an overview of the relevant law, see, LAW COUNCIL OF AUSTRALIA, REGULATION OF THIRD PARTY LITIGATION FUNDING IN AUSTRALIA (2011);
¹⁷⁸ Interview 16 (June 11, 2014) (academic expert on class actions noting that third party litigation funders are more likely to fund corporate class actions); Samuel Issacharoff and Thad Eagles, The Australian Alternative: A Review from Abroad of Developments in Securities Class Actions, 14-23 NYU LAW & ECONOMICS WORKING PAPER SERIES 1, 3 (2014) (finding third party funding litigation funders disfavor large consumer class actions because they must contract with each party that will be a claimant).
¹⁷⁹ Interview 16 (June 11, 2014) (arguing that since Slater is a public company it is less likely to take on riskier cases).
¹⁸⁰ Stephanie Quine, Failed Vioxx action hits Slaters' profit, LAWYERS WEEKLY, Aug. 28, 2012 available at http://www.lawyersweekly.com.au/news/failed-vioxx-action-hits-slatter-profit (Andrew Grech reportedly stated that “While it was very disappointing, I think the important thing to emphasis is it’s very much a once-off situation and certainly not indicative of what’s in the portfolio of cases we have in the future, most of which, in the class action area, are funded by third party litigation funders now.”)
¹⁸² Interview 27 (Aug. 17, 2014)
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that non-lawyer ownership has led to an unhealthy consolidation of the Australian personal injury market leading to a decrease in choice for consumers without necessarily improving the quality of services or making them less expensive.183

C. United States

Non-lawyer ownership of legal services is banned in all fifty U.S. states, although Washington D.C. allows for minority non-lawyer ownership, mostly to accommodate law firms with partners who are lobbyists, but not lawyers.184 In the face of perceived competition from accounting firms, the American Bar Association (ABA) seriously considered allowing for multi-disciplinary practice, which included non-lawyer ownership, in the late 1990s, but this was rejected amidst deep resistance from the bar whose suspicions about its dangers were heightened in the wake of the Enron scandal.185 In 2012, the ABA’s Commission on Ethics declined to develop a proposal that would have allowed for limited non-lawyer ownership and the same year a task force of the New York State Bar considered and rejected recommending non-lawyer ownership.186

Unlike its counterparts in the United Kingdom and Australia, the U.S.’s competition body, the Federal Trade Commission, has not been active in pushing for non-lawyer ownership, in part because of barriers created by U.S. federalism.187 Jacoby & Meyers, a large branded personal injury and consumer law firm,188 has brought litigation

183 Cristin Schmitz, PI bar warns of fallout if ABS comes, THE LAWYERS WEEKLY (Aug. 29, 2014) (quoting Charles Gluckstein commenting on how he thinks Australia has become a “monopoly [personal injury] market”)
186 James Podgers, Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals, ABA JOURNAL, June 1, 2012; NYSBA REPORT, supra note 11
187 The Supreme Court has held that the Sherman Act does not apply to “state action”. Parker v. Brown, 317 U.S. 341, 1950-51 (1943) This has allowed professions to restrict competition if the state clearly articulates and affirmatively expresses the challenged restraint. California Retail Liquor Dealers Ass’n vs. Midcal Aluminum, Inc. 445 U.S. 97, 97 (1980)
188 Jacoby & Meyers was well known as one of the major “franchise law firms” that some thought would transform the U.S. legal services in the 1980s and 1990s because of their ability to have national brands and economies of scale. See, e.g., Carroll Seron, Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 68 (Nelson, Robert L., Trubek, David M., and
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in federal court in New York claiming that the ban on non-lawyer ownership is unconstitutional and limits access to the civil legal system. The firm argues that it does not have access to capital like its non-lawyer owned competitors, such as LegalZoom, that are able to invest heavily in technology and advertising. It asserts that it brings the lawsuit “to free itself of the shackles that currently encumber its ability to raise outside funding and to ensure American law firms are able to compete on a global stage.”

While non-lawyer ownership of legal services per se is barred, this section examines two examples of sectors in the U.S. that provide close parallels: online legal services (in particular legal services provided by the company LegalZoom) and social security disability representation (in particular services provided by the company Binder & Binder).

i. Online Legal Services and LegalZoom

LegalZoom is an online legal services company that provides an example of a non-lawyer owned company that has innovated in the legal services market, invested heavily in technology and advertising, and achieved large economies of scale. However, it is unclear how much it, and other companies like it, has increased access to legal services for poor and moderate-income populations. It has also been able to achieve its growth in a regulatory environment that bars non-lawyer ownership, while similar online legal service companies have not developed in either the UK or Australia, although LegalZoom could potentially offer a superior service if the ban on non-lawyer ownership was lifted.

As of 2014 LegalZoom had over 800 staff, more than $200 million in revenue, and offered legal plans in 42 U.S. states. In 2011, LegalZoom’s customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using their online legal platform. The company was


190 Interview 11 (Feb. 7, 2014)


192 For example, in 2011, LegalZoom had about $150 million in operating expenses of which sales and marketing was $42 million and technology development $8.1 million. LegalZoom SEC filing, supra note 194 at 7. It provides equity-based compensation to its management team as well as key employees in marketing and technology development. Id. at 39

193 Interview 14 (April 15, 2014)

194 United States Securities and Exchange Commission, LegalZoom.com, inc., Form S-1 Registration Statement under the Securities Act of 1933, p. 36 (May 10, 2012), available at
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founded in 2001 by a small group of law graduates based in California. Today its management team is made up mostly of non-lawyers and it has a number of private equity investors.195

LegalZoom provides legal services mainly to small businesses and individuals. They offer flat fee rates for self-guided legal documentation services such as registering a company or creating a will. They also provide legal plans for their customers at set rates. For example, in 2014 they charged $15 a month for an individual to speak with an attorney regarding “estate planning, contracts and other new legal matters”.196 While LegalZoom has its own lawyers on staff that develop the guided forms that their customers use to create customized legal documents, the company contracts with third party panel law firms to service their legal plan customers.197 These panel law firms have dedicated lawyers that work with LegalZoom customers over the phone and online. The lawyers in these firms, not LegalZoom, are liable for their advice and the partner of the contracted firm is responsible for selecting, training, and supervising the attorney that services LegalZoom customers.198 After each customer interaction LegalZoom surveys customers on their experience with their lawyer.199 Since customers are not necessarily well positioned to determine the quality of the legal advice they receive, LegalZoom also hires a third party law firm to “secret shop”, or pretend to be customers, by calling LegalZoom affiliated lawyers with mock legal problems. Based on input from these sources, LegalZoom then analyzes a lawyer’s work and discusses their performance with contracted law firms.200

LegalZoom has confronted legal challenges to its business model. Litigants have claimed since non-lawyers own equity stakes in the company it is legally barred from offering legal services and so its services amount to the unauthorized practice of law. At the bottom of its homepage LegalZoom has a disclaimer that reads in part: “. . . LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.”201 In its terms of use listed elsewhere on the website it makes clear that “claims arising out of or relating to any aspect of the relationship between us” will be resolved through binding

http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm [hereinafter LegalZoom SEC filing]
197 Interview 14 (April 15, 2014)
198 Id.
199 Id.
200 Id.
201 legalzoom.com
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It also details that “Any arbitration under these Terms will take place on an individual basis; class arbitrations and class actions are not permitted.”

LegalZoom has so far either won or settled legal challenges that claimed their services amount to the unauthorized practice of law. Importantly, relying on recent U.S. Supreme Court jurisprudence, the Arkansas Supreme Court in LegalZoom.com v. Jonathan McIllwain 2013 Ark. 370 found that LegalZoom’s arbitration clause, including its ban on class actions, was enforceable. Without the economic incentives of a class action at the disposal of plaintiffs (and their lawyers), fewer litigants will likely bring claims against LegalZoom in the future and even where they do, if they are successful, their victories will be more limited. As LegalZoom, and companies like it, continue to expand, and more customers rely on them, it will also become increasingly impractical for a court–or perhaps even a legislature–to bar their business model.

If the ban on non-lawyer ownership were lifted LegalZoom would not only face fewer litigation challenges, but it would not have to rely on partnerships with outside lawyers and could hire lawyers to directly provide services to its customers. This would increase the company’s control over the lawyers that service its customers, potentially allowing the company to provide a better service at a lower price.

Still, the impact of LegalZoom and companies like it so far on access to legal services is not well documented. Anecdotally, they have put pressure on prices and so likely increased access. Yet, a company like LegalZoom is aimed primarily at small businesses and the upper middle class. In other words, people with the capacity to know they have a legal problem and the resources and savviness to be able to seek out its answer on the internet and pay for it.

