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The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law

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The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law

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ABSTRACT

The U.S. faces a mounting crisis in access to justice. Vast numbers of ordinary Americans represent themselves in routine legal matters daily in our over-burdened courts. Obtaining ex ante legal advice is effectively impossible for almost everyone except larger corporate entities, organizations and governments. In this paper, I explain why, as a matter of economic policy, it is essential that the legal profession abandon the prohibition on the corporate practice of law in order to remedy the access problem. The prohibitions on the corporate practice of law rule out the use of essential organizational and contracting tools widely used in most industries to control costs, improve quality and reduce errors. This keeps prices for legal assistance high by cutting the industry off from the ordinary economic benefits of scale, data analysis, product and process engineering and diversified sources of capital and innovation. Lawyers operating in law firms have not generated these benefits but they have appeared in countries, such as the U.K., where the corporate practice of law doctrine does not prevail. Eliminating restrictions on the corporate practice of law can significantly improve the access ordinary Americans have to legal help in a law-thick world.

* I serve as an advisor for some of the companies discussed in this paper: LegalZoom, Pearl.com, and AttorneyFee.com. Any opinions expressed in this paper are my own, independently reached, and do not necessarily reflect the views of any of the companies I advise. I am grateful to Zach Jones and especially Laura Sucheski for extraordinary research assistance, and to participants in the *Unlocking the Law: Building on the Work of Larry Ribstein* Roundtable at George Mason University School of Law for very helpful comments and feedback on an earlier draft. This paper is dedicated to the memory of Larry Ribstein, who served as a real force for change in the profession and whose energy and ideas are sorely missed.

The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law

I. Introduction

We face a tremendous failure of access to justice in the United States. Vast numbers of ordinary people appear in courts daily without any legal advice or representation. Courts themselves are hugely overburdened with shrinking budgets and growing caseloads, struggling to corral thousands of people through a complex and confusing system. A recent study of New York courts, for example, revealed that over 95% of people in housing, family and consumer debt matters lacked representation¹; close to half of those facing foreclosure did so without legal help to sort through “robo-signed” documents and procedures riddled with error and abuse.² The same is true throughout most of the country. The ordinary family obtains no legal help or advice with legal problems, muddling alone through the crises of job loss, divorce, bankruptcy, immigration challenges, access to services and benefits, injuries, and conflicts with neighbors or schools or health-care providers or local officials. We live in a law-thick world that people are left to navigate largely in the dark.

None of this is news. The legal profession has known for decades that ordinary people are largely shut out from legal assistance; the great majority of legal work is done for corporations, organizations and governments (Heinz, et al., 1998, Galanter, 2006, Hadfield, 2000). The response of the profession has been to treat this as a problem of poverty, urging governments to devote more money to legal aid and individual lawyers to devote more time to pro bono efforts.

But the problem is not fundamentally a problem of poverty, of insufficient volunteerism among lawyers or even of insufficient government funding. It is fundamentally a problem of economic regulation. And that is a problem that the profession has created and perpetuates and can choose to redress.

¹ Task Force to Expand Access to Civil Legal Services in New York (2010).

² Congressional Oversight Panel (2010); see also, e.g., Office of Inspector General, U.S. Department of Housing and Urban Affairs (2012a, 2012b, 2012c). “Robo-signing” in debt collection is apparently also widespread—see David Segal, *Debt Collectors Face a Hazard: Writer’s Cramp*, N.Y. TIMES, Oct. 31, 2010,—and so likely affects the 99% of New Yorkers who lack legal representation in response to consumer debt matters as well.

Unfortunately, the quality of policy work done in support of the economic regulation exercised by the legal profession is very low. Dramatic evidence of this has been generated recently in the context of what should have been an opportunity for serious reevaluation of the regulatory structure of American legal markets. In 2009, the American Bar Association created the Ethics 20/20 Commission to “perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice” (ABA 2011). Initially on the 20/20 agenda was a proposal to reconsider the rules that prohibit the participation of non-lawyers in the financing, ownership or management of law businesses—a doctrine that can be summarized under the heading of the prohibition of the “corporate” practice of law. As I explain in more detail in Part III, below, the corporate practice of law doctrine bans a wide variety of organizational and contractual relationships involving non-lawyers and effectively limits the organizational form of legal practice to traditional office-based law practice.

The Ethics 20/20 Commission provided an opportunity for serious re-examination of the wisdom of the corporate practice of law doctrine. The Commission at the outset, however, declined to examine any of the more ambitious paths for reform, comparable to those recently adopted in other Anglo-American jurisdictions such as the U.K. and Australia. The initial proposal for reconsideration of the rules was minor, a small step in the direction of permitting non-lawyers to participate in the provision of legal goods and services: allowing non-lawyer employees of a law firm to own a minority share of the firm. But even this modest proposal was killed by the Commission four months after the circulation of a discussion draft, never making it to the floor of the House of Delegates (ABA 2012).

No report supplying a policy analysis for the decision was released so we can only speculate about the reasoning. Comments received on the discussion draft reveal that lawyers—small firm, large firm and corporate counsel—opposed the proposal.³ The New York State Bar released a report explaining their opposition to the proposal.⁴ Based on a survey of the Association’s members, they discovered that 78% of lawyers in New York opposed the 20/20

³ See, e.g., *Comments of Nine General Counsel on the ABA Commission on Ethics 20/20’s Discussion Paper on Alternative Law Practice Structures*, available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/ninegeneralcounselcomments_alpschoiceoflawinitialdraftproposal.authcheckdam.pdf.

⁴ The NYSBA report also summarizes the opposition from other state bar associations, including the effort organized by the Illinois State Bar to pass a resolution that would have reaffirmed the ABA’s commitment to the profession’s “core values” and prevented any further discussion of changes in the regulatory structure involving non-lawyers. New York State Bar Association (2012).

proposal to allow non-lawyer ownership in law firms. From this the Task Force report concluded there was “no compelling need” to allow this form of financing and ownership of law firms.

No judiciary, mindful of its position as the ultimate *economic* regulator of legal markets, should find analysis like this to be competent evidence on which to base regulation. The “compelling need” that the profession should be addressing is the compelling need of ordinary people for legal help. But in framing the real issues of policy out of the picture, the NYSBA was in good company; the discussion draft soliciting comments on the 20/20 Commission’s proposal for modest change itself stated that its “work in this area has been guided by three principles: protecting the public; preserving core professional values; and maintaining a strong, independent and self-regulated profession” (ABA 2011). Missing from this list is the most important policy principle: ensuring that economic regulation of legal work promotes the welfare of ordinary people. No economists or other non-lawyer policy analysts sat on the Commission; no economic study papers were commissioned; no data were collected; none of the comments received were from experts in economic policy.

It is tempting to put the profession’s failure to engage in serious policy analysis down to craven self-interest (Gillers 1985). No doubt this is at least part of the story. But there are also many in the profession who truly do care about the lack of access experienced by most ordinary people. Moreover, a judiciary that is held on a daily basis to exercise objective judgment can and should be expected to transcend the vested financial interests and professional preferences of lawyers. A key reason why these more elevated interests in the profession have not played a more substantial role in the debate about regulatory reform, I believe, is the blinkered view of the economics at the root of the profession’s current regulatory approach and the tendency to focus on dominant clients—corporations—and dominant law firms—large law firms serving corporate clients. The initial framing of the issue by the Ethics 20/20 Commission almost guaranteed that core economic considerations would not come into play, even assuming a good faith effort to act as a fiduciary for the public interest. “Non-lawyer ownership in law firms” is not the issue. The problem is not financing options available to existing law firms. The issue is what would be possible with a much more diverse array of permissible organizational and contractual forms to support innovation in the production, pricing and delivery of legal services? How would consumer welfare be affected by such options in the market? For it is only through fairly radical innovation that ordinary Americans can be brought into the markets for legal help from which they are now firmly excluded.

In this paper, I explain why, as a matter of economic policy, it is essential that the legal profession abandon the prohibition on the corporate practice of law. Although there are

market imperfections that raise the price of law above competitive levels (Hadfield 2000, Crandall, Winston, and Maheshri 2011), the problem of access is primarily a problem of cost—meaning the total cost of identifying, securing and implementing legal help that raises the well-being of an ordinary person as he or she navigates the dense legal environment in which we all live. Under the existing business model—in which legal services for ordinary individuals are provided by solo and small firm practitioners operating in traditional law-office settings—these costs are simply too high. To reduce the cost of law and increase access to legal assistance, the form in which legal services are produced and delivered to the market has to change. This will require much larger scale organizations and more creative and complex financial and management relationships between those who provide legal expertise—lawyers—and those who provide many of the other components that go into ultimately delivering legal assistance to people. In this law is just like another modern complex service: medicine. Costs in health care have been controlled only as a result of substantial organizational innovation. By restricting the organizational and contractual structure of law to conventional solo and small firm practice, the legal profession ensures that the changes necessary to make legal help more affordable to ordinary Americans will not occur.

In Part II I set out the case for why the existing strategies propounded by the legal profession to respond to the problem of access to justice—more legal aid and pro bono work—can never meet the demand for legal help. I then turn in Part III to explain what I mean by the “corporate” practice of law and the ways in which the profession currently prevents corporate practice. Part IV examines the sources of the high cost of legal help and Part V then presents the argument that reducing these costs will require forms of organization and contracting that are now prohibited by the corporate practice of law doctrine. Part VI offers some concluding observations.

II. The scale of the access problem and the inadequacy of existing strategies of response

Repeated studies and committee reports from both state bar associations and the American Bar Association have worried about the problem of access to legal services since at least the 1980s. (See, e.g., ABA 1989). Despite this, we don’t really know very much about the dimensions of the problem. The ABA in 1993 commissioned a survey of legal needs that documented that approximately half of all American households were experiencing at the time of the survey at least one dispute-related problem that could have been addressed with legal resources but most (60-70%) obtained no legal assistance. Subsequent state-level legal needs surveys have confirmed these findings, showing if anything that dispute-related legal needs are more pervasive and less often met than the ABA survey suggested (Hadfield 2009, Hadfield and

Heine, forthcoming). As Kritzer (2008) has emphasized, not all of the problems people encounter that could be addressed with legal resources constitute a “demand” for legal help—sometimes people prefer to handle things without legal input or would not consider the cost of help worth the potential benefit, even if they could afford it. But even if only half of those who reported a problem but obtained no legal help would have benefitted from legal assistance, some 20 million households are dealing with a problem that requires legal assistance at any one time.

Another back-of-the-envelope calculation gives a sense of the scale of the problem (Hadfield and Heine, forthcoming). In 2012, Americans purchased an average of 1.4 hours of legal help per person, or 3.6 hours per household. State surveys of civil legal needs estimate that on average households experience two problems per year that could benefit from legal help. Thus households on average have the benefit of roughly 1 hour and 40 minutes of legal time per civil legal problem. That’s not very much for problems that include serious matters such as disputes over child custody, wrongful dismissal, personal bankruptcy, housing eviction, small business operations and denial of medical, social, or disability benefits.

Even this estimate vastly overstates the extent to which American households had access to legal assistance when needed. In addition to civil legal needs, many ordinary Americans face a demand for help with legal problems, such as misdemeanors (DUIs for example) or civil contempt charges, for which public defender services are traditionally unavailable.⁵ Even within the category of civil matters, legal needs surveys generally only ask respondents about “erupted” problems—difficulties that have blossomed into conflicts and dispute. What these surveys often don’t ask about is the hidden iceberg: all the decisions individuals make on a regular basis that are law-related and which could be better made with some legal information and advice.⁶ These include things like signing a rental or consumer contract, taking out a (sub-prime) mortgage, framing benefit or employment claims, establishing a will or living trust, complying with regulations governing small business, responding to credit difficulties, filling out tax forms, anticipating marital separation, buying a house, lending a car, changing a health plan, and so on.

⁵ In *Turner v. Rogers*, 131 S. Ct. 2507 (2011) the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not require provision of legal counsel for indigent defendants facing civil contempt charges punishable by imprisonment for failure to pay child support when the opposing side is not represented by counsel and when specific procedural safeguards are in place.

⁶ For a discussion, see Susskind (1996).

Another window on the scale of ordinary legal demand comes from a small sample of the legal questions asked on one legal question-and-answer information service in the U.S.:

I rent my land to a friend. I know you have to notify them if you are not going to rent it to them the next year, this year has been very dry. My question is if they don't pay the rent on time do you still have to notify them that you will not rent to them the next year? Wouldn't that be breaking the contract?

My Mom is disabled and I am [managing] her affairs. Five years ago my Grandfather came to us and ask if we wanted to buy his house and land. Mom and I discussed it and decided to do it. Because she doesn't draw enough money, I took out the loan and she paid it back. All 18,000.00 dollars. We granted Grandpa a life estate, but he only stayed there a few months at a time every couple years or so. Now, he's come back and made Mom leave saying he still owns the place. We can't figure out how he can take the money and the house and land too! Mom doesn't have the money for a lawyer and she's now without a place to live. Help! We don't know what to do.

Can a collection agency post a charge off from my business to my personal credit report?

How does a person sue a person in Georgia small claims court when the person being sued is an Indiana resident?

I am an ordained minister. I have been told that I may practice healing touch without the need of a state license. I have been looking for the regulation or law that backs up what I have been told without success. I would like you to share the code # and a copy of the written code or law or regulation, what ever it is. Thanks.

I was convicted 27 years ago of a misdemeanor in California. I am applying for a position and just found out that they want to conduct a fingerprint background check (livescan) The background check is conducted by a commercial agency for a commercial agency. How far back can they check criminal records? I thought that my records had been expunged. Unfortunately I have a time constraint as I begin the position in 5 days.

How do you go about handling partnership business disputes regarding pay/compensation for owners when nothing was ever established in writing prior? My sister and I began a salon 5 years ago.

These are mundane, ordinary events in daily life. They generate a demand for legal help, but few people are able to obtain that help at any reasonable cost.