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203 Id.
205 The Arkansas Court relied heavily on the US Supreme Court’s decisions in Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006) and AT&T Mobility v. Concepcion, 563 U.S. 321 (2011). In Cardegna the U.S. Supreme Court held that under the Federal Arbitration Act (FAA) the legality of an arbitration clause could only be decided by an arbitrator unless the clause itself was challenged (such as if the contract had been entered into through fraud). In AT&T the U.S. Supreme Court found that the FAA preempted state laws that banned contracts that prohibited class-wide arbitration. The Arkansas Supreme Court held that this line of U.S. Supreme Court jurisprudence barred the state’s courts from hearing the plaintiff’s challenge, but did refer the case to its Committee on the Unauthorized Practice of Law. In American Express Co. v. Italian Colors Restaurant 133 S. Ct. 2304 (2013) the U.S. Supreme Court continued this line of precedent further, finding in a five to three decision that under the Federal Arbitration Act a court is not permitted to invalidate a contractual waiver of class arbitration on the reasoning that the cost of an individual plaintiff of arbitrating a federal statutory claim exceeds the potential recovery.
206 But see, Terry Carter, LegalZoom hits a legal hurdle in North Carolina, ABA JOURNAL, May 19, 2014 (noting a North Carolina judge extending the life of a case by North Carolina bar claiming LegalZoom’s services amount to the unauthorized practice of law).
207 Interview 14 (April 15, 2014)
208 Interview 14 (April 15, 2014)
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Will-writing provides an example of both how hard it is to assess the access impact of companies like LegalZoom and a reason to believe it might be limited. Many people, even with minimal assets, could benefit from having a will (or at least their family or heirs would). One might hypothesize that the proliferation of websites that offer will-writing services like LegalZoom would increase demand for wills both through driving down prices and raising awareness of the need for a will through advertising. However, a periodic Harris Interactive survey has found that the number of Americans with wills has remained relatively unchanged in the past decade. According to the survey, it was 42% in 2004, 45% in 2007, 35% in 2009, and 43% in 2011. Data from probate courts in at least one state seems to back up this conclusion. In Massachusetts’ probate court in 2002 in about 32% of cases filed the deceased had no will. Slightly over ten years later in 2011 this rate was essentially unchanged at 31%.

While the survey and Massachusetts probate court data indicate there has been little movement in the number of people without wills this does not mean that companies like LegalZoom have had no positive access benefits. Perhaps without LegalZoom and companies like it the number of people without wills in Massachusetts or elsewhere would have increased significantly and instead the number has remained relatively steady. However, it does not seem the presence of such companies have been able to

209 Others prominent online legal service companies that offer will-writing services for the U.S. market include rocketlawyer.com and nolo.com.
211 Importantly, while the survey data does not tell us what number of Americans should have a will, the probate court data is more suggestive. Since the deceased’s heirs went to probate court these were instances where the deceased did have some property, that they had not undertaken other forms of estate planning (or these were insufficient), and so they may have benefitted from having a will. As the below table shows, in Massachusetts there has been little change in the number of cases filed in probate court where the deceased had no will between June 30th 2002 and June 30th 2011. (Note: data for 2008 and 2010 was not available. After 2011 changes in the law meant Massachusetts no longer tracked whether there was a will in a probate filing).

Massachusetts Probate Courts (source: email correspondence with Massachusetts Probate courts April 25, 2014)

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<tbody>
<tr>
<td>No. of Probate Filings</td>
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<td>21420</td>
<td>22152</td>
<td>21979</td>
<td>21384</td>
<td>21244</td>
<td>20322</td>
<td>20645</td>
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<tr>
<td>Filings with Will</td>
<td>13279</td>
<td>14488</td>
<td>14800</td>
<td>14756</td>
<td>14264</td>
<td>14345</td>
<td>13758</td>
<td>14226</td>
</tr>
<tr>
<td>Filings without Will</td>
<td>6273</td>
<td>6932</td>
<td>7352</td>
<td>7223</td>
<td>7120</td>
<td>6899</td>
<td>6564</td>
<td>6419</td>
</tr>
<tr>
<td>% of Filings without Will</td>
<td>32.1%</td>
<td>32.4%</td>
<td>33.2%</td>
<td>32.9%</td>
<td>33.3%</td>
<td>32.5%</td>
<td>32.3%</td>
<td>31.1%</td>
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</tbody>
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212 None of the survey or probate data collected indicates whether the price of making a will changed between 2001 and 2011. A number of variables may be masking a positive potential impact on access created by companies like LegalZoom. Perhaps, the rates of lawyers who created wills increased during this period and companies like LegalZoom were able to help partially fill the access gap. It may also be that these online websites are not increasing access even if they may be more convenient. Perhaps other affordable will-writing resources, like books on how to write your own will, had already saturated the market by the time companies like LegalZoom started offering services and so these new online providers simply attracted customers that would have otherwise
significantly increase the number of people with wills. Nor is the quality of LegalZoom’s wills compared to wills drafted by more traditional law firms well documented. Overall, it is unclear what impact a company like LegalZoom has on access to legal services, and how dependent their strategy is to jurisdictions adopting non-lawyer ownership.

ii. Social Security Disability Representation and Binder & Binder

In 2014 about 8.4 million Americans received Social Security Disability assistance. When applying for this assistance, claimants can represent themselves or be represented by an attorney or a registered non-attorney representative. Disability representatives, whether they are attorneys or non-attorneys, frequently act on a contingency fee basis and are paid by the Social Security Administration (SSA) 25% of any back award owed to the claimant, up to $6,000. In 2013, the SSA paid out about $1.2 billion to these disability representatives. Several disability representation companies are non-lawyer owned. Non-lawyer owned representation services often rely on non-attorney representatives while law firms often rely on lawyers in representing claimants. Therefore, it is frequently difficult to disentangle whether it is non-lawyer ownership or non-lawyer representation that is driving differences between firms. Still, the experiences of this sector provide another example of how non-lawyer ownership may allow some companies to scale, but not necessarily significantly increase access. Non-lawyer ownership in this sector may also amplify and formalize behavior that may undermine standards of professional practice.

Binder & Binder is one of the largest providers of social security disability representation in the United States. Binder started as a law firm in 1975, but incorporated in 2005. It is not public knowledge whether Binder started receiving non-

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213 The available data also does not tell us about the quality of the wills LegalZoom helps it customers create. A survey of will-writing in the UK found that online self-completion wills were significantly more likely to be judged not to be legally valid or to fail to fulfill the client’s wishes. IFF RESEARCH, UNDERSTANDING THE CONSUMER EXPERIENCE OF WILL-WRITING SERVICES 56 (2011) available at http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf
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lawyer investment in 2005, but in 2010 the venture capital firm H.I.G. reportedly bought a major stake in the company. Binder’s share of SSA payments to representatives increased from about 3.25% of the total in 2005 to 6% in 2010 (or approximately $88 million). Binder has been successful at expanding their customer base through investment in advertising and marketing, but the prevalence of contingency fees in disability representation means that most clients with strong claims probably could already find free representation even before Binder’s growth. In expanding its volume of customers Binder may arguably reach more individuals with riskier, but valid, claims. On the other hand, Binder may provide lower quality representation, causing more lost claims than otherwise would occur, but because of their high turnover still win enough cases so that their business model is profitable. Indeed, some disability lawyers complain that Binder’s streamlined emphasis on the bottom line has led to a deterioration of standards in the field that has “infected law firms” normalizing and nationalizing harmful practices, such as representatives not meeting clients until the day of their hearing. Binder has also been subject to complaints accusing them of ethical violations, such as not sharing damaging evidence against their clients with the SSA as required by law. Despite these allegations, Binder likely engaged in some of its more controversial business practices before they incorporated or had non-lawyer investors. Further, lawyer owned firms representing disability claimants have also been criticized for their questionable tactics. In the end, non-lawyer ownership may have allowed a firm like Binder to more effectively spread their business model, but likely did not create the tactics that some claim have helped undercut professional norms in the sector.

III. Towards a Fresh Understanding of Non-Lawyer Ownership

Changes in ownership rules do not directly challenge lawyers’ monopoly in providing legal services. However, they do help determine what type of ecosystem lawyers are a part of and the degree to which the profession is integrated, or distinct, from the rest of the market. Those who advocate for more integration by allowing non-lawyer ownership frequently argue this will lower prices and increase access and quality. Those who oppose greater integration worry it will undercut ethical and professional distinctiveness and create new conflicts. The country and case studies in this article show

directly from the SSA so they no longer had to collect payments from clients (previously only attorneys had been given this benefit)).

219 Paletta and Searcey, supra note 217
220 Id.
221 Interview 22 (Aug. 8, 2014) (noting that “Non-lawyers brought a different ethos that infected law firms. . . . It use to be unthinkable 20 years ago that you would go to a hearing and have never met the client before, but now it’s not just Binder & Binder that does it but many lawyers.”)
222 Id.
that while both sets of claims have merit, they also miss critical components of non-lawyer ownership’s likely impact.

A. Context Matters: A Taxonomy of Variables

The actual scale and form non-lawyer ownership takes is impacted by variables that are often overlooked, or under-emphasized, in the non-lawyer ownership debate. These variables include the type of non-lawyer owner, the sector of legal services at issue, the regulatory environment surrounding non-lawyer ownership and the broader profession, and the nature of the legal services and capital markets in a jurisdiction. More fully taking into account these variables can help regulators better predict the likely impact of non-lawyer ownership in different contexts, aiding them in their ability to craft appropriate regulation.

Ownership Variation

Not all types of non-lawyer owners of legal services are the same. Legal service enterprises may be publicly listed, owned by private outside investors, worker owned, consumer owned, government owned, or owned by a company that also provides other goods or services. Each type of ownership creates different kinds of pressures on an enterprise offering legal services. For example, a publicly listed firm like Slater & Gordon may be more likely to make decisions to satisfy the broader public investor climate, whether this means focusing on meeting projected targets or avoiding negative publicity. Consumer owned firms, like the Co-Operative in the United Kingdom, may be better able to follow a social mission when offering legal services. A company that also offers other services may be more likely to offer legal services geared towards increasing the bottom line of the core business of that company, potentially creating more conflicts of interest. Private equity investment may be particularly drawn to companies like LegalZoom that hold out the promise of technological or other innovations in legal services that could lead to large profits in the short to mid-term. Recently in England and Wales municipal governments have started their own law firms to provide legal services to both themselves and other local governments and non-profits for a fee. These new government owned enterprises could further the public interest by generating profits for the government exchequer or being able to better serve public clients, but they

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224 Hansmann, supra note 27 (describing why different industries may be more amenable to certain types of owners in different country contexts).
225 See Part II(C)(i)
226 See Part II(A)(ii)
227 For example, insurance companies entering the legal services market may be more likely to view legal services as a spin off from its core insurance business whose interests should remain paramount. See Part II(A)(i) for such a possible instance in the United Kingdom.
228 Online legal service platforms like LegalZoom have witnessed private investment. See Part II(C)(i); Binder & Binder has also seen private equity investment although it relies less on technology. See Part II(C)(ii). The presence of private equity investment in these two examples may also be linked to their presence in the U.S. where there is a more developed capital market.
also may present the opportunity for new conflicts of interest and the introduction of an unwelcome commercial orientation into government lawyering. Which types of ownership of legal services come to predominate in the future will have an important impact on what types of new conflicts of interest may develop, the public-spirited orientation of the profession, and non-lawyer ownership’s impact on access to legal services.

Legal Sector Variation

Vitally, and under-appreciated in the non-lawyer ownership debate, certain sectors of legal services are more likely to witness much more non-lawyer ownership than others. In particular, non-lawyer investor ownership seems more probable in areas of the law that are amenable to economies of scale, where the work can be more easily standardized, and where other non-lawyer costs may be high (such as advertising, administration, or technology). In this way, the impact of non-lawyer ownership should be viewed differently depending on the sector of legal services at issue, with some sectors likely to be transformed—with potential access benefits and professionalism concerns—and others being only marginally affected.

Notably, in Australia and England and Wales the personal injury sector has seen a disproportionately large amount of non-lawyer investment. This investment may be because personal injury has historically had high advertising costs, large profits, and a relatively routine and high volume workload of cases that is often handled by non-lawyers and results mostly in settlement. Meanwhile, areas like criminal law or immigration have seen much less non-lawyer ownership so far, perhaps because clients seek more individualized attention and the relative skills of a particular lawyer may matter more to the outcome of a case.

Variation in the Regulation of the Legal Profession

The broader regulatory environment of legal services in a jurisdiction also shapes how non-lawyer ownership develops. In the UK, a new ban on referral fees, which insurance companies once counted as an important source of revenue, led them to buy their own affiliated personal injury law firms. A ban on contingency fees in Australia, and conditional fees that vary by state, has arguably favored larger personal injury firms in the country who are better able to navigate this more complex regulatory environment as well as spread their risk across larger portfolios.

How non-lawyer ownership itself is regulated helps determine its prevalence as well. In Australia, non-lawyer owned enterprises in legal services simply need to register with the appropriate regulator, while in England and Wales they must be licensed. The

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230 See Part II(A)(i) and Part II(B)(i)
231 Nora Freeman Engstrom, Sunlight and Settlement Mills, 86(4) NYU Law Rev. 805, 810 (2011) (describing how in the U.S. settlement mills use a disproportionate number of non-lawyers to settle routine personal injury matters).
232 See Part II(A)
233 See Part II(A)(i)
234 See Part II(B)(i)
235 See Part II(B)
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more burdensome licensing requirement in England and Wales likely reduces the amount of non-lawyer ownership that might otherwise occur. On the other hand, in Australia a lawyer must manage non-lawyer owned enterprises, while in England and Wales a lawyer only has to be part of the management team. This more stringent requirement may discourage some non-lawyer investors from entering the legal market in Australia.

Variation in Capital and Legal Services Markets

Finally, the size of a country’s capital and legal services’ markets help determine the amount and type of non-lawyer ownership one can expect in a jurisdiction. Countries like Australia, without as well developed private equity markets and a relatively small legal services market, have seen far less ownership by non-lawyers than in the United Kingdom, where the population is almost three times larger and there is a broader and deeper range of potential investors. Despite a regulatory environment that generally bars non-lawyer ownership, the United States has seen much greater investment in and the rise of more online legal service companies than either the UK or Australia, likely in part because the U.S. capital markets are more robust and the legal services market is substantially larger and so creates a more suitable environment to scale online legal services.

If more jurisdictions allow for non-lawyer ownership, in full or in part, one would expect to see an increased number of multi-national legal service companies like Slater & Gordon. Their presence may reduce some of the inter-country differences that have marked the early days of non-lawyer ownership, as these multi-national companies would have access to both legal service and capital markets in different countries allowing them to scale their services more uniformly across jurisdictions. However, in a field like law, models developed in one jurisdiction often cannot be directly adopted to another jurisdiction given significant national and sub-national differences in law and the regulation of legal services. This means the size of relative markets, and the available capital within them, will likely continue to be meaningful variables in the scale and

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236 New South Wales Legal Profession Act, supra note 34; The Law Society, supra note 35
239 See Rose, supra note 94
diversity of non-lawyer owned enterprises delivering legal services that each jurisdiction can sustain.

B. New Business Models, but Questionable Access Benefits

While different contexts matter to how non-lawyer ownership develops, or does not, the country studies presented in Part II all provide support to those that argue non-lawyer ownership can, in some circumstances, lead to new innovation in legal services, larger economies of scale and scope, and new compensation structures. Yet, perhaps counter-intuitively, there is little evidence from the country and case studies to indicate that these changes have substantially improved access to civil legal services for poor to moderate-income populations. These findings may be partly the result of limited data and one could speculate that non-lawyer ownership in the future could bring notable access gains in some sectors, but there are also at least four reasons to believe that non-lawyer ownership may not lead to as significant or sweeping access gains as some proponents suggest.

First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where non-lawyer ownership is allowed. For example, a bankrupt tenant facing an eviction is provided few new options by non-lawyer ownership. After cuts in legal aid in the UK, only in about 25% of divorces did both parties have representation in private family law disputes, indicating that the legal market, even a deregulated one, is unlikely to address the legal needs not only of many of the poor, but also of middle income persons who cannot or will not spend the money to purchase the frequently rather sophisticated legal services they require.

Second, many of the legal sectors, like personal injury and social security disability representation, that have seen the greatest investment by non-lawyers will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies. Instead, competition amongst personal injury or social security disability representation providers is more focused on reaching persons with credible claims in the first place.

Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy to standardize or scale. Much legal work is complicated and requires the individualized attention of an experienced practitioner who often charges high rates. Even though many legal problems (although certainly not all) may have relatively uniform remedies, an experienced practitioner is needed to determine, case by case, the legal problem confronting the client before

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240 PLEASANCE AND BALMER, supra note 45 at 100-101 (noting that respondents to a legal needs survey in England and Wales were more likely to contact lawyers for severe problems and that there were clear links between social disadvantage and legal capability).

241 Ministry of Justice, supra note 148 (indicating that even before recent legal aid cuts only 50% of the time did both parties in private family law disputes have legal representation).