It is important to grasp the scale of the demand for legal services by ordinary people because it is vital for lawyers and judges to come to grips with the inadequacy of the strategies the profession focuses on for meeting this demand. These strategies include conventional paid attorney-client relationships, pro bono services, legal aid and increased court-based services. While all of these strategies could help on the margin, none of these is a plausible response to the scale of the problem. Consider paid attorney-client relationships. We don't have systematic public data on average hourly rates or other fees charged by licensed attorneys but consultant surveys such as the annual Altman-Weil survey of law practitioners indicate that the average hourly rate for a lawyer in solo or small practice (the setting in which almost all lawyers who serve individual as opposed to corporate clients work) was \$190 for associates and \$285 for partners as of January 1, 2012.⁷ Few ordinary Americans dealing with the daily legal needs of life can afford many hours of help at that rate. Conventional legal services are simply beyond the means of most Americans.

Increased public funding of legal aid is clearly not feasible as a means of meeting the demand for legal help: at the rates estimated for solo and small firm practitioners, it would cost on the order of \$50 billion annually just to secure one hour of legal help for all the American households with an unmet dispute-related need; the current total expenditure on legal aid in the U.S., counting both public funds and charitable donations, is less than 10% of that figure: \$3.7 billion (Hadfield and Heine, forthcoming). Even those living in poverty, who are eligible for civil legal aid, often are unable to obtain assistance: the Legal Services Corporation estimated that in 2009, half of those seeking assistance from LSC-funded services were turned away (Legal Services Corp 2009). Public defenders operate under crushing caseloads that make effective assistance in criminal matters almost impossible to deliver (Lefstein 2011). All told, the work done by legal aid lawyers and public defenders accounts for just 1% of all legal effort in the U.S. As for pro bono work: American lawyers average about 30 hours of pro bono work per year (ABA 2009). That's less than 2% of all legal effort. If every American lawyer in the country did an additional 100 hours per year, that would be enough to secure less than 30 minutes per dispute-related problem per household (Hadfield and Heine forthcoming).

There is simply no way for the pervasive need for legal services experienced by ordinary Americans to be met through the conventional means advocated by the legal profession.

⁷ The Survey of Law Firm Economics, *The National Law Journal & ALM Legal Intelligence*, Aug. 6, 2012, at 147.

Meeting demand will require a massive shift in the production technology for legal services to dramatically reduce costs. The only way to achieve the kind of scale and innovation needed, I will argue, is through the corporate practice of law.

III. The corporate practice of law

American lawyers, along with other like-minded professionals such as doctors, dentists and optometrists, invented the concept of the “corporate practice” of their field in the early twentieth century, when corporations were sweeping into all sectors of the economy as the dominant organizational form for business. The effort to prevent corporate entities from providing legal services was seen as a key element in the professionalizing agenda: establishing licensing and educational requirements for the authorized practice of the profession and drawing a clear divide between the honorable practice of the learned professions and the muck and muddiness of the business world. American lawyers have ever since taken it as a central component of their identity that theirs is a profession and not a business.

I will use the label of “corporate practice of law” as the profession does to refer to a wide variety of organizational forms to produce and deliver legal services. I take my cue here from health economist James Robinson (1999). Writing in the context of the medical profession—which, unlike law, has shown significant organizational innovation over the past several decades (Epstein this issue)—Robinson seeks to recapture for medicine the maligned concept of the “corporate practice of medicine.” He uses the term broadly to refer not just to the employment of doctors by hospitals but also to the vast array of complex organizational and contractual mechanisms by which doctors’ services are integrated with the multiple other services that ultimately produce health care. As Robinson explains, in the medical sphere:

corporate practice is the endeavor to bring together, not individual physicians into medical groups, but medical groups into larger health care systems. Physician practice management firms that span multiple markets, physician-hospital organizations that combine multiple facilities, and health plans that design multiple products seek to coordinate physicians in economically more efficient, clinically more effective, or at least financially more profitable ways. These systems are adopting forms of governance, finance, compensation, and marketing from the larger corporate sector into medicine.

Through its embrace of a robust notion of the corporate practice of medicine, Robinson says,

the future of health care will be defined by new methods of practice and payment, new concepts of oversight and accountability, and new forms of ownership and governance, by innovations in market contracting and corporate organization that have proven their mettle in global manufacturing, deregulated industries, and consumer services.

In the legal context, corporate practice most obviously refers to the provision of legal services to the public at large by a publicly traded or a privately owned corporation. Drawing on the more expansive connotations of the term, however, it also refers to the provision of services in *any* organizational or contractual form other than fee-for-service practice through a law firm that is exclusively owned and managed by lawyers or salaried services provided to a lawyer's corporate employer. This is why I include Larry Ribstein's (2010) felicitous phrase—the "uncorporation"—in my title. Under this more expansive definition, non-profit organizations such as foundations or charities that provide legal services are engaged in the corporate practice of law. So are unions or community organizations that supply lawyers to their constituents; schools that provide legal advice to their students; businesses that hire or contract with attorneys to provide legal advice or representation to their employees; insurance companies that hire or contract with lawyers to provide representation or legal advice to the people or companies they insure; partnerships where one or more of the partners is someone other than a licensed attorney; joint ventures between law firms and other business entities; and online communities or e-businesses that provide legal advice in conjunction with providing other services.

Almost all forms of the corporate practice of law are prohibited in every state. Every state bans the provision of legal services by a for-profit entity that is not wholly owned and managed by lawyers; the District of Columbia alone allows a legal provider to practice in a partnership or other entity that includes non-lawyer owners or managers, provided the non-lawyers are employees of the firm, the firm provides exclusively legal service, and the non-lawyers agree to be bound by lawyers' ethical obligations.⁸ Some states allow a non-profit organization to provide free legal services for the indigent or to perform legal services that are incidental to their non-legal mission. The U.S. Supreme Court has also held that states violate the First and Fourteenth Amendments if they prohibit entities such as unions from providing legal assistance to their members⁹ or political organizations such as the NAACP from furthering their political objectives by supplying lawyers to represent members of the public.¹⁰

The prohibitions on the corporate practice of law doctrine are embedded in a variety of ethical rules, common law principles and statutes. Some states have an express law on the books that establishes that corporations may not provide legal services.¹¹ The more expansive forms of

⁸ D.C. Rules of Prof'l Conduct R. 5.4.

⁹ *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 221–222 (1967).

¹⁰ *NAACP v. Button*, 371 U.S. 415, 428–429 (1963).

¹¹ See, e.g., New York (N.Y. JUDICIARY LAW §495); Missouri (MO. ANN. STAT § 484.020); South Carolina (S.C. CODE ANN. §40-5-320).

the doctrine find expression in the rules of professional conduct drafted by bar associations and adopted by state supreme courts and legislatures. Most jurisdictions follow the American Bar Association's Model Rule 5.4:

(a) A lawyer or law firm shall not share legal fees with a non-lawyer...

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

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

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

(1) a non-lawyer owns any interest ...;

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

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

5.4(d) expresses the prohibition on the for-profit corporate practice of law most explicitly, but the fee-sharing and partnership rules expand the prohibition well beyond banning the provision of legal services to the public by lawyers who are employed by a for-profit corporation. Lawyers cannot contract with a company that takes on the job of developing legal products to match consumer demand, building market reputation and scale, and managing advertising and transactions if the company collects anything other than a reasonable fee for its management services. Incentive contracts that involve profit-sharing with any other service providers—such as investigators, financial analysts, case managers, real estate brokers, interpreters or psychologists, for example—are prohibited unless these providers are employees and profit-sharing is not tied to performance on particular matters. Lawyers thus cannot form any type of organization—partnership or corporation—with other professionals or service providers. Collaboration with other service providers—such as banks or insurance companies or financial planners—which involve referring clients to a lawyer who is then compensated at a rate that involves sharing a portion of the fees generated from the referral are prohibited. Indeed, in many states, unless the referring entity is a bar association, a not-for-profit organization, or an entity approved by the state bar and which (among other things) must allow all qualified lawyers to participate¹², no compensation for referrals (to an entity that specializes in

¹² ABA Model Supreme Court Rules Governing Lawyer Referral Services; Model Rules of Prof'l Conduct R. 7.2(b).

advertising or consumer awareness, generating what lawyers would perceive as leads, for example) can be collected even at a fixed rate.¹³ An attorney cannot pay to participate in a service that ranks or otherwise evaluates the suitability of lawyers and provides consumers with this information.

In several states the authority to prohibit the corporate practice of law is understood to derive not from express legislation or rulemaking but rather from the judiciary's exercise of its exclusive authority to control admissions to the bar and to discipline lawyers. For example, in an early and influential decision, the New York Court of Appeals held that a corporation that had provided legal services through staff attorneys for subscribers to their service since 1901 was incapable of lawfully engaging in the practice of law even before the New York Assembly passed legislation a prohibition on the corporate practice of law because

the practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study...No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.¹⁴

These views are not outdated: in 2006 the California Supreme Court held that “the profit motive [of a corporation] creates an inherent conflict of interest for attorneys and would foster inappropriate commercialization of the profession.”¹⁵

¹³ The Florida bar association in 2012, for example, concluded that a website called LawButler.com, which operated as a portal for those looking for legal representation and forwarded information it organized about potential cases to lawyers affiliated with the site, was engaged in illegal fee-splitting because it collected a \$300 charge from lawyers who took one of these cases. The bar concluded that even though the amount might look like a reasonable fee for the web-site services, the charge was passed on to the client and so was collected as a “fee” which was then “shared” with the website. See *Board Says LawButler.com's Fee Splitting Violates Rules*, THE FLORIDA BAR, Sept. 1, 2012.

¹⁴ *In re Co-operative Law Co.*, 198 N.Y. 479, 483 (1910).

¹⁵ *Frye v. Tenderloin Hous. Clinic, Inc.*, 38 Cal. 4th 23 (2006)

This core set of beliefs, inculcated in generations of lawyers, is what gives the corporate practice of law doctrine such expansive power, effectively locking the practice of law into a 19th century model of in-person law-office practice. Moreover, because it is rooted in multiple sources, the corporate practice of law prohibition is enforced on multiple fronts. It strips the non-lawyer owners or members of a corporation or partnership of the right to engage in the business of providing legal services—inviting an injunction and potential criminal prosecution.¹⁶ It threatens a lawyer who attempts to practice in the context of a prohibited organizational form with disciplinary action and disbarment. And it entitles anyone who enters into a contract with a prohibited organization (including a contract between a lawyer and the organization) to avoid enforcement of the contract on grounds that the contract violates public policy.¹⁷

The multiple and unclear sources of the doctrine also explains why the doctrine is infrequently challenged, and perhaps why it has evolved so little since its origins in the late 19th and early 20th century. The regulatory framework here is disorganized and hard to track. Can the state legislature pass a law authorizing for-profit provision of legal services? Yes, but it may well have no effect: most state courts assert their right to independently, if not exclusively, regulate the legal profession and caselaw states that the doctrine is judicial not legislative in origin. Moreover, it is not merely an area of common law, which the legislature can displace; it is an exercise of the claimed inherent authority of the judiciary to regulate as a matter of constitutional separation of powers.¹⁸ Even if the legislature did remove the ban on corporate practice, the ethical codes generated by bar associations and adopted by state supreme courts would continue to prohibit lawyers from participating in these authorized forms.

The confusing and inadequate state of the regulatory environment governing the corporate practice of law is illuminated by a recent, and rare, challenge. The law firm of Jacoby & Meyers filed suit in federal court in the spring of 2011 against the state supreme court judges (in their regulatory capacity) of New York, New Jersey and Connecticut, claiming that Rule 5.4 was an unenforceable restraint on their ability to obtain non-lawyer financing for their firm. They claimed the rule went beyond the constitutional and/or legislative authorization of the courts

¹⁶ See, e.g., *Application of New York County Lawyers' Ass'n*, 273 A.D. 524, 527–28 (N.Y. App. Div. 1948), *order aff'd without opinion*, 299 N.Y. 728 (1949).

¹⁷ Public policy against the unauthorized practice of law allows clients to get out of unenforceable contracts with unauthorized practitioners and entitles them to affirmative relief. See, e.g., *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 588 (Iowa 2004). Note that the Court in *Frye*, however, rejected the plaintiff's claim that he should be released from his contract to share statutory attorney fees awarded when he prevailed with the non-profit organization that litigated his housing claim.

¹⁸ For an extended discussion of the profession's success in defeating legislative attempts to change the regulatory landscape, see Rigertas (2009).

to regulate lawyer conduct and, furthermore, violated federal constitutional law. In the spring of 2012, the District Court for the Southern District of New York dismissed the case against Rule 5.4 because other unchallenged provisions of New York state law also prohibit non-lawyer investment in law firms, and would continue to prevent it even if Rule 5.4 was struck down. In early 2013, however, the Court of Appeals for the Second Circuit remanded the case back to the District Court, in order to allow Jacoby & Meyers to amend their complaint to name additional defendants and challenge the other provisions of state law that prohibit non-lawyer investment.¹⁹

Perhaps the most striking observation to be made about the Jacoby & Meyers' challenge is that the challenge has to be framed as a violation of rights in the first place. The real question is not whether Jacoby & Meyers is harmed by the ongoing prohibition on the corporate practice of law but whether the prohibition is *good public policy*. But what is the procedure for pressing the policy question? State supreme courts can and do take it on themselves to establish task forces to engage in a review of their regulations—the Washington State Supreme Court did this recently when it issued the first-ever order requiring a bar association to establish procedures for licensing people without JDs to provide limited legal assistance, under the awkward title of Limited License Legal Technicians.²⁰ It may be possible for members of the public to petition state supreme courts to change their regulations but the procedures for doing so are opaque. Most rulemaking in courts takes place largely out of the public eye. The only way to force the court-as-regulator to act is to bring a lawsuit, a lawsuit that can legitimately be dismissed for failure to state a claim of individual harm to the plaintiff.