242 For an overview of the regulatory framework for conditional fee arrangements in England and Wales, see, LONDON ECONOMICS, supra note 107 at 14-16; For a similar overview for Australia, see, LAW COUNCIL OF AUSTRALIA, supra note 177
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tailoring an appropriate solution. Non-lawyer ownership may not be able to overcome this challenge in a significantly more efficient way than a traditional worker owned partnership model. Indeed, where the attention of a lawyer is the primary input into a service, and other capital costs are low, a worker owned model could provide advantages over investor ownership.

Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have ability to do so, either because they do not believe they need a legal service or there are cultural or psychological barriers to accessing the service. For example, even if the price of preparing a will decreases many persons still may not purchase one because they do not like to contemplate their own death or do not perceive a will as a need. In other words, for some civil legal services there may not be as much price elasticity in the market as proponents of deregulation as an access strategy suggest.

C. Distinct Challenges to Professionalism

While non-lawyer ownership’s advocates claims that it will significantly increase access are largely unsubstantiated by the available evidence, those who oppose non-lawyer ownership on the grounds it will undercut professionalism often make claims that are simply too sweeping. Take concerns about commoditization and public spiritedness. Although certainly non-lawyer ownership can place new pressures to increase profits on legal service enterprises, lawyers at many firms were arguably already predominantly driven by this desire. Further, some forms of non-lawyer ownership, such as consumer owned firms, might actually be more likely to pursue a public-spirited mission than a lawyer owned firm. Still, while critics of non-lawyer ownership can over-generalize or

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243 In this way legal services may be an example of Baumol’s cost disease or the proposition that salaries in occupations with little or no increase in labor productivity will rise at corresponding rates to occupations where there has been increases in productivity, making goods or services produced by those occupations inflicted with Baumol’s cost disease relatively more expensive. Health care, education, and the arts are other fields where labor productivity has generally lagged behind other sectors, such as manufacturing, increasing the relative cost of these services. See, William J. Baumol, Health care, education and the cost disease: A looming crisis for public choice, 77 PUBLIC CHOICE 17(1993)

244 For example, Hansmann argues worker owned enterprises may be able to better overcome monitoring challenges than some investor owned enterprises. Henry Hansmann, When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy, 99 YALE L.J. 1749, 1761-62 (1989-1990); but see, Andrew von Nordenflycht, Does the emergence of publicly traded professional service firms undermine the theory of the professional partnership? A cross-industry historical analysis, 1(2) J. OF PROFESSIONS AND ORGANIZATION (2014) (arguing that the proposed benefits of partnerships versus public ownership are largely illusory).

245 Rebecca L. Sandefur, Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services, in MIDDLE INCOME ACCESS TO JUSTICE 244 (Trebilcock, Duggan, & Sossin eds. 2012) (noting that the cost of lawyers is one important factor in explaining why justice problems are not taken to lawyers, but that other factors, like what people perceive as a legal problem, are also significant).

246 See Part II(C)(ii) (observing little change in the number of persons with wills in the United States and Massachusetts).

247 For example, Co-Operative Legal Services in the UK, see Part II(A)(i); Similarly, labor unions in the UK have begun to invest in their own law firms, although this may mostly be to recapture referral
over-estimate its impact, non-lawyer ownership in some contexts can change how legal services are offered in a way that is detrimental to consumers, the public, or the legal system more broadly.

Conflicts of Interest

The interests of traditional law firms do not always perfectly align with their clients' interests, but enterprises that offer legal services that also have other commercial interests are more likely to have conflicting and potentially adversarial interests to their clients. For instance, since insurance companies in the UK have an interest in reducing the amount they compensate claimants there is a concern that they may have a conflict of interest in acquiring plaintiff personal injury firms, who often bring claims that impact insurance companies. These enterprises may act to either shape outcomes of cases or the overall regulatory environment in a way that is beneficial to the insurance industry, but not necessarily their clients.

Where government outsources functions related to the legal system—like prison or probation services—there is a greater possibility for conflicts of interest to arise. These conflicts can cast doubt on the integrity of the legal system, undermining the public’s trust in very real, if sometimes hard to measure, ways. Capita, a large business process outsourcer with multiple contracts with the UK government, has recently entered the legal services market by buying a law firm. Before buying this law firm, Capita already helped run the UK’s migrant removal process and, separately, one of the government’s telephone hotlines to assess litigants’ entitlement to legal aid. While perhaps not a direct conflict of interest, those active in legal aid have expressed concern that immigrants who were worried about the legality of their immigration status would not call the legal aid hotline out of fear that Capita might then try to deport them. This conflict existed before Capita had started its ABS, but similar conflicts could arise in the future with its affiliated law firm, particularly if it began providing legal aid.

Employees of companies that deliver outsourced public services often do not have the same duties as government employees to not further their own (or their company’s) financial interests. In this context, non-lawyer ownership creates new possibilities for

248 As Susan Shapiro notes, one of the primary sources of conflicts of interest for a fiduciary is the diversification and growth of their organization. SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE 5 (2002)
249 See Part II(A)(i)
253 Interview 3 (Jan. 10, 2014)
254 KATHLEEN CLARK, ETHICS FOR AN OUTSOURCED GOVERNMENT (2011) (describing in the U.S. context how outsourced employees do not face the same ethics standards as government employees).
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self-dealing. For instance, attorneys contracted to provide legal aid assistance may refer clients to other services offered by their company, whether or not it was in the client’s best interest. Alternatively, a company contracted by a government agency, like the Social Security Administration in the United States, could attempt to use its insider knowledge to benefit those it represents before that agency.255

Some potential conflicts that may undercut public trust or potentially have long-term detrimental impact to the legal system can be so nebulous that they are difficult to regulate. Walmart is one of the largest employers in the United States and is frequently criticized for their employment practices.256 If Walmart started offering legal services in the United States, including employment law, some may question if they have a conflict of interest even if lawyers in their stores never directly represented their clients against Walmart. One could argue that Walmart has an interest in shaping employment law in the United States in a direction beneficial to the company and so it is troubling if they start representing a large number of workers for employment claims. At the very least, it may lead some to have less faith in the integrity or fairness of the justice system. However, the amorphous nature of such a potential conflict makes it difficult for a regulator to justify specifically barring Walmart, and not other retailers, from entering the legal services market in employment law.

Finally, non-lawyer ownership not only can create new conflicts of interest, but also can be used to bypass professional regulation, particularly for enterprises offering multiple services. For example, in England and Wales insurance companies, which once referred injured customers to personal injury firms, have bought up these same firms in part to bypass a new ban on referral fees.257 Similarly, non-lawyer ownership could potentially be used to bypass other regulation such as restrictions on advertising or fee arrangements (particularly where non-lawyers are allowed to enter contingency fee arrangements, but lawyers are not, such as in Australia). If one believes these professional rules serve a purpose, such bypass should be of concern to both regulators and the public.

Undercutting Public Spirited Ideals

In some situations non-lawyer ownership can undercut the public-spirited ideals of the profession. Lawyers may not have as an altruistic identity as doctors or the clergy, but most lawyers would acknowledge that the pursuit of profit should not be the sole goal

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255 For example, the SSA awarded Social Security Disability Consultants, a major social security representation company, a contract in 2006 to study the value of vocational expertise in the disability determination process. Federal Business Opportunities, Experts to Study the Value of Vocational Expertise at All Adjudicative Levels of the Disability Determination Process, available at https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=7f5130f6fe72ddabc923fad66c1f5ece Maximus, which has undertaken social security representation, also has been a major contractor for the SSA, particularly for its work training and placement program. Charles T. Hall, Maximus also has conflict, SOCIAL SECURITY NEWS, Jan. 27, 2006, available at http://socsecnews.blogspot.com/search?q=maximus+conflict


257 See Part II(A)(i)
of those in the profession nor making money the only, or even dominant, criteria for determining what characterizes a “good lawyer” or a “good law firm.” Many lawyers, and the profession more broadly, value furthering the rule of law, pro bono assistance to the needy, acting as a check on government or corporate power, competent assistance, and other social values. Non-lawyer ownership in some situations can subvert these public-spirited ideals in at least two ways.

First, legal service providers with outside investors are likely to be concerned about the enterprise’s reputation within the investor community. The failure to meet a projected financial target can lead to a drop in stock price or the loss of a needed private equity investor. Such concerns about reputation may make these enterprises more likely to focus on meeting investors’ targets, as is alleged of publicly listed firms in Australia, at the expense of more public-spirited goals, such as pro bono work or taking on riskier class actions that further the public interest. Importantly, lawyer employees, or lawyer co-owners, may change their behavior to be less public spirited not directly on the orders of non-lawyer owners, but rather if they merely believe such a change will help increase their firm’s reputation in this investor community.

Second, legal service providers that provide other services may be less likely to offer legal services to publicly unpopular clients out of fear of harming the larger brand of their company or because others in the company do not appreciate the value of servicing these clients. For example, in the United Kingdom the management at the Cooperative Group was initially concerned about Cooperative Legal Services having certain kinds of clients, such as men who had abused their wives, whose association might end up tarnishing their larger brand. This potential problem has ended up being more hypothetical, as Cooperative Legal Services markets themselves as offering services to resolve disputes as amicably as possible, thereby attracting fewer of these clients that are likely to be actively vilified by the public. The example though raises the specter that unpopular clients, who already face discrimination from some law firms today, might be further marginalized and have fewer alternatives in a market with a small

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258 While the literature on commodification argues some things should not be bought or sold (like body organs), the point here is slightly different. See e.g. MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); MARTHA M. ERTMAN AND JOAN C. WILLIAMS, RETHINKING COMMODIFICATION (2005) It’s not that legal services or medical services should not be bought or sold, but rather that other factors besides price and profit should be part of a lawyer’s or doctor’s decision on when to provide their services.

259 For example, a RAND study of class actions in the U.S. found “plaintiff attorneys seemed sometimes to be driven by financial incentives, sometimes by the desire to right perceived wrongs, and sometimes by both.” DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 401 (1999)

260 See Part II(A)(i) (Quindell notably lost half its stock value in one day after an unfavorable market report).

261 See Part II(C)(i) (Slater & Gordon CEO reassuring investors that in the future most class actions will be funded through outside funders).

262 Lawrence Fox has noted that companies offering other services might be less likely to offer legal services that are unpopular either to the public or the company at issue. Fox, supra note 21 (“Can we expect Arthur Andersen to take a tolerant attitude toward a death penalty representation? Or Sears to be pleased its lawyer employees are supporting the Legal Services Corporation, the funder of consumer complaints on behalf of the indigent?”)

263 Interview 10 (Feb. 4, 2014)

264 Id.; Interview 1 (Jan. 9, 2014) (another national legal services provider noting that unpopular clients pose a potential challenge to their brand)
number of large providers that want to create or maintain highly respected brands in the eyes of the public at large.

Standards of Professional Practice

Advocates of non-lawyer ownership have claimed that allowing for outside ownership will increase the quality of legal services as these owners will be eager to build well-respected legal brands and implement quality control systems. Non-lawyer ownership could sometimes improve professional standards, but it is not clear that this would always be the case, or even be the case the majority of the time. In other situations non-lawyer ownership may lead to the systematization of more dubious business practices that undermine the quality of legal services as firms scale, attempt to create efficiencies, and their work culture is less tempered by the professional norms that lawyer ownership may bring. For example, Binder & Binder has been accused of nationalizing and normalizing cost cutting practices in social security disability representation that provide an inferior service for the client.

The introduction of non-lawyer ownership has had an ambiguous impact on consumer complaints about legal services. There is some evidence from the UK that ABS firms in the United Kingdom receive more complaints from clients than non-ABS firms, but ABSs produce about as many formal complaints to the UK’s Legal Ombudsman as ordinary solicitor firms. The higher number of recorded initial complaints may be because of the newness of some of the ABSs operating or because they do a better job of soliciting and tracking initial complaints. In Australia, at least one study has shown that customers of firms that have become ILPs make fewer complaints to regulators afterwards. This though is likely the consequence of ILPs required implementation of their own “appropriate management systems” rather than non-lawyer ownership, which is still relatively rare for ILPs in Australia. So far at least, the evidence from both the UK

265 Hadfield, supra note 17 at 49-50
266 Parker, supra note 5 at 4 (arguing that the ethical dangers commentators worry will come from non-lawyer ownership are actually a “formalisation and accentuation of existing ethical pressures on legal practice.”)
267 See Part II(C)(ii) (noting complaints that Binder spearheaded the normalization of not meeting with clients until the day of a hearing)
268 According to a 2013 LSB report ABSs generated £4.3 million in turnover for every complaint referred to the Legal Ombudsman, which is similar to the £4.5 million for every complaint for ordinary solicitors firms. LSB 2013, supra note 106 at 7, 78
269 Christine Parker, Tahlia Gordon, and Steve Mark, Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in in Regulation of the Legal Service Profession in New South Wales, 37(3) J. OF LAW AND SOCIETY 466 (2010) (showing a statistically significant reduction in complaints about ILPs after they performed a self-assessment process to create their own appropriate management systems).
270 Others have argued that the potential dangers of outside investment are not adequately regulated against in Australia. Alperhan Babacan, Amalia Di Iorio, and Adrian Meade, The (in)effective regulation of incorporated legal practices: an Australian case study, 20(3) INT’L J. OF THE LEGAL PROFESSION 315 (2013) (although showing no empirical evidence of violations, arguing that regulation of ILPs in Australia does not sufficiently account for new pressures from non-lawyer ownership and management).
and Australia suggests that non-lawyer ownership does not have a large effect on consumer complaints.

Given the uncertain impact of non-lawyer ownership on quality of legal services, those interested in increasing quality may be better off pressing for other interventions, such as entity-based regulation, requiring malpractice insurance for all legal service providers, or creating an independent ombudsman to hear complaints.

**Unanswered Questions**

The country studies in Part II make clear that there is a need for improved collection of data regarding legal services to better assess the impact of non-lawyer ownership. In particular, regulators should attempt to better track the cost of commonly used legal services, the demand for legal services, how these legal services are used, and different pathways for resolving legal issues. Sector specific studies could also periodically examine the functioning of markets for specific legal services such as personal injury, immigration, probate, conveyancing, or family law.

While there are still many unanswered questions about the impact of non-lawyer ownership, perhaps the greatest involves the increasing role of technology in legal services. Legal professionals in the future may need to rely on technology, and an accompanying organizational structure, that lawyers cannot efficiently provide for themselves either in-house or otherwise. If this proves true than non-lawyer ownership will provide clear benefits for the delivery of legal services. Still, it is not certain such a future is ordained. Lawyers may find a way to effectively outsource or contract for these technological and organizational needs just as they currently do for legal databases or for online referral networks. Alternatively, as is the case with LegalZoom, lawyers and their services may become the outsourced product offered by a company. Finally, the most routinized legal services that technology may have the greatest benefit in helping deliver efficiently may eventually not be considered the practice of law at all in the future and either lawyers or non-lawyers would be able to perform these services in different organizational and ownership contexts.

**IV. Non-Lawyer Ownership and a “New Professionalism”**

The rise of non-lawyer ownership of legal services should not be viewed in isolation, either within the legal profession or within the professions more generally. It is useful to think of those who perform traditional legal work as being controlled or organized by at least four forces: (1) the demands of the market, (2) the structure and bureaucracy of the organizations in which they work, (3) the legal profession; and (4) the

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271 England and Wales is the furthest along of the three jurisdictions in gathering relevant data
272 [LONDON ECONOMICS, supra note 107 at 47](#) (making similar recommendations in the UK context).
273 [RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008)](#) (speculating about the transformative role technology may have in legal services); [Gillers, supra note 53](#) (arguing the regulation of the profession should be adopted to harness technological changes transforming the delivery of legal services); [John O. McGinnis and Russell G. Pearce, The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services, 82 FORDHAM L. REV. 3041 (2014)](#) (describing how technology, particularly machine intelligence, may disrupt the legal services market in the future).
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government. While lawyers have always had to be responsive to market pressures, it is notable that lawyers are both becoming integrated into firms that are more similar to other types of commercial organizations and that their relationship with the rest of the economy is becoming more like those of other services. For example, the lifting of bans on advertising, the abolition of mandatory fixed fee schedules for lawyers, and increased consumer awareness of their legal options that has been witnessed in many jurisdictions have made lawyers more responsive to conventional market forces. The rise of limited liability enterprises in legal services and non-lawyer owned legal service companies in some jurisdictions have embedded lawyers in organizations more similar to those in other fields. The reducing regulatory power of the bar and the rise of new outside regulators of the profession, whether these are independent ombudsmen, specialized regulators, or competition regulators has seen the government increasingly encroach on the self-regulatory power of the profession. Other professions, like doctors, accountants, teachers, and architects, have seen similar shifts—witnessing greater integration of their occupations into the overall economy and into more varied organizational forms, as well as greater outside regulation. Indeed, such broader trends have led some to conclude we are witnessing the birth of a “new professionalism” and led to similar battles about the “corporatization” of fields such as medicine and education.