In fact, serious policy analysis of the costs and benefits of different approaches to providing ordinary Americans with the legal help they need is not to be found in the bar and judicial treatments of the corporate practice of law over the past one hundred years. The rationale for the rule provided by bar associations and courts has been based exclusively on considerations

¹⁹ *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Departments, Appellate Div. of Supreme Court of State of New York*, 488 F. App'x 526 (2d. Cir. 2012), as amended (Jan. 9, 2013). As for the other two challenges, the district court in New Jersey has stayed the federal case and remitted to the New Jersey Supreme Court the question of whether Jacoby & Meyers is prevented by Rule 5.4 from accepting non-lawyer investment; the Connecticut district court has yet to rule.

²⁰ See *In the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-1005 (Sup. Ct. Wash. June 15, 2011). The New York Supreme Court has also recently undertaken efforts in this regard—establishing committees charged with developing pilot programs for non-lawyer assistants. The California State Bar Board of Trustees established a working group to review similar issues; recommendations to pursue the issue have been referred to another committee.

about risks potentially posed by the corporate practice of law to the way in which law will be practiced by lawyers in conventional settings: will lawyers who work with or for non-lawyers be tempted to ignore their duties of loyalty and confidentiality to their clients? Will they exercise their professional judgment free of unprofessional considerations? Many critics have already articulated the weaknesses of this rationale, pointing out that the profession has not undertaken to evaluate empirically the magnitude or likelihood of these risks, nor to compare systematically these risks to the risks faced by clients who obtain legal services from conventionally-licensed lawyers operating in solo or small-firm practice (Rhode 1981, 1996, Luban 1988, Gillers 1985, Andrews 1989, Gilbert and Lempert 1988, Adams and Matheson 1998, Knake 2012). Nor has the profession explored alternative approaches to minimizing these risks, such as by regulating corporate providers and holding lawyers employed by corporations to their ethical duties regardless of employment status, rather than adopting the blunt instrument of banning corporate practice in all forms.²¹ Critics have also pointed out that the comparison between services provided by a corporate entity and services provided by a conventionally-licensed lawyer operating in private practice is a phantom one: the choice most Americans face is not between these two alternatives, it is between services provided by some form of corporate entity and no services at all. The profession has recognized at least the latter criticism, which is why bar associations and state courts focus their access to justice concerns on increasing pro bono, legal aid and court funding.

But these strategies cannot even begin to attain the scale necessary to address the problem of access. For that, we need a more serious policy analysis. Although critics generally find it enough to debunk conventional rationales for the doctrine—and assail the bona fides of the profession in the process—if we are to take the profession’s obligations for policymaking seriously, we need to evaluate more carefully what the real choices are.

In what follows, I try to shift the frame of our analysis of the corporate practice of law, from one focused solely on the risks to lawyerly compliance with their ethical obligations to one based on the costs and benefits of legal help supplied in alternative formats. I take it as a basic starting point that protecting the markets of existing lawyers is not a legitimate policy objective for those ultimately responsible for regulating the profession: state supreme court judges and legislatures. Although these regulatory institutions are themselves populated by lawyers who move in legal professional circles and often depend on the support of the practicing bar, the

²¹ For a discussion of how the medical profession has maintained physician obligations of quality care in the face of an increasing role for non-physicians such as hospitals, insurers and health maintenance organizations in structuring care, and how malpractice liability has been extended to these non-physician entities, see Harris and Foran (2001).

obligation here to ensure independence from improper considerations of attorney benefit is clearly paramount.

IV. The economics of legal services for ordinary Americans

Much of the current discussion about the corporate practice of law has been framed as a matter of allowing outside investment in law firms and possibly publicly traded law firms, and most of this has been concerned with the sector that makes up the great bulk of legal services—the supply of services to corporations by large law firms (Adams and Matheson 1998, MacEwan, Regan and Ribstein 2008, Ribstein 2010, Andrews 1989). I have written elsewhere about why I think that the provision of legal services to corporations is failing to keep up with changes in technology and globalization and why limitations on capital interfere with the capacity for innovation in corporate legal services (Hadfield 2008, 2012). Here I want to focus specifically on the supply of legal services to individuals and households. These are services people need to address issues concerning their families, workplaces, communities, personal finances and small businesses and their relationships with government officials (crime, immigration, regulation, taxes and so on).

A. The crux of the problem: cost

The nature of the problem of access to legal services is not that hard to name: legal services cost more than most people can afford. Why are legal services so expensive? For an economist there are two places to look for an answer: the nature of competition over price and the determinants of product cost. A product might be expensive because there is a lack of competition among providers, so that price exceeds marginal and long-run average costs. Or it might be expensive because costs are high. Or both.

Consider the problem of price first. As I have argued elsewhere, pricing in legal markets may well fail to be competitive (Hadfield 2000). Legal services are often a credence good—meaning that their quality cannot be determined even after the good is consumed—and they are offered in a market beset by the imperfections of specialization, sunk costs and winner-take-all dynamics. Price can easily and persistently exceed cost in circumstances such as these. I continue to believe that these imperfections intrude on pricing in legal markets, but they have a much greater impact on pricing at the high end of the legal services market—in the provision of full-scale litigation, regulatory strategizing and deal-making, for example. This is the legal market in which we largely find corporate clients and wealthy individuals in personal disputes. But in the legal market where we find the vast majority of individuals—seeking assistance with managing the ordinary legal issues of daily life or supplementing what are of necessity pro se efforts even in family matters and other disputes of great personal consequence—there is reason to believe that among existing providers (lawyers operating in solo or small firm private

practice) there is substantial competition over price.²² Here is where we historically have seen significant excess supply of lawyers (Sander and Williams 1989).²³ There is no shortage of licensed attorneys willing to fill out wills, process bankruptcy filings, manage a DUI charge, secure a divorce and so on and they are anxious to do so with whatever clients they can find at whatever price they can manage. Even with robust price competition, however, the cost of obtaining useful legal help is prohibitive for most people. Median household income in the U.S. in 2010 was just below \$50,000 (U.S. Census Bureau, 2011). Price competition among solo and small firm practitioners still produces rates that rarely dip below \$150 - \$200 per hour. Flat fee charges by private practitioners (to the extent we know anything reliable and systematic about these figures²⁴) for an uncontested divorce or filing a simple personal bankruptcy probably start at about \$300 but likely increase rapidly in practice.²⁵

The crux of the access problem is cost. And by cost I mean the all-in cost: the final cost of getting the benefit of legal services—such as information, advice, document completion, or representation—into the utility function of an individual consumer with a legal need. This includes not only the time, research and educational costs incurred by an attorney in producing analysis or advice or representation, but also the cost to the attorney of operating a solo or small firm practice: renting space, hiring assistants, devising a pricing scheme, collecting bills, marketing services. It includes the cost to the consumer of recognizing the need for²⁶ and then

²² Note, however, that competition in price in the personal services market may not extend to contingent fee lawyering in personal injury matters. See Engstrom (2013).

²³ Of course, the last few years have witnessed excess supply creeping up the income distribution to include lawyers who, ten years ago, would have faced few difficulties earning a comfortable living in medium to large-size corporate commercial practices.

²⁴ AttorneyFee.com, the source of the flat fee price estimates shown here, is a service that scrapes data from the web using attorney websites, attorney submissions, client postings and so on to generate prices for attorneys in a given location. The reliability of the information is unclear—there is no systematic and validated data collection of attorney charges available.

²⁵ The price shown by LegalZoom.com and CompleteCase.com, for example, for an uncontested divorce is \$299 (exclusive of filing fees). LegalZoom charges \$1299 for a Chapter 7 bankruptcy filing with attorney representation in Washington State (not including a Bankruptcy Court filing fee of \$306); Do It Yourself Documents (doityourselfdocuments.com), which provides assistance from legal technicians newly licensed to operate in Washington State as of September 1, 2012, quotes a price of \$224 and states for comparison purposes that local attorneys charge \$400-\$500.

²⁶ Strikingly, in a recent legal needs survey conducted in New York, 94% of low-income respondents said “no” when asked the general question “in the past year, did you or anyone in your household have any legal problems, excluding criminal problems or issues, or aren’t you sure?” When presented with a list of specific problems—such as eviction, debt collection,

finding, evaluating, understanding, and implementing the analysis and recommendation. And it includes the costs associated with risk, errors and waste in the provision of services.

To tackle the problem of the high cost of legal help for individuals we need to be thinking about all the components of that cost. This means not only seeking ways to reduce the cost of educating the people who help individuals meet their legal needs but also ways to reduce all the incidental costs of search, delivery, implementation, error and waste. The corporate practice of law is an essential part of reducing those costs.

V. Reducing the cost of legal services

A. Scale and branding

Many of the costs of delivering legal help are fixed costs over some range—that is, costs that do not vary as the scale of a practice increases. If a solo practitioner hires an office assistant, for example, it is likely that the assistant can provide services simultaneously to a few other partners as well without a change in wages or benefits. The same is true of other types of office expenses such as office equipment, library holdings, building services, common space such as waiting rooms and conference rooms. Many of these types of fixed costs are probably already optimally shared by lawyers forming small partnerships that balance the benefits of sharing fixed costs across a larger practice group against its costs: losses due to congestion, market saturation, the increased costs of coordinating business decisions, and the introduction of reputational, legal and financial risks generated by an independent partner.

But there are many other fixed costs associated with delivering legal help that are not optimally shared in small partnerships. These are predominantly information costs, which have the special property of having zero marginal cost. Even within the traditional form of delivering legal services—one-on-one office help provided by a lawyer—these are optimally shared over a much larger volume of demand than the small firm supports. These costs include the costs of traditional legal work such as monitoring changes in legislation, regulation and caselaw and learning from practice and experience—with an area of law, a particular agency or court, using particular strategies—to improve legal judgment, analysis and advice. But they also include the costs of figuring out how to run a business effectively such as the costs of identifying the best strategies for finding and retaining clients, the optimal systems for pricing, billing and collecting from clients, delivering productive customer service, and reducing errors. These are the kinds of costs that we see shared across large scale through, for example, business-format

custody or support issues, etc.—however, 47% report having at least one problem. Task Force to Expand Access to Civil Legal Services in New York (2010), at Appendix 17, 16–17.

franchising: franchisors develop systems and protocols that increase the consistency of quality and raise the profitability of small-businesses and spread those benefits with cost-reduction shared across a large customer base. Sometimes information like this can be capitalized in technology, such as in business software packages. The phenomenon of franchising in the retail sector, however, suggests that there are gains from standardization in practices across a large number of outlets that exceed those that can be secured through arms-length software methods.

Information costs are not limited to the costs of learning and transmitting information among providers. They include the costs incurred by consumers in identifying goods and services, understanding product attributes and price terms and evaluating quality. Larger scale businesses can reduce these costs for consumers. Larger scale businesses can invest more in developing advertising and marketing approaches that cost-effectively communicate with consumers. This includes not only traditional advertising choices but also newer web platform systems linked to Internet search. Larger scale businesses can also invest more in developing and maintaining a market identity and reputation because they recoup the benefits of good performance in individual circumstances across a larger customer base (Iacobucci 2012).

These scale-related benefits have important implications for solving the access to justice problem. Although the profession has worried for more than a century about lawyer advertising and the potential for lawyers to use it to foment litigation, this worry misperceives the nature of legal demand and the gaps in access. Many of those who need legal services need them not to file personal injury suits—they need them to manage a law-thick daily environment: filing a divorce, managing a financial crisis, applying for a job, complying with small business rules, handling a child-support claim or a misdemeanor charge. For these services, advertising and marketing is essential to reduce the search costs individuals face. These search costs, augmented by perceptions of risk and uncertainty, probably account for a substantial share of the impediment to obtaining legal assistance. Concerns about quality are also a major obstacle to consumer efforts to identify lower-cost options to assist in their efforts to handle everyday legal problems. Increasing the scale of legal businesses can increase access by harnessing the improved reliability of quality that is supported by a robust system for reputation and organization-wide service protocols.

Large-scale practice does not necessarily mean large numbers of lawyers in a single traditional office or even, necessarily, large numbers of lawyers operating within a single firm. The volume of demand needed to support lower-cost and higher-quality business models and reputations can also be achieved through branding. The scale across which information costs can be shared is then achieved by lawyers adopting a common market presence—operating under a shared

name or trademark or using a shared web platform. Suppose we lived in a world in which lawyers were only permitted to engage in plain vanilla advertising: ads and listings and webpages that only communicated a firm name, location, and areas of specialty, for example. Assume that the principal way in which people locate a lawyer and learned about his or her quality and cost in this world is through word-of-mouth and recommendations. Even in this inoffensive advertising environment, the capacity to advertise a firm, operating under a single trademark and capable of serving large numbers of clients, would generate significant search cost savings for individuals with legal needs. The shared brand enables people to share information about their experiences with the brand—rather than an individual attorney. This makes online reviews and recommendations, for example, a potentially potent form of marketing and providing reputational guarantees for legal services. This would allow law to harness the benefits of the substantial reductions in consumer search costs generated by the electronic and information revolutions of the past few decades.

The benefits of shared branding go beyond providing those with legal needs with a cheaper way of identifying providers and learning about their reputation. A shared brand can coordinate a wide range of information exchanges that can allow individuals to better identify the types of legal help available and to assess better their own needs. This can improve the matching between services and users. Moreover, by generating data, it can allow providers to improve their services—online discussions about experiences with lawyers can reveal gaps and problems in how lawyers understand and meet their clients’ needs; these can be incorporated into organizational protocols to weed out error or improve efficacy. The volume of information exchange needed to generate these types of benefits is significant: and this requires a legal business that operates at sufficient scale to make contributions to reviews and recommendations potentially valuable to those searching for legal help. The pool of people interested in hearing about lawyer X is much smaller than the pool of people interested in hearing about company or website X.

B. Innovation and investment in product and process development

The above discussion demonstrates that even if we focus on legal services offered in much the way they are today—in brick-and-mortar offices where clients meet individually with licensed attorneys who exercise their personal judgment in crafting legal advice and strategies—the legal sector serving individual clients operates at a scale that is probably significantly below an optimal level. Costs are probably significantly increased by the small scale of individual services practice.

The most important gains in reducing the costs of serving ordinary people, however, are likely to come from the capacity for increased scale to support substantially increased investment in

product and process development. Much of this cost-saving can be achieved with respect to elements of the delivery of legal benefits that do not implicate the exercise of legal judgment per se.

Improvements in product and processes for delivering legal assistance arise from two key sources that are standard in most businesses: research and development.

1. Research

Those in the legal sector are likely to think that “research” refers to legal research. But the type of research that I’m referring to here is market research: understanding the nature of what people need, what they can afford and might be willing to pay, and how different types of products would satisfy demand in competition with other options. Of course, ordinary practitioners will learn some of these things incidentally through their anecdotal observations about who comes through their door and the success of the contact. But deliberate market research can do much more than this, and produce much more reliable results.

We understand very little about the dimensions of the demand (need) for legal assistance by ordinary individuals. Consider the job applicant quoted earlier who asked on a legal question-and-answer system about how to respond to the request for a fingerprint scan in light of his misdemeanor record of 27 years ago. How rare is that type of problem? How well do people understand it? How often do errors and misunderstandings waste the resources of an applicant, a school board or a court? What strategies do people currently employ to respond to this risk and at what cost? We don’t have reliable systematic answers to these basic questions—or to the similar questions we could raise about the panoply of problems ordinary people encounter on a regular basis. One of the striking features of the emergence of some internet-based legal question and answer sites in the past few years is the impression of deluge that they create, and the wide variety of issues that people face.

Systematic efforts to understand the nature of legal demand for ordinary Americans currently is limited almost exclusively to “legal needs” surveys conducted by bar associations; often these surveys focus exclusively on the access available to the poor (see Hadfield and Heine forthcoming for a review). While valuable, these studies are seriously incomplete as a picture of legal demand: they present respondents with a list of problems and ask if the household or individual is experiencing any of these problems. They then ask what of a proposed list of actions the respondent has taken in response to the problem. As other commentators have noted (Kritzer 2009), the studies do not attempt to evaluate the “cost” of the problem (in personal or financial terms) or assess the detailed options and obstacles available to the respondent. Our job applicant, for example, would appear in this survey at best as answering “yes” to the question “have you had a problem with employment” and checking off “sought

information from a third-party” on the list of “steps taken.” Indeed, because these studies focus on erupted problems, this job applicant might not register at all because he may decide to forego the application and required fingerprint scan and hence may see himself as having avoided a possible legal problem rather than experiencing one.

Legal needs surveys also are woefully inadequate to assess legal demand because they do not investigate what the landscape of options, alternatives and relative costs and benefits looks like to a person facing a legal situation (Prescott 2010). Nor do they consider what type of help, at what cost, could make a difference. What will work best to minimize the risk of misunderstanding—of the problem by the provider and of the advice and recommended strategy by the client? What features of a client’s situation can mitigate or exacerbate the nature of a particular problem? What features make a standardized solution adequate and what features indicate the need for a tailored solution? And so on.

Legal providers operating on large scale can afford to direct resources to researching these aspects of consumer demand in legal markets. The importance of this to cost reduction for legal services can be substantial. Consider for example the potential for research to identify the factors that make individuals anxious or reluctant to seek legal assistance. Maybe these anxieties are rationally based on the absence of reliable signals of quality or information about what the process will involve or what it will cost, all told. Similarly, it is highly likely that errors in understanding and implementing legal advice are related to lawyers’ lack of appreciation or awareness of the ways in which non-lawyers—educated or not—perceive legal issues: as with any profession that involves jargon and expertise but perhaps even more so in law, there is a widespread tendency to speak past the person you’re trying to help. Lawyers, moreover, are neither trained nor selected for their understanding or empathy of the realities of ordinary people’s lives. This is not to say they cannot acquire such understanding and empathy, but rather to say that there is substantial room for improved research into these aspects of lawyer-client communication and relationships.

Lawyerly misunderstanding of the consumer experience in markets is particularly evident with respect to beliefs about how individuals process and deploy information. For decades, lawyers have advocated warnings and disclosures as a means of overcoming risks in the context of consumer protection—despite the counterintuitiveness of solving a problem rooted in information costs by increasing the volume of information that needs processing.²⁷ The availability, per se, of information is not sufficient to ensure that information is absorbed, remembered, understood and deployed to improve consumer decisionmaking. This is the flaw

²⁷ For a discussion, see Hadfield, Howse and Trebilcock, (1998).

in the line of reasoning we often hear from those who oppose the introduction of online services that supply legal documents or answers to legal questions for a fee that are available for free from other sources. There are numerous attributes of a delivery system for information—content, word-choice, word-density, style, design, source and so on—that affect the likelihood that information is understood and implemented to improve decisionmaking (Viscusi 1994). In studies from the 1970s involving information about the relationship between different foods and disease, for example, researchers discovered that information conveyed by profit-oriented consumer product firms—trying to sell more cereal by advertising the health benefits of fiber or promoting the sale of low-fat items—was more effectively understood and implemented than information provided by trusted sources such as doctors’ organizations or government health agencies (Ippolito & Mathios, 1990, 1995). A key feature of the improved efficacy of information transmission by private firms motivated to sell products was the increased tailoring of messages to the different abilities and contexts of different segments of the population—tailoring made feasible by market research into the types of messages that were effective with different segments. We badly need increased research into the elements of legal communication that affect the cost and efficacy of legal advice and implementation of proposed strategies—particularly in the individual consumer market where strategies are so often implemented by the individual him or herself.

2. Design and Development

The value of improved research into the nature of legal demand is the capacity for improved understanding of how people need and make use of alternative legal resources to spur the development of less costly and more effective alternative ways of meeting demand. This is probably the most potent means of improving access to justice.

The type of development I want to focus on is product and process design. I mean by this, in the context of legal services, the way in which legal services are packaged and delivered—as distinct from the development of the content of legal advice per se. That is, I want to hold constant the state of legal knowledge (about the possible risks generated by a failure to adapt language in a legal document to take account of recent caselaw, the likelihood that a court will award custody to a parent in a family law case or the legal options available to a person facing foreclosure, for example).²⁸ My focus on the potential to deploy product and process improvements to reduce elements of cost other than the content of legal advice per se stems from my goal of demonstrating that the profession’s prohibition on the corporate practice of law—with its exclusive rationale focused on the impact of the corporate form on the exercise of individual lawyerly judgment—seriously limits the capacity for reducing legal costs and

²⁸ I believe there is considerable scope for development in legal expertise per se as well—I analyze this in the context of the corporate legal services market in Hadfield (2008).

increasing access in aspects of legal services that do not depend on the exercise of legal judgment.

Product and process development in law involves both deliberate and incidental efforts to design, experiment with and modify the way legal goods and services are made available to those who need them. Focused attention on the readability of a document, for example, can lead to changes in word choice, presentation and length, perhaps even tailored across different segments of the market. An evaluation of the marginal benefit that different potential clients are likely to derive from a standardized versus a customized document or advice can inform marketing decisions about how to make each type available and at what price. More detailed knowledge of the context, location and time at which particular legal needs arise can prompt the development of services that anticipate these needs—staffing advice booths at job fairs, for example, or bundling legal advisory services with banking or real estate services. Providing legal assistance in retail locations—whether through standalone legal storefronts or counters or kiosks in larger retail outlets (as banking, medical, optical or watch repair services are now offered in some large stores)—by adapting to consumer search and travel patterns, can significantly reduce the costs of finding and securing legal help. Understanding the anxiety and concerns of individuals with legal questions and needs can motivate the development of service attributes that build confidence and mastery, such as by providing an easy method of contacting a provider for reassurance during the completion of forms or procedures, following up to ensure procedures are followed and timelines met, and fast phone-response times. In the delivery of medical services there is increasing recognition that outcomes are significantly affected by non-medical delivery components such as follow-up calls or community support services (Gawande 2011).

The big news here, of course, is the Internet and more generally a web-based platform for legal goods and services. The web introduces tremendous opportunities for changing the structure and process by which ordinary individuals identify legal providers, learn about their legal needs, and obtain legal assistance. Online systems provide the opportunity for using electronic question-and-answer services, community discussions, email, chat, video calling and more as means of conveying legal information, advice and support to individuals as they manage legal situations. Online providers can also complete documents and serve as an interface with legal entities such as courts, regulatory bodies and entitlement agencies. Online triage systems—perhaps aided by large-scale data analysis and artificial intelligence systems—could help an individual analyze the nature of their legal problem, evaluate what kind of help they might need, what’s available, what it might cost, how long it would take and how soon the help should be sought—with what consequences for delay. We can imagine mobile applications that could help pro se litigants or claimants navigate procedures and filing requirements, in

real-time as they are waiting for their case to be called or talking to the clerk at the courthouse. In a world where you can deposit checks or submit health care reimbursements by photographing or scanning a document with your smartphone, it is easy to imagine ways in which legal help could be delivered at much lower cost, with lower error and higher value. Video-calling provides the opportunity for those involved with legal systems to obtain face-to-face advice from an attorney when needed, without the costs of brick-and-mortar offices and transportation. The job applicant whose problem we reviewed earlier could, in a different world, have sought advice about how to complete his application form and whether to submit to the fingerprint scan immediately when presented with the situation, rather than burning the short window of time available to resolve the problem on trying to figure out who to ask and how. The opportunities for vastly reducing the costs of legal help and thus significantly increasing access through web-enabled systems are, as Richard Susskind (2008) has envisioned for the U.K. and any observer of the last decade in other types of markets—including traditional face-to-face services such as banking, financial advice and medical care—transformed by the internet can attest, tremendous.

C. Specialization

A major source of economic benefits from increased scale arises from the potential for increased specialization. Scale here can refer both to the scale of an individual business and scale of the market as a whole. Expanding access to justice by reducing the multiple sources of the costs of securing legal help can have knock-on effects: with a larger pool of available consumers, legal providers can take advantage of the potential cost-savings that arise from specialization, which will spur even further expansions in access.

Consider first specialization across firms. Solo and small firm practitioners serving individuals often engage in a general practice—taking on matters involving divorce, wills, misdemeanors, taxes, torts, etc. This is in response to the small scale of practice: there are simply not enough potential clients in a given practice area to support the costs of running an office. With increased access and increased scale, however, firms can specialize in different legal services. This generates substantial reductions in legal costs. Repeat engagement with similar issues allows providers to build expertise, routines and judgment about when standardized approaches will be sufficient and when a situation calls for more tailored legal work. The larger scale of specialized practice spreads the cost of monitoring developments in the law and changes in personnel and procedures—at a courthouse or agency, for example. These features can reduce the direct cost of providing service, but they can also reduce the costs incurred by clients who turn to a provider for help: with greater expertise and experience comes improved quality and hence reduced error, waste and uncertainty. Indeed, studies in the UK have

demonstrated that individuals who receive services from specialized providers—legal services dedicated to assisting with housing problems or immigration cases, for example—receive higher quality service than do those who are helped by traditional general-practice lawyers (Moorhead, Sherr & Paterson 2003).²⁹

Specialization can also occur internally within a firm if there is sufficient scale. The conventional form of specialization in legal services is specialization across practice areas—this is what characterizes the large corporate law firm, for example. With shared branding, specialization across practice area could link the benefits described above from area specialization with the benefits of scale even for individuals who are less likely than corporations to require service in multiple areas at a time. But the opportunities for cost-reduction through specialization in services for individuals are probably more likely to arise from two different types of specialization: first, specialization in the different economic activities involved in delivering a final legal good or service, and second, specialization in different market segments.

Richard Susskind (2008) refers to the first type of specialization as the “decomposition and multi-sourcing” of legal work. We have already noted several of the component parts of ultimately connecting an individual with a legal need with legal benefits: identifying and diagnosing needs, identifying and evaluating alternative providers and solutions, managing uncertainty and error, acquiring knowledge about a person’s legal situation, communicating advice and strategy, ensuring consistent implementation of strategy and follow-up, producing documents, designing marketing materials and methods, and so on. Costs are generated at all phases of the process of connecting a person with a legal problem with a result that generates benefits. Specialization in these component parts can thus produce cost-savings that ultimately lower the total cost of obtaining access to legal services. Moreover, a deliberate focus on the component parts of the process of generating a legal benefit for someone can identify ways in which processes can be re-engineered to reduce costs: systems analysis is itself a component task. In the small or solo practice office, the practicing lawyer is responsible for all of these tasks, perhaps with the help of an administrative assistant or paralegal. Only a larger-scale entity is capable of devoting significant resources to more specialized production of the individual components of delivering effective legal assistance.

It is also important to recognize that many of the components of successful delivery of the benefits of legal assistance draw on expertise different from conventional legal expertise of the type that determines eligibility for licensure (that is, the expertise that is learned in law schools

²⁹ For further discussion in the U.S. context, see Kritzer (1998).

and tested on bar exams.) Assessment of the nature of legal demand in different segments of the market, for example, is at least in part a product of market research and expertise about various substantive areas such as real estate markets, family dynamics, immigration, small business etc. Improved communication and reduced error in the interpretation of legal information, advice and strategy requires expertise about cognitive processes, design, and consumer behavior. Online document production draws on expertise in web-enabled processes, web programming and design, supply chain coordination and customer service. Large-scale document analysis requires expertise in computer processing and organizational design and management. Even a conventional law practice requires expertise in finance, business management, billing and collection, customer service and so on to support a successful and efficient office.