These shifts do not mean that professions are disappearing or becoming less significant, even if they might be becoming less distinctive. Occupational licensing and the competency and signaling that go with it has only increased in prominence in countries like the United States. In today’s “law-thick” world it is hard to imagine that

275 Eliot Freidson, one of the founders of the sociology of professions, argued that consumers control how work is organized in the market, bureaucracies control work in organizations, and other members of an occupation control work in a profession. See, ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 12 (2001) Actors in government, whether this is legislatures, courts, or regulators also clearly have a role in organizing legal services.

276 See, STEPHEN BRINT, IN THE AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE (1994) (arguing that professions are becoming marketized and commercialized and as a result their rhetorical justifications have shifted from social trusteeship to expertise).

277 See, Julia Evetts, A New Professionalism? Challenges and Opportunities 59 CURRENT SOCIOLOGY 406, 412-14 (Describing how professions increasingly emphasize quality control, standardization, and other managerial and governance forms of control.)

278 Evetts, supra note 277 at 412; See, also Sigrid Quack and Elke Schubler, Dynamics of Regulation and the Transformation of Professional Service Firms: National and Transnational Developments, in OXFORD HANDBOOK OF PROFESSIONAL SERVICE FIRMS (forthcoming) (describing how the advance of competition policy, the liberalization of company forms, a shift towards more public oversight, and an increasingly transnational entanglement of the state have led countries to regulate professional service firms more like multinational companies).


280 In fact, one could argue that the professions are organizing work life more than ever before. In the United States in 2008 29% of the labor force was in an occupation that required a license (compared to less than 5% in the 1950s). Although not all these occupations would be considered “professions” many would. Morris M. Kleiner and Alan B. Krueger, Analyzing the Extent and Influence of Occupational Licensing on the Labor Market, 331(2) J. OF LABOUR AND ECONOMICS S173, S176 (2013)
there will not continue to be a vital and extensive role for legal professionals for the foreseeable future. Still, these broader trends facing the legal profession, of which non-lawyer ownership is a key component, raise questions about how to understand and manage these changes. While it is not possible here to systematically lay out such an analytical or normative agenda, this article ends with some implications that the findings of this article may have on both the access to legal services debate as well as how to best regulate legal services to better cope with both non-lawyer ownership and these broader shifts.

A. Access Implications

Permitting non-lawyer ownership of legal services is frequently viewed as a relatively inexpensive regulatory intervention to increase access to legal services. Yet, the access benefits of non-lawyer ownership so far seem questionable. At the very least, the available evidence should warn against viewing non-lawyer ownership as a substitute for more proven access strategies, like legal aid.

In general, deregulatory strategies have had a mixed track record of increasing access in a substantial manner. As perhaps the most comprehensive review of the literature on the regulation of legal services noted, “The theoretical literature, on the whole, suggests fairly strong recommendations to policymakers regarding self-regulation [towards deregulation]. On the other hand, the limited empirical evidence does not always support such strong theoretical predictions.” This does not mean these deregulatory strategies are not worth pursuing, but rather expectations about their impact should be appropriately tempered. For example, several studies have indicated that more advertising leads to lower priced legal services. A well known study undertaken by the Federal Trade Commission (FTC) in the 1980’s in the United States found that the five legal services it surveyed were cheaper on average in states with fewer restrictions on lawyer advertising than in states with more restrictions. However, the report also found that within the same state law firms that advertised personal injury services actually charged higher contingency fees than those that did not advertise. Stewart Macaulay in surveying, and questioning, the results of the FTC report and the consequences of loosening restrictions on advertising argued that even if lawyer advertising did somewhat decrease the price of legal services that “[W]e must be concerned that largely symbolic debates about lawyer advertising may divert us from concern with more pressing issues of access and equality.”

281 As Gillian Hadfield observes, “We live in a law-thick world that people are left to navigate largely in the dark.” Hadfield, supra note 17 at 43
284 JABOBS, WILLIAM W. ET AL., IMPROVING ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (Report of the Staff to the Federal Trade Commission, 1984) (finding, “Attorneys in the more restrictive states, on the average, charged higher prices for most simple legal services than those in the less restrictive states.” Id. at 79)
285 Id. at 125
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Other regulatory solutions, such as new, and more varied, types of legal professionals, who require less training than traditional lawyers, could potentially increase access more than non-lawyer ownership. For example, in both Australia and the United Kingdom there is limited evidence to suggest that licensed conveyancers transfer property at a significantly lower price than solicitors, although a more nuanced study of particular geographic regions where conveyancers had entered the market versus where they had not in the UK produced more ambiguous results. Whatever the evidence, creating new categories of legal professionals who can perform a subset of legal activities requires a sufficient market. In the UK during the 2008 economic and housing downturn conveyancers were particularly hard hit, reducing the number of persons who were willing to enter conveyancing. While the housing market over the long run may provide a sufficiently large enough market for a practitioner to invest in the expense of becoming a conveyancer (and not the additional expense of becoming a solicitor) other legal markets may not be large or lucrative enough to allow for their own specialized licensed legal practitioners.

There is a rich theoretical literature that argues unauthorized practice of law (UPL) provisions are too broad and increase prices, and limit access, as a result. While there has been little actual empirical research done to support this proposition limiting the reach of UPL provisions likely has some merit as an access strategy, but it is not always obvious what services should be regulated and which should not. For instance, in the United Kingdom will writing is not a reserved legal activity, a position that some advocates for looser UPL restrictions might cheer. The UK Legal Services Board (LSB) though on the basis of a study and consumer feedback is pressing the government, so far unsuccessfully, to regulate will writing as a legal activity. The LSB argues that there are will-writing companies who use the power and information asymmetry in their relationship with the customer to sell defective, unnecessary, and costly wills, undercutting the trust of customers in the will-writing market.

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287 BDRC CONTINENTAL, supra note 44 at 86 (noting that conveyancing in the UK is more expensive when done by a solicitor compared to a licensed conveyancer - nearly £1,300 versus £785 on average); NSW GOVERNMENT SUBMISSION, PRODUCTIVITY COMMISSION REVIEW OF NATIONAL COMPETITION POLICY ARRANGEMENTS 10 (2005) available at http://www.pc.gov.au/__data/assets/pdf_file/0020/47342/sub099.pdf (noting that conveyancing fees in New South Wales fell by 17 per cent between 1994 and 1996 after the removal of the legal profession's monopoly on conveyancing).

288 Stephen, Love, & Rickman, supra note 282 at 656 (noting that the results of a study of conveyancers in the early 90s "should caution against the assumption that multiple professional bodies will necessarily be of benefit to the customer")


290 See, e.g., Abel, supra note 23 at 127-141; Rhode, supra note 75 at 87-91;

291 Stephen, Love, & Rickman, supra note 282 at 655 (noting "little empirical work has been done by economists to estimate the effects of professional monopoly rights and the existence of para-professions.")


293 Id. (While these companies promise to store the wills of their customers, many go out of business, leaving the customer without any will at all.) The LSB does not propose that will-writing only need to be
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parallels to criticisms of trust mills in the U.S., which sell un-customized documents to create trusts to seniors at exorbitant rates.294

Deregulating legal services to make them more like other services offered in the market may increase access in some contexts, but this approach has already been aggressively pursued in jurisdictions like the UK with results that still leave many poor and moderate income individuals without access to legal services. These findings would seem to indicate that although appropriate deregulatory strategies should certainly be pursued, alternative ways to increase the supply of legal services should be prioritized when attempting to address the access gap.295

Setting to the side forms of fee shifting and sharing,296 the two primary alternatives to deregulation to increase access to civil legal services are pro bono and legal aid. Pro bono already plays a vital role in delivering legal services, and should be expanded where possible, but it also has clear constraints both in terms of the amount and type of pro bono lawyers are likely to engage in.297 Pro bono may also come under new pressure in a regulatory regime that allows for non-lawyer ownership. Non-lawyer owners may influence lawyers to engage in either less pro bono or less controversial pro bono in order to increase profits. Given these limits of pro bono, increasing legal aid may be the most significant way to expand access to legal services. Indeed, the most noticeable change in access to legal services that was measured while collecting data for this article was not produced by any change in regulation of pro bono activity, but instead by cuts in UK legal aid, which created a large and measurable increase in pro se litigants in family court.298

Given recent dramatic cuts in the UK legal aid budget and declining or stagnating legal aid budgets in the United States299 and Australia300 advocating for renewed performed by solicitors, but that it could also potentially be performed by other licensed legal professionals like para-legals or conveyancers. Id. at 7

294 See, for example, Angela M. Vallario, Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad, 59(3) MARYLAND L. REV. 595 (2000) describing how trust mills may victimize unsuspecting seniors into buying trusts that do not accomplish the clients goals.

295 Demand for legal services could be reduced in a number of ways that are not explored here, but deserve attention. These include simplifying legal procedures or government policies designed to reduce the number of disputes in society in the first place.