Lawyers have traditionally approached the need for expertise in areas other than legal expertise by either learning it themselves or retaining the services of a non-lawyer expert. Both approaches are inherently limited. It is fairly obvious that lawyers cannot just become experts in multiple areas at once. Nor can they be expected consistently to have the expertise to recognize what other experts could potentially do for the ultimate delivery of legal goods and services. A lawyer who does disability benefits work isn't going to hire programmers and medical experts to build a smartphone-based benefits filing system unless that lawyer him or herself has the expertise to recognize that such a system is possible and that it would be an improvement on established delivery systems. There's just no reason to expect lawyers to be particularly good at that aspect of innovation. The ones who will see the potential for disruptive innovations in non-legal dimensions of legal service delivery are likely to be those with expertise in non-legal dimensions.³⁰ Even if lawyers can learn enough office management expertise to handle a small business, they cannot become experts in consumer research, graphic design, computer programming, web-based services, and so on. More to the point, if there's a basic lesson from economics to be taken to heart here, it is that there are great returns to specialization in the division of labor—even if lawyers can learn all these things, their time is better spent being lawyers and not programmers, consumer experts or graphic designers. Even innovation is a form of specialization. Lawyer effort is probably better spent on innovating legal reasoning and analysis; the project of innovation in the non-legal

³⁰ Moreover, it is highly unlikely that established lawyers will undermine the continuity of their professional work with the kind of disruptive innovation that is necessary to substantially redesign the delivery of legal goods and services and thus substantially reduce costs. This is one of the key lessons of how major innovation occurs, as Clay Christensen (2006) has emphasized. Disruptive innovation threatens the established way of doing things. Lawyers are not likely to reinvent their own practice, at least not without the threat that if they do not do it, someone else will.

dimensions of delivering the ultimate good of legal services is better left to other specialists. Some of these innovations could be coordinated across market relationships. Experience in other industries, however, suggests that integrated innovation requires other organizational structures such as joint ventures or collaborative profit-sharing contracts (see, e.g., Bozovic and Hadfield, 2012). The empirical evidence discussed in the next section also suggests that coordinating innovation between different specialists is more likely when other organizational structures are available.

The second type of non-area specialization that can help to reduce costs is specialization across different market segments. Commitment to a one-size-fits-all mode of delivery for legal services generates tremendous barriers to access for ordinary people. This one-size-fits-all mode is the mode of individualized face-to-face services structured around an encompassing attorney-client relationship. Clearly there are many settings in which this is exactly the form in which legal services are best provided. But just as clearly, this is a form of assistance that is poorly differentiated to accommodate differences in need and resources. Most importantly, this form of assistance puts individuals in an all-or-nothing position: if they can afford the traditional mode of delivery, they get assistance; if they cannot afford the traditional mode of delivery, they get nothing. This excludes large segments of demand in any given setting.

The legal profession has made some modifications in this approach in the past decade or so, with steps taken to authorize and facilitate the provision of “unbundled” legal services (see Greiner & Jennings 2013). Unbundled services generally involve assistance that a lawyer provides to a pro se litigant involved in litigation—such as by reviewing documents, offering strategic advice, ghostwriting pleadings, arguing a single motion or communicating with an opposing attorney on a single element of the case.³¹ Unbundled services are also at the heart of recent efforts to expand the reach of virtual law offices—solo or small practice attorneys who operate completely online, without in-person interaction with a client (Kimbrow 2011, 2013a, 2013b). These attorneys specialize in serving a segment of the market that cannot afford full-scale representation, and thus have the opportunity to generate the benefits of specialization by gaining expertise in understanding the nature of demand in this segment and developing strategies for lower-cost servicing of demand. The extent of these benefits, however, is limited by the continued reliance on small-scale practice.

³¹ As Greiner and Jennings (2013) point out, the definition of “unbundled” services is ambiguous precisely because there have long been services available in non-litigation settings that are only a piece of a transaction—such as having a lawyer draft or review a contract but not be involved in negotiation.

With larger scale practices, further specialization across different segments of the market could differentiate even more fully from the traditional model of legal assistance: focusing on the specific legal needs—whether advice, planning, dispute resolution or adjudicative in nature—of different segments of the market broken down both by income and circumstances. We see this in the model of legal aid clinics. Separate law school-based clinics, for example, focus on assisting low-income immigrants, victims of domestic violence, tenants, artists, small business operators, and more.

VI. Why we need the corporate practice of law

The economics of reducing the cost of legal services for ordinary individuals makes clear that the scale of legal service delivery needs to expand dramatically. Expanded scale is necessary to accommodate branding, to support investment in the research and development of products and processes, and to increase significantly the scope for specialization in the component elements of legal service delivery and across different market segments. Innovation and specialization need to extend to the many non-legal dimensions involved in ultimately producing the benefits of legal assistance for an individual facing a legal situation.

Is it possible to achieve these changes in the economics of legal services using the model of traditional law practice with partnerships or professional corporations that are completely financed, owned and managed exclusively by lawyers and that do not use contracts with other service providers that can be characterized as fee-sharing?

Clearly the answer is, yes—in some settings and in some respects. Law firms serving large corporate clients are organized as partnerships (or professional corporations wholly owned by their senior lawyers) and they have achieved relatively large scale, display elements of branding, and engage in specialization to various degrees. Whether they have achieved optimal levels of scale, branding, specialization and innovation is another question, one that I do not take up here.³² It is important to note, however, that in other professional business services such as consulting, accounting and banking—where there are no professional regulations limiting the choice of organizational form—we see a diversity of form choice. (Table 1)

Table 1: Forms of Governance in Top 100 Professional Service Firms Globally

Professional Sector	Partnerships	Private Corporations	Public Corporations
Law	100	0	0

³² I address this question in part in Hadfield (2008).

Accounting	56	42	2
Management Consulting	17	44	39
Advertising	0	77	23
Architecture	18	73	9

Source: Greenwood & Empson (2003)

In the personal services market, however, the achievement of scale and shared branding with the traditional model of service delivery is very rare. This is precisely what it means to say that most lawyers serving individuals work in solo or small firm practice. The only examples of scale and shared branding we find in this sector grew out of the experiment with “franchised” law offices that emerged in the 1970s. Today, the only recognizable national name in personal legal services is Jacoby & Myers, which operated as a chain of affiliated offices in the 1980s. Hyatt Legal Services also operated as a chain—and was at one time the second-largest law firm in the country—but is now devoted to the provision of services via a network of attorneys approved for servicing their pre-paid legal plans. And the evidence from new efforts to generate branded online networks of lawyers in the U.S. is not encouraging; one of the leaders in this field has recently observed that the adoption of these methods is surprisingly low (Kimbrow 2013).

The fact that we have not seen the emergence of larger scale in personal service practices using the exclusively lawyer-owned, financed and managed professional corporation or partnership form is an indicator that the prohibition on corporate practice is a roadblock to reducing the cost of legal services. It’s not proof: perhaps the failure to take up the opportunity for expanding scale with the existing partnership form is a consequence of lawyer conservatism or preferences for the autonomy and personal involvement that solo or small firm practice allows. Professional identity in the American legal profession clearly is tightly bound up with the idea that this is the way law is meant to be practiced (Seron 1996). And it is possible, as an empirical matter, that the economies of scale that I have identified are simply not great. Both theory and empirical evidence suggest, however, that there are many reasons to think that the prohibition on alternative organizational and contractual structures is a key reason legal services continue to be delivered in forms that make them so expensive as to be of no use to millions of those with legal needs.

A. The theory of organizational and contractual governance

1. Organizational tradeoffs: risk-sharing, expertise and control

The emergence of the corporate form of organization was a key development in the evolution of commercial law (Hansmann, Kraakman and Squire, 2006). Although there is substantial debate in the literature about the relative merits of partnership and corporate forms (Guinnane

et al. 2007), in the modern economy it is clear that the partnership form is rare in large-scale businesses outside of professional services (Greenwood and Empson, 2003).

Several scholars have sought to explain the (at least, historical³³) dominance of the partnership in professional services (Fama and Jensen, 1983; Levin and Tadelis, 2005; Greenwood and Empson, 2003). These accounts emphasize that in human-capital intensive industries the partnership form provides a means of motivating individuals to contribute their expertise to the joint enterprise (Greenwood and Empson, 2003), can improve the quality of service when insiders outperform markets in monitoring quality (Levin and Tadelis, 2005), and can optimally vest control over firm decisions in the experts who are also best placed to implement decisions (Fama and Jensen, 1983). The partnership form relies on collegial as opposed to hierarchical control over the actions of participants in the firm (Greenwood and Empson, 2003).

The benefits of the partnership form, however, come at a cost. The capital available to the firm is limited to the capital brought by the partners themselves. This implies not merely a limit on the supply of capital. It also limits risk-sharing. Monitoring of participants is limited to active monitoring by partners and other employees of the firm. Decision-making processes are costly, requiring a large number of people whose primary value is based on their expertise in substantive delivery of services also to be knowledgeable about firm performance and governance. Collegial decision-making relies on political processes rather than managerial or bureaucratic procedures. Decisions are influenced by the preferences of individual partners—senior partners approaching retirement, for example, have a different horizon for decision payoffs than do younger partners (Greenwood and Empson, 2003; Jensen and Meckling, 1976).

As scale and complexity in an enterprise increases, the costs of the partnership form increase (Greenwood and Empson, 2003). Increased size (scale) makes collegial decision-making processes more costly, in terms of time diverted from the work of the firm, personal conflict, and delay (as decisions take longer to reach because of the need to educate more decision makers and to build consensus). Large professional service partnerships thus often tend to add formal hierarchical structures for decision-making—such as powerful executive committees (Greenwood and Empson, 2003; Empson and Chapman, 2006). This may reduce some decision costs but at the expense of introducing others, as partners outside executive management continue to play a formal role in firm decision-making but are increasingly excluded from information and participation in key decisions.³⁴

³³ As Table 1 shows, partnerships are less prevalent today in the top 100 firms in some professional service sectors.

³⁴ Governance failures arguably contributed to the May 2012 collapse of “biglaw” firm Dewey & LeBoeuf. See, Reeser (2009a, 2009b, 2009c, 2012).

Increased size is not the only reason larger partnerships will need to move towards hierarchical and formalized control mechanisms. Several of the cost-reducing strategies that scale supports will independently prompt a reliance on hierarchical control. Building a brand, and hence collective reputation, requires a greater capacity for a small group of monitors to coordinate and control individual decisions. Even in a world where individual legal judgment resides with individual practitioners, the other elements of legal service delivery—such as customer service, use of technology, the format in which legal assistance is delivered, and so on—need consistent control to build brand identity. Increased specialization within a firm across a greater variety of legal and non-legal forms of expertise also implicates a greater reliance on hierarchical control, as individual participants become less knowledgeable about the circumstances facing their colleagues, making collegial decision-making both lower quality and higher cost. Heterogeneity in expertise also raises heterogeneity in preferences, resulting in different firm planning horizons and priorities. Specialization across market segments is also likely to produce increasingly standardized solutions and services for the segment of the market where the marginal value of customization falls below the cost of customization. Standardization, in turn, can only be achieved through consistent formal control over products and processes.

As a professional partnership comes to rely more heavily on formalized and hierarchical control systems, there is an increase in agency costs. In the prototypical (small) partnership, partners supply the key monitoring of the decisions made by other firm participants. With hierarchical control superimposed on the partnership, however, partners outside a key decision-making circle are less able to monitor decisions. The effective control group shrinks to a subset of partners and may be inadequate to provide good incentives; hierarchical control mechanisms in corporations are supported by the disclosure and audit functions and by the market for corporate control. Hierarchical control systems also diminish the motivational benefits of partnership. Professionals with a taste for autonomy and personal performance will be less likely to remain with and may produce lower quality for a firm that exercises more formalized control over their work and in which they are largely outside the sphere of operational decision-making. These effects will be exacerbated by differentiation in the categories of partnership that reduces the likelihood of ultimately achieving true partnership status in the firm.

The costs of the partnership form of governance also increase as the risks to which a business is exposed increase.³⁵ Partnerships are funded with a high-cost form of capital: the undiversified investments made by partners. The cost of relying on this source of capital increases as the

³⁵ Greenwood & Empson (2003) consider this in terms of malpractice (litigation) risk.

risks of the business increase; put differently, partners with their capital at risk will be more reluctant to take on risk than a comparable business that can fund risk with investments from a broader pool of investors. Several of the strategies for reducing the cost of legal services, however, will generate greater risk. First, there is the risk associated with increased scale and complexity and the implications of both for firm decision-making and incentives, discussed above. Partners in a large professional partnership who have less information about firm decisions and who have less capacity to monitor or participate in decision-making will perceive this as an increase in the risk to which their capital is exposed.

More fundamentally, many of the cost-reducing strategies discussed above involve moving into novel forms of service delivery and will require investments in research and development to generate new products and processes, as well as new organizational forms. Innovation involves significant risk. Non-traditional pricing models—particularly fixed fees or package prices—also generate added risk as a legal business takes a gamble on getting the fixed fee right relative to the costs of service.

Innovation in legal services is also subject to high levels of regulatory risk. This follows from the highly fragmented and unclear framework of regulation in the legal profession. Regulation is largely state-by-state³⁶, resulting in a patchwork of regulations. The capacity to operate as a limited liability partnership or corporation, for example, varies state to state, both in terms of the law on the books and the willingness of courts to implement statutory provisions that may allow lawyers to escape malpractice liability in contravention of judicial rules about professional responsibility (see Hillman 2003). Even within individual states, the location of regulatory authority is murky. In most states, state supreme courts assert an inherent and exclusive authority to regulate the practice of law—include the business form in which lawyers operate and the definition of the practice of law—but the relationship between legislative authority and judicial authority is sometimes unclear, even to legislatures and judiciaries. Moreover, judicial regulation of the bar has consistently refused to provide clear rules determining what counts as the practice of law—leaving any entity that attempts to diversify the components of legal delivery across a wider range of professionals or processes exposed to substantial uncertainty about the likelihood it violates unauthorized practice of law rules and statutes. Policymaking within the judiciary is also unsystematic and opaque, not subject to the standard procedures of notice-and-comment rulemaking, for example, or legislative hearing. Finally, bar associations—which operate on political models—play a major role in the design and implementation of policy. This generates the risks associated with the politics of trade associations. It also

³⁶ See generally Ribstein (2004). The few exceptions to state-by-state regulation involve some aspects of federal practice, including tax, bankruptcy, securities (Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (Supp. 2003)), and patent practice.

produces the risks associated with the reactions of individual lawyers to the advisory opinions issued by the ethics committees of local bar associations: if an entity's business model depends on participation by lawyers, an ethics opinion by a small group of local practitioners operating in an ad hoc and opaque procedure can scare lawyers away from the model despite the lack of systematic and formal policy at the judicial or legislative level. Challenging these rules and opinions (including their legitimacy under the antitrust laws) is a high-risk endeavor.

Innovation of novel ways of meeting legal needs also requires increased capital relative to what is required for traditional legal practice. Research and development requires resources— notably capital to sustain the organization until a profitable business model is built and stabilized. Increased scale and complexity requires increased resources for overhead devoted to management structures—services that are not directly fee-producing. Increased standardization of products and processes requires increased investments in information technology. A web-based service, for example, requires substantial expenditure on hardware, software engineering and other professional services. Consumer-oriented services and the building of a retail brand require up-front investments—advertising, free services, promotional offers and so on—to generate sufficient volume to cover costs. A partnership's capacity to invest, however, is limited by the liquidity of its partners and the willingness of banks to lend to an entrepreneurial legal business. Regulatory risks compound the access to bank financing.

Finally, the move toward greater standardization in legal service delivery—including greater use of standardized non-legal components such as approaches to customer communication and service, product (document) design, user interfaces, support and follow-up procedures—diminishes one of the key benefits of the partnership form of governance. As a general rule, partnerships have too few partners (Levin and Tadelis, 2005). The reason is the following: Under any profit-sharing rule that commits to distributing a positive share of profits to each partner, the partnership brings in new partners up to the point at which the marginal partner generates profits equal to the average profit share of existing members. This means the marginal partner generates strictly positive marginal profit. At the first-best size, however, the firm would continue to hire partners until their marginal profit was zero. Compared to a firm that pays employees a fixed wage (perhaps including discretionary bonuses) as opposed to a guaranteed percentage of profits, a partnership will have fewer partners but they will be of higher average quality. As Levin and Tadelis (2005) show, this excessive quality produces higher overall profit (and client welfare) if the market is particularly poor at judging quality, because the incentive to exploit poor consumer knowledge of quality—which will tend to cause a firm to hire workers of excessively low quality, passing them off as high quality—is counterbalanced by the incentive to restrict the size of the partnership. This effect disappears, however, in markets

where consumers are better able to judge quality. In those markets, the corporate form in which employees are not guaranteed profit-shares produces higher profits and client welfare.

Legal markets in which products and processes are subject to greater standardization and brand uniformity are ones in which consumers will be better able to judge quality. A provider who offers a standard-form will, for example, does not promise to optimize across a wide range of variables for an individual client. The extent to which the will produced meets the promised level of quality is thus easier to judge, even in the abstract. But even if individuals feel unable to assess quality, the market is better able to assess quality because standardization allows comparison and supports investments by some individuals in evaluating quality and sharing information about quality. If the standardized will is invalidated in some jurisdiction, for example, online reviews and competitor advertising about such failures will share this information about quality with others in the jurisdiction. These considerations apply with even greater force to the non-legal dimensions on which legal businesses might compete to reduce overall legal costs: ease and reliability of the user interface, for example, or the availability of customer support. Given a greater capacity for market monitoring, the optimal form of governance shifts from partnership to corporation.

2. Finance and Contracting: Incentives and Risk-Sharing

The corporate practice of law doctrine prohibits much more than the use of a particularly robust formal legal structure for a legal enterprise. It also restricts the sources of finance for the entity and the payment relationships with other entities—whether the law business is structured as a partnership or a corporation. The doctrine, with only narrow exceptions³⁷, prohibits lawyers from being employed by entities that provide legal services to others: this is a restriction on the form of contract that a lawyer can enter into with others. Limits on fee-sharing and referral fees also restrict the types of contractual arrangements that lawyers can enter into with non-lawyers. For example, according to ethics committees and courts, the following constitute prohibited fee-sharing:

- A contract between a corporation that uses staff lawyers to perform legal research whereby the corporation receives a share of any contingent legal fees earned by the

³⁷ For example, some states allow non-profit organizations that provide services to the indigent to use employed lawyers to serve these clients. In addition, First Amendment principles have been used to strike down restrictions on the capacity of unions and public interest organizations to use employed lawyers to act for their members or members of the public with cases raising the political issues to which the organizations are dedicated. See *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); see also *NAACP v. Button*, 371 U.S. 415 (1963).

lawyer; only payment on an hourly basis for research (presumably from fees earned by the lawyer on this and other cases) is permitted.³⁸

- A contract between a non-lawyer estate planning firm and an elder law specialist who prepares legal documents for clients of the firm and is paid one-third of the fees collected by the firm.³⁹
- An employment arrangement within a personal injury law firm whereby case managers are compensated on the basis of a percentage of fees collected in cases assigned to them that settle.⁴⁰
- An arrangement between a non-lawyer and a lawyer operating a bankruptcy services firm whereby the non-lawyer handles the client and paperwork business of the firm and the lawyer is paid a flat fee monthly to complete bankruptcy files and appear in court on matters for the clients of the firm.⁴¹
- A lawyer's use of online "daily deal" websites (such as Groupon) in which the website retains a portion of the amount paid by the customer for a coupon redeemable for services provided by the lawyer.⁴²
- Any compensation of any non-law entity based on a percentage of either specific or general law firm profits.⁴³
- An online service that collects legal questions from users and routes questions to lawyers who participate in the service and who agree to pay the service a one-time sign-up fee, a fixed fee per question routed and a bonus to the service calculated as between 1 and 5% of any revenues received by the lawyer from the client.⁴⁴
- An agreement between a non-lawyer firm and a law firm under which the non-lawyer firm provides financing for products liability litigation conducted by the firm in exchange for one-half of fees collected from any litigation.⁴⁵
- An on-line matching service that collects information about a user's legal needs and routes information to lawyers who agree to participate in the service's network; a

³⁸ ABA Comm. on Ethics & Prof'l Responsibility Informal Op. 86-1519 (1986).

³⁹ *In re Deddish*, 557 S.E.2d 655 (S.C. 2001).

⁴⁰ *In re Guirard*, 11 So. 3d 1017 (La. 2009).

⁴¹ *In re Whatley*, 621 S.E.2d 732 (Ga. 2005).

⁴² Alabama State Bar Office of Gen. Counsel Op. 2012-01 (2012); Indiana State Bar Ass'n Legal Ethics Comm. Op. 1 of 2012. Other states have found such arrangements not to constitute fee-sharing. See New York State Ethics Op. 897 (2011), North Carolina Ethics Op. 2011-01 (2011), and Indiana State Bar Ass'n Legal Ethics Comm. Op. 1 of 2012.

⁴³ Iowa State Bar Ass'n Comm. on Ethics and Practice Guidelines Op. 10-04 (2010).

⁴⁴ State Bar of Arizona Comm. on the Rules of Prof'l Conduct Op. 99-06 (1999); see also Maryland Ethics Opinion 01-03 (2001).

⁴⁵ *In re Matter of Disciplinary Proceedings Against Mark. X. Van Cura*, 504 N.W. 2d 610 (Wis. 1993).

lawyer who follows up on the information and enters into a contractual relationship with the user agrees to compensate the service at a flat rate of \$300.⁴⁶

Restrictions on the contracts that legal businesses can enter into with others limit the use of standard contractual mechanisms to generate incentives and share risk. Variable compensation tied to quality is routinely used to generate incentives to provide quality and control costs. More complex compensation terms are also used to address problems of moral hazard and adverse selection in many markets. By limiting lawyers to fixed payments for services received from others who contribute to the ultimate value delivered to a client—investigators, translators, social workers, business managers, legal researchers, and so on—undercuts the ability for the relationship to achieve higher value and lower costs. Restrictions on financing arrangements, which prohibit rewarding an investor with a share of the value generated by a legal business, both limit access to capital and undercut incentives to deploy the many other forms of expertise that go into devising a successful business model. Contractual restrictions on variable compensation also limit the capacity to shift risk to those better able to pool, evaluate or manage risk and thus reduce the overall economic cost of risk.

The corporate practice of law doctrine deprives law of the standard tools that economic theory demonstrates are available to reduce costs, improve quality and spur innovation.

B. Empirical Experience

The theoretical considerations canvassed above generate several reasons to think that a restriction on the organizational and contractual forms that can be used in legal services imposes costs and generates barriers to innovative service delivery models that could cut costs for ordinary Americans with legal needs. Ultimately, however, the question of how important it is to remove the restriction on the corporate practice of law in order to generate cost reductions is an empirical one: as Table 1 indicates, even in professional services industries that do not restrict the form of organization, we see a mix of forms with some large and successful firms continuing to choose traditional partnerships even when corporate forms are available. Indeed, in all professional services other than law, diversity of form is a key characteristic. This suggests not that all legal practice should be shifting from partnership to corporate forms, but rather that there are likely to be significant forms of service and cost structures that are underrepresented in the mix of options available to those with legal needs.

In this section I turn to some empirical evidence on the question of how important it is to make the corporate form and more complex contracting tools available to spur the development of cost-cutting changes in legal service delivery. The empirical evidence is anecdotal: no one has

⁴⁶ *Board Says LawButler.com's Fee Splitting Violates Rules*, THE FLORIDA BAR, Sept. 1, 2012.

studied this question systematically and, indeed, doing so is highly problematic given the pervasive restrictions on the corporate practice of law in the United States.⁴⁷ But the empirical evidence we have nonetheless buttresses the theoretical basis for believing that it is essential to allow corporate organization and more complex contractual relationships to produce significant change in legal markets for ordinary Americans.

1. Franchised law firms

The 1970s and 80s saw the emergence of franchised law firms—also known as legal clinics—whereby local law offices operated under a single national brand and sought to standardize procedures and pricing in the delivery of basic legal services. There appears to be little systematic data on this phenomenon. Jerry van Hoy studied two well-known franchised law firms in his 1997 study, but he uses pseudonyms for the firms, leaving us to guess as to their actual identity.⁴⁸ Van Hoy defined a “franchise law firm” as a chain of law offices operating under a common firm name, located in shopping malls, strip malls and other retail districts, and providing a limited menu of standardized services, generating substantial uniformity across offices.⁴⁹ Van Hoy does not provide much detail about the formal organizational structure of these firms: one required attorneys to “buy into the firm and pay[] royalties on their earnings;” branch offices in the other firm were “entirely owned by its founding partners” (Van Hoy, 1997).

The franchised law firms studied by Van Hoy shared several of the features we considered above as potential methods of reducing costs: national branding, standardization, use of technology, retail location and an emphasis on customer service including fixed pricing and a

⁴⁷ This is a central flaw in the stance taken by bar associations in connection with the aborted proposal to relax some of the rules governing non-lawyer participation in law firms as part of the ABA’s Ethics 20/20 review. The New York State Bar Association (2012), for example, cites the lack of data about the impact of non-lawyer ownership on access and professionalism as a reason to oppose change. However, there is no data because the bar’s rules ensure that the U.S. has almost no experience with non-lawyer participation. Moreover, bar associations do not engage in data collection or analysis to address this gap.

⁴⁸ The most likely candidates are Jacoby & Myers and Hyatt Legal Services. Van Hoy suggests there were several other firms fitting the franchise description when he did his study (1990-1991) but he does not provide data on numbers or names of firms so-categorized. Van Hoy, (1995). For more history of the emergence and disappearance of legal clinics, see Engstrom (2013).

⁴⁹ This is not the definition of a franchise used in the retail industry more generally. The term “franchise” is generally restricted to outlets that are wholly owned by a franchisee, and not by the franchisor. Many franchise systems contain both franchise and company-owned outlets. For more background, see Hadfield (1990).

commitment to prompt responses to customers.⁵⁰ As Van Hoy (1997) reports, they showed in particular a shift towards greater use of non-legal delivery components, including standardized documents and the services of secretaries who performed substantial amounts of customer service. Indeed, Van Hoy's focus in his book is on the relatively limited role for the attorneys in these offices: given standardization, they largely played the role of providing an attorney face to the process of providing standardized documents and services, and closing sales.⁵¹

The emergence of nationally known franchise law firms in the 1970s and 1980s potentially evidences two facts. One, there is some demand for lower-cost legal services that can be delivered using cost-reducing methods such as branding and standardization to a significant segment of the market. Two, the demand can potentially be met, at least to some extent, by law firms or entities that are wholly lawyer-owned, -managed and -financed, consistent with existing limitations on the corporate practice of law. The subsequent history of the franchise law firm, however, suggests that traditional organizational structures in law have significantly limited the growth of lower-cost legal services.

The franchised law firm has not survived in the U.S.; the phenomenon largely collapsed in the mid-1990s.⁵² Jacoby & Meyers shuttered most of its offices and focused on personal injury practice. Hyatt Legal Services—at one time the second-largest law firm in the country—transformed into a prepaid legal services plan which was eventually bought out by MetLife. Affiliated plan attorneys supply legal services to purchasers of the plan but it appears there is little in the way of standardized procedures or uniformity in the services themselves.⁵³ Indeed, many bar associations have rules requiring that prepaid legal services plans exercise relatively little oversight over attorney practice or quality, requiring that the participation in the plan as a provider be open to any appropriately licensed and insured attorney.⁵⁴

⁵⁰ For a closer look at how for-profit national legal service firms operate, see Seron (1992).

⁵¹ Van Hoy (1997) provides an anecdote about one lawyer who, asked by a young couple about how long it would take for them to get a will—indicating some urgency—made the mistake of revealing that he had little legal work to do in producing a will for them. He told the clients “Let me see how busy the girl is. If she isn't too busy you can come back in fifteen or twenty minutes.” As Van Hoy reports, “the couple was clearly stunned. The woman exclaimed, ‘Tonight? That fast?’ The attorney, realizing his mistake, quickly said, ‘Well, ahh, I guess it might take a little longer really. How about tomorrow afternoon?’”