296 Class actions and contingency fees are two forms of fee shifting or sharing that can increase the ability of litigants to bring cases, particularly in cases that involve monetary damages against large businesses. Loser pay rules meanwhile can discourage parties from bringing litigation. For a recent overview of U.S. Supreme Court litigation limiting class actions and supporting binding arbitration on companies terms, see, LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 282-299 (2014)

297 For an overview of some of these constraints see, Scott Cummings, The Politics of Pro Bono, 52 UCLA LAW REV. 1, 115-144 (2004)

298 See Part II(A)(ii)

299 Funding to the Legal Services Corporation, which helps fund civil legal aid programs in U.S. states, has declined by almost half in real terms between 1994 and 2013 (when it was just $340 million). Legal Services Corporation, Funding History, (August 5, 2014) http://www.lsc.gov/congress/funding/funding-history

300 In 1997 the government of Australian Prime Minister Howard instituted major cutbacks in the Commonwealth’s funding of legal aid. While Australian states have made up for some of these cuts, civil legal aid programs were curtailed by legal aid commissions. PRICE WATERHOUSE COOPERS, LEGAL AID FUNDING: CURRENT CHALLENGES AND THE OPPORTUNITIES OF COOPERATIVE FEDERALISM 19, 57 (2009);
investment in legal aid may seem like an unrealistic strategy. However, the alternative of relying on regulatory changes or a dramatic increase in pro bono assistance to address access needs seem even more far-fetched. Increases in government spending may also become more realistic if regulatory strategies to improve access seem largely exhausted. Recent surveys in the United States, United Kingdom, and Australia showing that in many instances the government actually saves money in the long run by providing legal aid may further incentivize such spending. Finally, the relatively small amount of money spent on government legal aid for civil legal services makes it more plausible that there could be a marked increase in legal aid budgets.

Importantly, increased public spending on legal assistance does not have to be directed towards “traditional” legal aid where a publicly employed legal aid attorney guides a client through a legal problem from start to finish. Where appropriate, government intervention could also include legal assistance and advice provided by non-lawyers, “unbundled” legal assistance, provision of legal self-help information, and

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**Community Law Australia, Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System** (2012)

**301** For an overview of studies showing the cost savings of legal aid in the United States, the United Kingdom, Australia, and Canada, see, Graham Cookson and Freda Mold, *The Business Case for Social Welfare Advice Services* (July/Aug. 2014) available at http://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf (surveying studies from these countries showing cost savings from 160% to 800% depending on the study and type of legal aid); Boston Bar Association, *Investing in Justice: A Roadmap to Cost Effective Funding of Civil Legal Aid in Massachusetts* 4-5 (2014) (noting findings of independent economic consulting firms that in certain categories of cases the government will save from $2 to $5 for every $1 spent in civil legal aid).


**303** Several studies have shown that, at least in some situations, non-lawyers can be just as effective or more so than lawyers. In the UK, they have long had heavy reliance on non-lawyers in their legal aid scheme. See, e.g., Richard Moorhead, Alan Paterson, and Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37(4) Law & Society Rev. 765, 794-96 (finding that non-lawyers perform to a higher standard than lawyers in a study of the UK’s legal aid system, but that non-lawyers took more hours on the same case and so cost more, perhaps because of contractual incentives they faced (but lawyers did not) to spend more time in giving legal assistance.); Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals, Report to the Lord Chancellor* 245-46 (1989) (finding that based on interviews in the UK tribunal system that experience and expertise were reported as being more important than being a lawyer to successfully represent a client); Herbert Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (1998) (finding that non-lawyer assistance was just as effective as lawyer assistance in three of the four U.S. case studies examined).

**304** For an overview of the literature on unbundled legal assistance see, Molly M. Jennings and D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89(4) Denver Univ. L. Rev. 825 (2012); James Greiner et al., *The Limits of Unbundled Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901 (2013) (finding that litigants facing eviction from housing offered a traditional legal aid attorney achieved more advantageous results than those that only received unbundled assistance in a randomized control study, but that screening procedures by the legal aid provider may have selected those least likely to benefit from an unbundled approach).
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Such programs should be targeted at both the poor and middle class.

Where non-lawyer ownership of legal services is adopted it should be adapted to maximize its access benefits. This might be through encouraging consumer ownership, or other types of non-lawyer ownership, that may be more likely to increase access. Some jurisdictions could also choose to tax non-lawyer owned firms to subsidize the government’s legal aid budget. Traditionally, one of the justifications of pro bono was that lawyers should provide legal services to those who cannot afford them in exchange for the benefit they receive from having a monopoly on legal services. Since non-lawyer owners, unlike lawyer owners, cannot provide pro bono legal services they could be expected to contribute monetarily for being able to benefit from this monopoly as well.

Finally, to incentivize more public-spirited initiatives by legal services enterprises a jurisdiction could encourage that non-lawyer owned companies be set up as benefit corporations where possible, explicitly stating that directors must consider not only maximizing profits in the decisions they make, but also increasing access to justice. Given the loose reporting requirements of benefit corporations, such an organizational structure would certainly not guarantee these enterprises would promote access to legal services and could even potentially weaken directors overall accountability as they can blame their poor performance on trying to serve the multiple goals of the company.

However, such an organizational form might encourage these companies to pursue more public-spirited missions and would help protect legal service companies that did engage in extensive pro bono work or other riskier public spirited activity from shareholder suits alleging that the company did not focus solely on maximizing profits.

B. Regulatory Implications

Since this article only examined non-lawyer ownership’s impact on access and professionalism for civil legal services for poor and moderate income populations it does not attempt to lay out a comprehensive regulatory framework for all non-lawyer ownership. That said, the case studies and other evidence presented in this article do

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305 For one proposal for a publicly sponsored opt-out legal expenses insurance scheme in Canada see, Sujit Choudhry, Michael Trebilcock, and James Wilson, Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Insurance, in MIDDLE INCOME ACCESS TO JUSTICE (Trebilcock, Duggan, & Sossin eds. 2012)
307 J. Haskell Murray, Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporations Statutes 2(2) AM. U. BUS. L. REV. 1, 33 (2012) (noting that “as has been long recognized, if the law asks directors to serve multiple masters, it becomes difficult to hold the directors accountable at all.”)
308 Id. at 16 (noting that existing law in the U.S. likely already provided protection from shareholder lawsuits for pursuing social goals at the expense of profits, but that benefit corporations do add clarity to such protections).
309 Notably, it did not study how non-lawyer ownership impacts other parts of the legal market (such as the criminal or corporate sector), how it might impact other clients (such as the upper middle class, corporations, or government), or how it might affect volatility in the legal services market, the satisfaction of legal professionals with their jobs, or other relevant considerations. For example, John Morley argues
suggest that there is a need for careful regulation. This is particularly true of some types of non-lawyer owned legal service enterprises compared to others. Take conflicts of interest. Non-lawyer ownership per se does not necessarily create significant new conflicts of interest. A publicly listed law firm may not have any more conflicts than a lawyer owned firm. Instead, new conflicts of interest with non-lawyer ownership seem to be most likely to occur for enterprises that offer legal services, but also have other commercial interests. Even then it is only a sub-set of these enterprises that are most likely to develop new conflicts, such as when insurance companies own personal injury law firms or when a company has contracts with the government to provide both criminal defense services and private prisons.

Given this context, regulators should not treat all types of non-lawyer ownership as the same. In situations where the potential for conflict of interest, or perceived conflict of interest, is high, jurisdictions adopting non-lawyer ownership should ban such ownership, or at least heavily regulate it. When the potential for conflict is more amorphous or where the public spirited ideals of the profession, professional standards, or other values of the profession may be undermined regulators should exercise their choice on when and how to intervene, using the available evidence to weigh the costs and benefits of different types of non-lawyer ownership.

In regulating non-lawyer ownership jurisdictions might adopt several different approaches. They could have blunt and restrictive rules, such as that non-lawyers can only own a minority of any legal services firm or only own non-voting shares. They might allow for non-lawyer ownership only in some legal sectors, or in all, or could bar legal services from being provided by enterprises also engaged in other types of services. They could have more fine-tuned licensing requirements where potential non-lawyer owners had to submit plans about how they would overcome potential conflicts of interest that would be subject to approval. Or they could only require licensing in certain sectors (like criminal law) or for certain types of owners. The point here is to not go through every possible permutation of regulation and weigh its respective merits (some may be sensible, some unwise, and others would require far more regulatory capacity than others). Rather, it is simply to observe that in designing a regulatory regime for non-lawyer ownership that a regulator faces a large number of choices many of which could plausibly be justified.