⁵² See, e.g., Selinger (1996) (describing the 1990s decline of franchised law firms Jacoby & Meyers and Hyatt Legal Services).

⁵³ HYATT LEGAL PLANS: A METLIFE COMPANY, www.legalplans.com (last visited Oct. 17, 2012).

⁵⁴ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 87-355 (1987), Colorado Bar Ass'n Ethics Comm. Op. 81 (1989).

The lack of growth in nationally-branded law firms with lower-cost services to meet ordinary legal needs could be evidence that there is little demand for such services, but this is at odds with the clear evidence of large scale unmet needs for legal advice and services that we considered earlier. Indeed, founder Stephen Meyers attributed the decline of the business model he had pioneered with Leonard Jacoby to competition: many personal service lawyers adopted the model of selling computer-produced standardized documents for flat fees.⁵⁵ Moreover, it is clear that the model did not expand much beyond the production of basic documents and representation in routine personal injury settlements.

Other evidence about the experience of franchise law firms suggests that the aborted development of lower-cost legal services was in significant part due to the limitations of the organizational form imposed by professional regulation of lawyers. Several bar associations in the mid to later 1990s issued ethics opinions stating flatly that lawyers who participated in franchised law firms—operating under a shared brand name—were in violation of professional rules against operating under a trade name other than the name of a partner or partners in the firm.⁵⁶ Van Hoy (1997) focuses in his study on the problem of motivating professionals to participate in the delivery of services that, in fact, require little in the way of legal work. He notes that the secretaries who worked in these firms—who in fact did most of the work, ranging from client intake and customer service to document production—were very satisfied with their roles; the lawyers, on the other hand, were dissatisfied. But delivery of the service within the limits imposed by the corporate practice of law required that licensed attorneys head the offices of these providers. Not only was this an overinvestment in expensive personnel, attorneys were poorly motivated to participate. The only real legal work necessary here resided in the work of designing and selecting the standardized legal procedures and templates that local offices were required to follow. A lack of success in this model is what our theory predicted above: standardization and resort to formalized and hierarchical control methods undermines the motivation of professionals and diminishes the benefits to the partnership mode of governance.

There are also strong reasons to suspect that limitations on capital and risk-sharing to support investment in novel methods and procedures and the use of fixed-fee pricing models has played a role in stunting the development of this form of service delivery. Van Hoy (1997) suggests that many franchised firms had successfully circumvented the ABA rules about non-lawyer investment by spinning off management companies to provide funds for capital improvement and expansion. Bar associations, however, were unlikely to agree: any

⁵⁵ Randy Kennedy, *Groundbreaking Law Firm Shifts Its Focus to Personal-Injury Cases*, N.Y. TIMES, May 12, 1995, at A29.

⁵⁶ See, e.g., Ohio Bd. of Comm'rs on Grievances & Discipline Op. 97-1. (Feb. 14, 1997).

relationship with a non-lawyer owned management company that generated profits for non-lawyer owners would have to have involved sharing fees given that all revenues for the firm were derived from clients who purchased legal services. And, indeed, while Jacoby & Meyers has survived since the heyday of franchised law firms (and refers to itself as “a network of affiliated law offices across the country”⁵⁷) as discussed earlier, it now claims that restrictions on access to equity are constraining its growth. That they have bothered to incur the costs of filing these lawsuits suggests at least some plausible basis for believing that one of the few personal services firms that is still seeking to expand its lower-cost model finds itself limited by the prohibition on the corporate practice of law.

But the best evidence that the corporate practice of law doctrine is a critical limit on the development of franchised or nationally-branded legal systems in the U.S. comes from the U.K., where these restrictions were definitively lifted in 2010. At least two franchise-type systems have quickly emerged: Face2Face Solicitors advertises a “business in a box” model for law offices that join its branded system; Quality Solicitors offers local law offices a common branded network with shared practices and pricing models and a shared consumer-friendly website. Both employ business organizational models that are prohibited in the U.S. by the corporate practice of law rules. Face2Face Solicitors is a joint venture between its lawyer founders and a legal software company—suggesting that there are benefits to this integration that were not achievable by an arms length licensing of the business format and software components and the legal advice components. Quality Solicitors is funded by private equity. Both companies collect the equivalent of royalties from the law firms that affiliate with them—a contractual arrangement that would constitute illegal fee-splitting in the U.S.

2. Innovations by non-lawyer-owned corporations

Another source of evidence that significant innovations to reduce the cost of legal services require access to benefits provided by corporate form comes from the emergence of corporations owned and financed by non-lawyers, seeking to fill pockets of legal demand within the constraints of what current professional regulation allows.

The standardized document production that firms like Jacoby & Meyers and Hyatt Legal Services pioneered has now largely been taken over by corporations with access to the capital needed to build large-scale web-based consumer-oriented platforms. Corporations such as USLegal, SmartLegalForms, LegalZoom, RocketLawyer, Nolo, LegalForce/Trademarkia and LawDepot, offer online, generally interview-based, services for the production of legal

⁵⁷ Complaint at 9, *Jacoby & Meyers Law Offices, LLP v. Justices of the Supreme Court of New Jersey*, No. 11-2866 (D.N.J May 18, 2011).

documents such as wills and trusts, the court documents necessary to file an uncontested divorce and the administrative documents necessary to incorporate a business or file for a patent or trademark. Some of these services link document production to legal services such as from a pre-paid legal plan where for a monthly fee members can obtain no-fee services (such as reviewing documents and providing one-time consultation on a legal problem) and contracted-fee services on other legal problems from a lawyer affiliated with the plan; contact with the lawyer is organized on a 'click to consult' basis through the company's website.⁵⁸

Legal information companies are also emerging. Pearl.com is a San-Francisco-based company that allows members to post questions to be answered by experts who join the system. The member selects a proposed price for an answer and experts choose whether to answer at that price. The expert is paid when the member indicates satisfaction with the answer received; the company also receives payment for hosting the communication. The system includes experts in a wide variety areas including car repair, finance, medical issues, veterinary care, as well as legal problems. LawPivot.com is a law-only system, recently acquired by RocketLawyer, where questions are posed to the system and then funneled to lawyers affiliated with the system and paid for on a per-question satisfaction-guaranteed basis. Questions can be asked either in a public forum or confidential setting.⁵⁹ Unlike Pearl.com, lawyers on LawPivot.com are identified by name and can be contacted outside the system; Pearl.com experts are identified by username only. LawGuru.com provides free answers to legal questions through its network of affiliated lawyers; it appears that the business model is, as with many other Internet services, based on ad-revenues.⁶⁰ Similar services are offered by online companies such as LawQA.com, Avvo.com and StandardLegal.com.

⁵⁸ LegalForce/Trademarkia bundles attorney services with online documents by having legal services provided by a law firm wholly-owned by the attorney who also co-founded the online company. Fees for legal work are collected by the law firm and not shared with the online company; it is unclear how the online company generates separate revenues.

⁵⁹ Users pay a fee to LawPivot, which claims that "[n]o fee sharing arrangement exists" between the company and participating attorneys. Lawyers are not compensated for answering questions, but rather participate in order to generate leads with potential new clients. Attorneys may perform defined legal services for LawPivot users in return for a fixed cost, which includes an "estimated flat attorney's fee, and transaction cost to be paid to [LawPivot] for handling of administrative tasks and details and maintenance of the Website." See LAWPIVOT TERMS OF USE, PARTS VIII, X, XI, <https://www.lawpivot.com/staticcontent/terms/> (last visited Sept. 10, 2013).

⁶⁰ Attorneys list themselves for free on LawGuru.com. LAWGURU FOR ATTORNEYS, http://www.lawguru.com/answers/atty_profile/ (last visited Oct. 17, 2012).

Other emerging innovations in the legal market online include AttorneyFee.com, a website that scrapes the web to generate information about the fees charged by lawyers in a particular field and location designated by the user. The system also provides contact information for these lawyers. MyLawsuit.com is an online company that allows people with personal injury claims to post their case on the website and receive potentially competing offers for representation from attorneys who become members of the site. Clients pay a fee to MyLawsuit.com, calculated as a percentage of any amounts received in a successful case, for the service. Although operating in different spheres, both companies thus help to cut search costs for those in need of legal help. They also potentially provide a means of generating public shared information about quality, thereby reducing the costs associated with risk. Other examples are collected in Kimbro (2010).

These corporate ventures, often involving lawyers as founders but not funded exclusively by lawyers, demonstrate that the possibilities for cost-reduction in legal services we canvassed earlier in the paper are clearly within reach. All of these U.S. ventures, however, face limitations on their business model—and hence on the opportunity for cost reduction—as a result of professional limitations on the corporate practice of law. Document providers such as LegalZoom and RocketLawyer, for example, run the state-by-state risk⁶¹ of being found to have engaged in the unauthorized practice of law if their service is deemed by an ethics committee or court to go beyond a scrivener role; legal help is not available to choose what documents to complete or how to complete them except through a pre-paid legal plan that refers clients to conventional legal practitioners who cannot be contractually bound to follow protocols established by the company. Legal question-and-answer services such as Pearl.com and LawPivot must be careful to either ensure they are only directing users into traditional and confidential lawyer-client relationships or providing access to only generic legal information in response to questions. An ethics committee of the South Carolina bar association recently opined that South Carolina lawyers who participated in Pearl.com’s system would be in violation of professional ethics by assisting a corporation in the (unauthorized) practice of law.⁶² This generates risk for these companies as well as limiting their capacity to provide a more valuable service.

⁶¹ See *Janson v. Legalzoom.com, Inc.*, 802 F.Supp. 2d 1053 (W.D. Mo. 2011); Connecticut Bar Ass’n Unauthorized Practice of Law Comm. Informal Op. 2008-01 (2008); Pennsylvania Bar Ass’n Unauthorized Practice of Law Comm. Formal Op. 2010-01 (2010).

⁶² South Carolina Bar Ethics Advisory Comm. Op. 12-03 (2012). The opinion states that it is improper for a South Carolina lawyer to answer questions on JustAnswer.com (the former name of Pearl.com). The company was not contacted by the advisory committee for any input or information to confirm the relevant facts about its business model prior to the issuing of this opinion.

Again, comparable corporate ventures in the U.K. do not face these limitations as a result of the longstanding acceptance of lay practitioners in law—who frequently practice as part of profit and non-profit organizations—as well as the recent reforms of the Legal Services Act which allowed licensed solicitors to be employed by organizations with non-lawyer ownership.⁶³ A U.K. website called Expert Answers.com, for example, is operated by a corporate entity; like Pearl.com and LawPivot.com, it provides users with access to legal information; but it is able to go further and provide full-scale legal advice online.⁶⁴ A sample answer to a question about how to manage a ticket received in a private parking lot operated by a retail store, for example, gives specific advice about next steps, tailored to the particular circumstances indicated by the questioner. U.S. sites, on the other hand, are limited to providing only generic legal information and specifically prohibited from providing advice based on the particular circumstances of the user, unless they go through the more cumbersome and state-specific process of establishing a limited-representation attorney-client relationship with a conventionally licensed lawyer. AskLaw24 is an online service owned by a traditional solicitors firm and offering a fixed-fee online legal advice service. Users pay £99, complete an information sheet and upload any documents relevant to their situation. AskLaw24 then obtains a formal written opinion from licensed barristers (operating in a separate practice but affiliated with the law firm that operates AskLaw24.)

U.K. services such as Divorce-online—owned by a family law paralegal and staffed by paralegals—Halifax Legal Express—owned by one of the U.K.’s largest banks—and Coop Legal Services—owned by a major consumer-owned grocery chain—provide the documents needed to file an uncontested “DIY” divorce, as do U.S. services like LegalZoom and RocketLawyer. In addition, however, the U.K. services offer legal advice about completing documents online. There are also additional tiers of fixed-fee service, involving progressively more assistance from lay legal advisors, solicitors or barristers. Coop Legal Services users can opt for a solicitor-managed flat fee package as well as the DIY option.⁶⁵ Halifax Legal Express offers an impressive list of documents and letters and a choice between three levels of flat fee service: DIY, legal review by in-house legal experts or review by an affiliated law firm. The Divorce-online system provides assistance to individuals representing themselves in contested divorce proceedings. Someone who wants to file for a modification of a support order, for example, can (for £199) have licensed solicitors working with the company prepare the application and an affidavit; the

⁶³ For a discussion of the uniqueness of the U.K. reforms in the European context, see Garoupa in this issue.

⁶⁴ EXPERT ANSWERS, www.expertanswers.co.uk (last visited Oct. 17, 2012).

⁶⁵ *Legal Advice from Qualified Barristers*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/contemplating/legal-advice.asp> (last visited Oct. 17, 2012).

solicitors then also provide support and advice by phone and email “throughout the proceedings up to and including any final hearing.”⁶⁶ The company also has a paid referral arrangement with AskLaw 24. Divorce-online receives a percentage of the fee charged by AskLaw24 for referrals that come through their site.⁶⁷ The website includes a “View Feedback” button that displays about 1,200 comments from users with the legend that “all entries on this page are user generated without any intervention from Divorce-Online”⁶⁸ and a page showing over 200 testimonials.⁶⁹ The company is a corporate member of the Institute of Certified Paralegals⁷⁰ and carries professional indemnity (malpractice) insurance.⁷¹

All of these services employ business and organizational elements that are prohibited by the U.S. corporate practice of law rules. The fact that comparable services are unavailable to Americans but now pervasively available to those living in the U.K., under rules that do not impede organizational choices like this, is compelling evidence that the corporate practice of law is an impediment.

3. Medicine

Like law, the medical profession in the early years of the 20th Century was successful in prohibiting the practice of medicine by corporations. Unlike law, however, the corporate practice of medicine doctrine has been substantially narrowed and reshaped as medicine has responded to growing specialization and complexity in medical practice and the pressure to reduce costs and extend health insurance coverage. Additional evidence of the importance of

⁶⁶ *Application to Vary Maintenance*, DIVORCE ONLINE, http://www.divorce-online.co.uk/services/children/application_to_vary_maintenance.asp (last visited Oct. 17, 2012).

⁶⁷ *Legal Advice from Qualified Barristers*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/contemplating/legal-advice.asp> (last visited Oct. 17, 2012).

⁶⁸ *Our Clients Divorce Online Reviews*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/FeedbackDisplay.asp> (last visited Oct. 17, 2012).

⁶⁹ *A Selection of Testimonials from Our Satisfied Clients*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/testimonial.asp> (last visited Oct. 17, 2012).

⁷⁰ Under the U.K. regulatory scheme, paralegals (like other non-lawyers) are authorized to provide anything other than specific legal services that require either registration or licensing by one of the eight regulatory bodies that supervise legal work (such as the Solicitor’s Regulatory Authority, the Bar Standards Board, the Institute of Legal Executives Professional Standards Board and the Council for Licensed Conveyancers). Registration is required to receive payments under the Legal Aid scheme for work, to engage in immigration advice or assistance, or manage personal injury claims. Reserved work that requires licensing by a legal regulatory body includes appearing in most courts, conducting litigation, and signing and lodging certain documents related to probate or transferring land or property.

⁷¹ For other examples and discussion see Hadfield (2014).

lifting limitations on organizational and contractual form to spur cost-reduction in a professional field thus comes from our colleagues in medicine. (See Epstein, this volume, for additional discussion of medicine and law.)

The last three decades have seen extensive experimentation and diversification in the organizational structures in which medicine is practiced, leaving behind the “cottage industry of professional dominance” (Robinson 1999) by doctors, operating in solo or small practices, who secured informal privileges at local hospitals and collected their fees from patients who, if insured at all, sought indemnity from an insurance company. Today the medical landscape is dominated by a combination of large-scale health care systems and networks that integrate the services of hospitals, doctors and other health care professionals, insurers and professional managers. Although several states still have corporate practice of medicine laws on the books that prohibit hospitals or other corporations from hiring doctors⁷², a wide variety of arrangements between doctors and corporate entities have flourished through de jure or de facto exceptions. These arrangements include outright employment of physicians by hospitals or non-physician owned businesses, contractual relationships between physician groups and hospitals that involve sharing of gross revenues from patient and insurer payments, and referral relationships within more decentralized networks of hospitals and medical groups.

One of the earliest innovators was Kaiser Permanente in California, established as a pre-paid plan in 1942 to provide health care for Kaiser shipyard workers during World War II. Today Kaiser Permanente is structured with exclusive contracting relationships between the non-profit Kaiser Foundation Health Plans on the one hand and non-profit Kaiser Hospitals and regional for-profit Permanente Medical Groups of physicians on the other. The Permanente Medical Group (TPMG) for Northern California, for example, is organized as a professional corporation owned and managed by physicians. TPMG enters into annual exclusive contracts with the Health Plan and negotiates a fixed per capita payment based on memberships in the Health Plan, reimbursements for expenses such as office rental and equipment, and an incentive payment which distributes to TPMG a share (originally 50%) of net revenues received by Health Plan.⁷³ In Michigan the Henry Ford Health System has its roots in another early system pioneer, the Henry Ford Hospital, which opened in 1915 with a salaried staff of

⁷² Only 5 states (California, Colorado, Iowa, Ohio, and Texas) prohibit hospital employment of doctors. Kim (2007). As of 2006, 14 states had laws on the books that prohibited non-physician ownership of a business in which physicians provide medical treatment; several other states had caselaw or attorney general opinions suggesting that there were limits on non-physician ownership of medical practices. Michal et al. (2006).

⁷³ *Payments to Physicians in the Permanente Medical Group*, available at <http://businesspractices.kaiserpapers.org> .

physicians. Today the system is organized as a combination of a health plan, hospitals and physician organizations. The Henry Ford Physician Network is a wholly-owned subsidiary of the Henry Ford Health System. It consists of private practice doctors as well as doctors employed by the Health Plan and Henry Ford Hospitals and negotiates contracts for both fixed and incentive/performance payments for its member doctors. Practice guidelines in both Kaiser-Permanente and the Henry Ford System are developed collaboratively between the health plan, hospital and physician components.

Another important innovation, the medical group practice whereby several doctors of different specialties practice together in a defined entity, also had early roots in pre-paid health plans in the early part of the 20th C. The Ross-Loos Clinic in Los Angeles, for example, set up a program in 1929 whereby it agreed to provide health care on a pre-paid basis to the employees of the Los Angeles Department of Water and Power. These early efforts, however, met stiff resistance from the medical profession, as medical societies and hospitals exerted pressure (by denying membership, referrals or hospital privileges) to those practicing in pre-paid or group formats (Robinson, 1999). Only in the 1970s and 1980s, however, did such behavior meet with opposition from antitrust authorities.⁷⁴ As the limits on innovation in health plans and compensation arrangements with doctors fell away, health plans and managed care organizations in the 1980s and 1990s then found themselves bargaining with large-scale private-equity backed or publicly traded physician practice management corporations. For a time, medical groups went through a frenzy of Wall Street financed mergers and acquisitions. These systems ultimately crashed, replaced by physician-hospital arrangements with more a thoughtful attention to regional and specialty needs (Robinson, 1999). Today, medical groups operate in the context of a wide variety of relationships with health plans and hospitals, ranging from highly centralized employment models to loose affiliations.⁷⁵

Physicians and other licensed health-care professionals also experimented with non-insurance based low-cost health care by providing services in retail settings operated by corporate entities. MinuteClinics, originally headquartered in Minneapolis and operating under contract in stores like CVS and Targe, is now owned by and operates out of CVS Pharmacies. WalMarts

⁷⁴ See, e.g., *United States v. Halifax Hospital Medical Center*, No. 78-554-Orl-Civ-Y, 1980 WL 7912 (M.D. Fla. 1980) (Consent order which, *inter alia*, enjoins county medical society from taking any action with purpose or effect to discourage physicians from practicing medicine on other than fee-for-service basis); and *United States v. Halifax Hospital Medical Center*, No. 78-554-Orl-Civ-Y, 1981 WL 2101 (M.D. Fla. 1981) (Consent order which, *inter alia*, enjoins hospital from denying privileges to doctors who affiliate with health maintenance organization.).

⁷⁵ For a now somewhat dated overview, see G.J. Bazzoli et al. (1999).

throughout the country house the operations of in-store clinics with names like SmartCare, RediClinic, QuickHealth and Medpoint Express. These clinics are routinely staffed by nurse practitioners rather than MDs, although in some states nurse practitioners must be supervised to some extent by a doctor. Retail clinics generally offer a fixed menu of fixed-price services including diagnosis and treatment of conditions such as bladder infections, flu, minor skin infections, nausea, and strep throat as well as providing many basic vaccinations. In another variation on the model, Access Health in California operates retail outlets, staffed both by doctors and nurse practitioners, and offers basic services at low fixed prices.⁷⁶ HealthRite clinics in New Jersey are individually owned by physicians who employ nurse practitioners; the clinics operate under a single system name and contract with a non-profit health system, AtlanticCare, for management and billing services (Takach and Witgert, 2009).

These innovations in health care delivery and systems have emerged from complicated legal and regulatory changes in the corporate practice doctrine. Starting with the federal Health Maintenance Organization Act of 1973, more complex arrangements between hospitals, doctors, and insurers were exempted from corporate practice of medicine rules; the Knox-Keene Health Care Service Plan Act of 1975 in California (one of the few states to maintain an express prohibition the hospital employment of doctors) exempted health care service plans from application of limitations on the corporate practice of medicine. Following an order from the Federal Trade Commission acting under the antitrust laws, the American Medical Association in 1979 dropped its ethical objections to the corporate practice of medicine, stating that physicians should be “free to choose whom to serve, with whom to associate and the environment in which to provide medical care” (Kim 2007). The federal Patient Protection and Affordable Care Act of 2010 does not expressly preempt state law on the corporate practice of medicine but it contemplates the development of Accountable Care Organizations which have a legal structure enabling the sharing of fees and savings amongst a wide set of participants in the health care system and a management and leadership structure capable of overseeing both clinical and administrative systems.⁷⁷ This suggests that any remainder of the corporate practice of medicine doctrine at the state level is soon to fall.

None of these incursions on the corporate practice of medicine doctrine resulted in a diminution of the professional responsibility of care that physicians hold towards their patients. Hospitals and health service plans are expressly prohibited from interfering with medical matters. At the same time, practice guidelines and protocols aimed at containing costs are clearly allowed. As the Knox-Keene Act in California expresses this, contracts between health

⁷⁶ ACCESS HEALTH, www.myaccesshealth.com (last visited Oct. 16, 2012).

⁷⁷ See 42 U.S.C. § 1395jjj (2010).

services plans and physicians may not employ incentive plans “as an inducement to deny, reduce, limit or delay specific, medically necessary and appropriate services⁷⁸” but this leaves substantial space for cost-control mechanisms; moreover, the statute expressly allows “contracts that contain incentive plans that involve general payments such as capitation payments, or shared-risk arrangements that are not tied to specific medical decisions involving specific enrollees.”⁷⁹ Moreover, hospitals and health service plans are themselves regulated entities subject to obligations of care towards their patient-customers and authorized to provide services only under a valid license—providing a regulatory hook for failures in care.

The diverse landscape of organizational forms, and specifically the replacement of the “cottage industry” of solo and small firm medical practice with a variety of corporate forms and formerly prohibited relationships, has clearly played and will continue to play a major role in innovation, quality improvement and cost-containment in medicine. As one close student of this phenomenon has put the case for why corporate practice forms are so important to innovation in medicine:

The second feature of the emerging health care system, which derives from the first [pressure to adopt cost-increasing technologies while moderating economic burden] is continued innovation in forms of organization, ownership, contract, finance and governance...large rewards will accrue to those who pioneer cost-decreasing products and processes...These product and process innovations do not occur in a vacuum but require organizational changes that enhance coordination and reward efficiency. . . The corporate system of health care demonstrates daily its economic superiority over the traditional system of professional dominance. . . (Robinson, 1999).

VII. Conclusion

Why have our sister professions and notably medicine been able to move away from outdated prohibitions on corporate practice while law has only reinvigorated its commitment to a 19th century mode of economic organization? The answer lies in the uniquely powerful form of self-governance that lawyers have asserted. Physician self-governance is ultimately held accountable to political processes working through legislatures. Lawyer self-governance, in contrast, is held accountable only to a judiciary comprised of members of the same tribe. Judges have largely delegated their role in the economic regulation of legal markets to bar associations; bar associations have framed the issues of regulation as matters of ethics in conventional practice. But even if they were to recognize the problem with that framing,

⁷⁸ CAL. HEALTH & SAFETY CODE § 1348.6(a).

⁷⁹ CAL. HEALTH & SAFETY CODE § 1348.6(b).

neither state supreme courts nor bar associations are well-equipped to perform the kind of deep policy and economic analysis that this critical issue requires.

The prohibition on the corporate practice of law—which, as we have seen, bans a wide variety of organizational and contractual relationships between lawyers and non-lawyers—hobbles the innovation of lower-cost means of providing legal help to the great majority of ordinary individuals. Many of those lower-cost innovations are within easy reach—if the profession would relax its stranglehold on the practice of law. Corporate entities that can sink capital into consumer research, document and process design, and improved sub-market-sensitive means of communication are ready to do so. Web-based platforms for service delivery are already in place to provide a means for building the reputational capital that lowers costs and improves quality in most service sectors. Large-scale data and information systems are now available to provide standardized documents, procedures and protocols to meet the needs of a large segment of the population that now muddles through with no help at all in legal proceedings, imposing huge costs on our courts and other litigants. Innovators with one foot in the law and another in software or enterprise development are already at work but facing unnecessary and costly limits on their business models to comply with corporate practice rules that no one has, or could, demonstrate improve the well-being of ordinary individuals whose alternative to standardized online legal help is no legal help at all.

It is important to recognize that other professions have not submitted willingly to the changes foisted upon them. Doctors did not applaud the licensing of nurse practitioners or the authorization of health maintenance organizations that retained the capacity to develop drug formularies and require pre-authorization of medical procedures subject to a demonstration of medical necessity (Rigertas, 2012; Wholey, Christianson, and Sanchez, 1993). But few can argue that these changes have not been essential to expand the reach and reduce the cost of health care. Expanding the accessibility and reducing the cost of legal assistance will similarly require sea changes in our approach to the economics of legal work. As a profession, American lawyers fought to close the loop on self-governance, resting ultimate and exclusive authority in state supreme court judges who are largely dependent on lawyers for support, and sometimes for their seat on the bench. With their success came an especially heavy obligation, to step outside of the narrow frame of the economics of their existing law practices and into the broader frame of the economics of the legal industry.

It is also important to recognize that changing the regulatory environment to allow (un)corporate forms of practice does not mean an unregulated free-for-all. Law can be a complex product and there are reasons to license and regulate its delivery to ensure quality. Again, however, the models from the U.K. and medicine are instructive. Hospitals are licensed

entities. The corporations that provide legal services under the Legal Services Act in England and Wales are licensed and regulated by approved regulators. The regulatory goals of ensuring competent, confidential and conflict-free legal advice and representation can be achieved—perhaps even more effectively—through regulation at the entity-level. The flaw in the current model is the belief that these goals are, and can only be, achieved by prohibiting lawyers from entering into arrangements with other professionals, companies and investors—arrangements that can provide tremendous economic benefits to people in need of legal help.

The prohibition on the corporate practice of law might have seemed an appropriate regulatory stance at a time when law played a much smaller role in daily lives, when regulation of the corporation was much less developed, and when technology and scale held less promise. But today the doctrine stands only in the way of any sensible solution to a problem of the profession's making: the indefensibly high cost of delivering legal help to ordinary people as they navigate the law-thick world we have assembled.

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