Given this extensive regulatory menu of options and the currently limited empirical basis upon which to make these choices, who the regulators are making these decisions becomes all the more significant. In the past, the academic literature has been preoccupied with lawyers capturing their own regulation to further their own interests. Examples of this type of regulatory capture are arguably seen in the non-lawyer ownership debate. For instance, in rejecting non-lawyer ownership wholesale, the New York Bar’s Taskforce on Non-Lawyer Ownership, which was comprised exclusively of members of the bar, noted that there was not sufficient empirical evidence to know the impact of non-lawyer ownership and “that it was not worth taking the risk of impacting the core values of our profession by allowing nonlawyers to hold equity interests in law

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See, for example, Abel and Abel & Lewis, supra note 23

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This intense caution expressed by the Taskforce, and blanket refusal to experiment with non-lawyer ownership, could be interpreted as a protectionist decision that ensures that lawyer owners do not have to compete with non-lawyer owners for either profits or prestige.

With the advent of non-lawyer ownership though there is a concern that new actors, who can now potentially profit from legal services, may also try to capture its regulation. For example, the Clementi report was instrumental in ushering in non-lawyer ownership in the UK. In recommending the largely wholesale adoption of non-lawyer ownership to the UK government, David Clementi argued that, “The burden of proof [in the debate over non-lawyer ownership] rests with those who seek to justify the restrictive practice.” This was a very different burden of proof than the Taskforce of the New York Bar, which in the face of unclear evidence favored the status quo. Perhaps not surprisingly, Clementi is not a lawyer, but a Harvard Business School graduate who had been prominently involved in the movement to privatize government companies in the UK. He was also the chairman of a major insurance company when he wrote the report. Today, the current head of the Legal Services Board is Richard Moriarty, who again is not a lawyer, but came from a competition background and before joining the LSB was the director of regulation at Affinity Water, a private water supply company owned by Morgan Stanley.

There is little reason to believe the divergent positions of these different regulators on non-lawyer ownership, whether members of the bar or competition advocates, are not sincere. However, given these regulators different backgrounds they are likely to emphasize different priorities in regulation as well as norms for the organization of a legal market. One should also expect that in a world of non-lawyer ownership, large legal service companies, and their owners, will likely try to influence regulators to approve regulation that benefits these companies, but may disadvantage either the public or smaller, more traditional legal service enterprises. In other words, we should expect that if large non-lawyer owned legal service companies gain market share that there will be new and potentially powerful pressures on regulators from these companies just as there historically has been by lawyer owned law firms.

More and better data will likely continue to be collected on jurisdictions’ experiences with non-lawyer ownership. This could reduce some of the potential for regulatory capture by any interest group by limiting the discretion of regulators in their choices, or at least what arguments they can make in justifying these choices. However, much of non-lawyer ownership’s ultimate effect on both access and professionalism is

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311 NYSBA REPORT, supra note 11 at 73
312 CLEMENTI REPORT, supra note 50 at 132
313 David Clementi was the Chairman of Prudential LLC until 2008. David Clementi at a glance, Forbes, available at http://www.forbes.com/profile/david-clementi/
315 JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 20 (2008) (noting that “large corporations often use their political clout to lobby for regulations they know they will easily satisfy, but that small competitors will not be able to manage.”),
likely to be subtle and remain difficult to assess.\textsuperscript{316} It is unclear how one would accurately measure whether certain types of non-lawyer ownership negatively affected the public’s perception of the justice system and the consequences of any such change in attitude. Similarly, in many cases it will likely be challenging to trace whether new innovations in delivering legal services arose because of non-lawyer ownership or other factors. Yet, these are precisely the types of issues that we want regulators to consider. There is a danger that if regulators only make decisions based on what they can measure with specificity that they will deemphasize factors they cannot easily quantify, but may be just as, or more, important.\textsuperscript{317} One can attempt to overcome this bias by requiring more qualitative studies, such as not only commissioning a survey on the public’s perception of non-lawyer ownership, but also undertaking in-depth interviews with the public and surveying the history of the impact of other similar regulatory changes, like the lifting of restrictions on the corporate practice of medicine. These studies though may generate as many questions as answers and could often prove too costly to undertake.

Given the frequently uncertain consequences of non-lawyer ownership, as well as competing normative priorities of potential regulators, it is unlikely that in the near future there will be expert consensus on how to regulate such ownership. Instead, such decisions should be made through regulators drawn from a diverse set of stakeholders.\textsuperscript{318} This more deliberative approach should include not only members of the bar or competition advocates, who tend to weigh a narrow, if valid, set of concerns,\textsuperscript{319} but also consumer organizations, access advocates, other professional groups that deal directly with the public’s legal challenges (like doctors, educators, and accountants), and the academy.\textsuperscript{320}

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\textsuperscript{316} Limited liability partnerships provide a parallel example. At the time of their introduction in the 1990s and 2000s, there were warnings that the liability protection of LLPs would reduce the incentive of partners to monitor each other’s behavior leading to a decline in professional conduct. For example, see, N. Scott Murphy, It’s Nothing Personal: The Public Costs of Limited Liability Partnerships, 71 INDIANA L. J. 201 (1995) (arguing that LLPs shift the costs of underinsured legal practices from firms to clients). Although nightmare scenarios about the effect of LLPs did not come true, law firms today might, and some commentators claim do, engage in riskier conduct than in earlier decades, helping contribute to law firm collapses like Dewey & LeBoeuf and a law firm culture that frequently prizes the rainmaking ability of partners over their ethical integrity. Michael Bobelian, Dewey’s Downfall Exposes the Demise of Partnerships, FORBES, June 7, 2012 http://www.forbes.com/sites/michaelbobelian/2012/06/07/deweys-downfall-exposes-the-demise-of-partnerships/ However, given the multiple factors that influence firm behavior we might never know the full effect of the widespread adoption of LLPs.
\textsuperscript{317} The availability bias, judging probability on the basis of evidence that is easily cognitively available, is a well known problem in people’s ability to assess risk. Cass Sunstein, Empirically Informed Regulation, 78 UNIV. OF CHICAGO L. REV. 1349, 1358 (2011)
\textsuperscript{318} Such a regulatory strategy draws on scholarship on deliberative democracy that does not assume consensus, but rather how to manage conflict given different normative stances of participants AMY GUTMAN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 10 (2004)
\textsuperscript{319} Russell G. Pearce, Noel Semple, and Renee Newman Knake, A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England/Wales, and North America, 16 LEGAL ETHICS 258 (2013) (arguing that common law legal services regulation can be divided between a professionalist-independent framework and consumerist-competitive framework).
\textsuperscript{320} Having a diverse group of regulators may have the added benefit of shielding regulation from future anti-trust scrutiny in the U.S. context, see, Aaron Edlin and Rebecca Haw, Cartels by Another Name: Should Licensed Occupations Face Anti-Trust Scrutiny, 162 UNIV. OF P.A. L. REV. 1093, 1155 (2014); Milton C. Regan, Jr., Lawyers, Symbols, and Money: Outside Investment in Law Firms, 27 PENN
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As this article has argued, while reforms that make legal services less distinct and more integrated into the market, like non-lawyer ownership, provide opportunities to better deliver legal services, they do not always solve the problems they were expected to and may generate their own array of challenges.321 There is a danger that the push to deregulate legal services may come to dominate the access to justice agenda as deregulation and competition become central tenants of a new set of ideals about how to organize the delivery of legal services in society.322 Instead, the goal of regulation of legal services should not be deregulation for its own sake, but rather increasing access to legal services that the public can trust delivered by legal service providers who are part of a larger legal community that sees furthering the public good as a fundamental commitment. Some types of non-lawyer ownership may be part of this strategy, but only a part.

St. Int’l L. Rev. 407, 431-38 (2008) (Arguing that one of the benefits of the move towards non-lawyer ownership may be to trigger an acceptance that the practice of law is a business and a move away from self-regulation and towards regulating legal services as an industry).

321 In most fields—not just the legal profession—a striking feature of the spread of regulation across jurisdictions is that new regulatory frameworks are frequently adopted more on the basis of ideology, or to harmonize with global norms, than on concrete evidence of their merit. John Braithwaite and Peter Drahos, Global Business Regulation 17 (2000) (explaining that the key processes of the globalization of business regulation are “coercion, systems of reward, modeling, reciprocal adjustment, non-reciprocal coordination, and capacity-building.” Note that evidence-based learning is not amongst the most important mechanisms identified.)

322 Edward Shinnick, Fred Bruinsma & Christine Parker, Aspects of regulatory reform in the legal profession: Australia, Ireland and the Netherlands 10(3) Int’l J. of the Legal Prof. 237, 246 (2003) (noting that there is “… a danger that the ongoing impetus for regulatory reform of the legal profession will be the … competition agenda alone and that access to justice and consumer critiques of the legal profession will disappear from the debate.”)