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2016

How to Regulate Legal Services to Improve Access, Innovation, and the Quality of Lawyering

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Available at: <https://works.bepress.com/ghadfield/60/>

How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering

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February 2016

Abstract

Proposals to change the regulatory framework for the legal profession to increase access to legal services have been made for decades. The organized bar frequently responds to these proposals by raising concerns about the difficulty of regulating alternative providers and corporate legal services entities with nonlawyer investors or managers. In this paper we explore the nature of the regulatory challenge. By reviewing in detail the approach developed in the U.K. under the 2007 Legal Services Act—which initiated a licensing regime for legal services entities including but not limited to lawyer-owned law firms—we demonstrate the feasibility, and benefits, of developing an analogous regime in the U.S.

I. Introduction

The case has been made for decades: our existing approaches to regulating the American legal profession increase costs, decrease access, stifle innovation, and do little to protect the interests of those who need or use legal services.¹ Ordinary Americans routinely

¹ Deborah L. Rhode, *The Trouble with Lawyers* (2015); Benjamin H. Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (2015); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 *International Review of Law and Economics* 43 (2014); Gillian K. Hadfield *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 *Daedalus* 1 (2014); Benjamin H. Barton, *In Defense of the Status Quo: A Critique of the ABA's Role in the Regulation of the American Legal Profession*, 45 *Suffolk University Law Review* 1009(2012); James E. Moliterno, *Crisis Regulation*, 2012 *Mich.*

manage complicated legal circumstances with little or no professional help²; the great majority of lawyers' work is done for large corporate clients, and the trend has only worsened in the last decades.³ The number of people showing up in court without legal assistance to manage problems with housing, family, domestic violence, consumer credit and other challenges continues to mount—in a recent New York study, the percentage of unrepresented litigants topped 95% in several routine categories.⁴ A lack of legal assistance with municipal and traffic violations has played no small part in the abusive use of arrest warrants and fines in poor

St. L. Rev. 307 (2012); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Cost of Professional Control over Corporate Legal Markets*, 60 *Stanford Law Review* 1689 (2008); Deborah L. Rhode, *Access to Justice* (2004); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 *J. Inst. Study Legal Ethics* (1996); David B. Wilkins, *Who Should Regulate Lawyers?* 105 *Harv. L. Rev.* 799 (1992); David Luban, *Lawyers and Justice: An Ethical Study* (1988); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 *Ohio St. L. J.* 243 (1985); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stan. L. Rev.* 1, 61 (1981); Deborah L. Rhode, *Why the ABA Bothers: Functional Perspective on Professional Codes*, 59 *Tex. L. Rev.* 689 (1981); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?* 59 *Tex. L. Rev.* 639 (1981); Barlow F. Chistensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 5 *Am. B. Found. Res. J.* 159 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29 (1978)

² See Gillian K. Hadfield and Jamie Heine, *Life in the Law Thick World: The Legal Resource Landscape for Ordinary Americans* in S. Estreicher and J Radice (eds.) *Beyond Elite Law: Access to Civil Justice in America* (forthcoming).

³ John P. Heinz, Robert L. Nelson, Rebecca I. Sandefur, and Edward O. Laumann, *Urban Lawyers: The New Social Structure of the Bar* (2005).

⁴ Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, at 1 (2010).

communities.⁵ Even in criminal matters where the *Gideon* right to counsel is constitutionally guaranteed, the inadequacy of legal help is staggering.⁶

The traditional response of the organized bar to the crisis in access to justice has been to promote increased funding for legal aid, increased pro bono obligations on practicing attorneys and the creation of a government-funded “civil *Gideon*” right to counsel in some civil matters. But it is also painfully clear that these responses are wholly inadequate. Providing even one hour of attorney time to every American household facing a legal problem would cost on the order of \$40 billion.⁷ Total expenditures on legal aid, counting both public and private sources, are now just 3.5 percent of that amount.⁸ Fewer than 2 percent of all American lawyers work in legal aid or public defender jobs and pro bono work accounts for less than 2

⁵ United States Department of Justice, Investigation of the Ferguson Police Department (March 4, 2015).

⁶ Rhode, *supra* note at 30-35; Roger A. Fairfax, Jr. Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice reform Agenda, 122 Yale L.J. 2316, 2319, 2321 (2013); ABA Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* 7-14 (2004); Karen Houppert, Chasing Gideon, The Elusive Quest for Poor People’s Justice 154 (2013); Carol S. Steiker, Gideon’s Problematic Promises, *Daedalus*, Summer 2014, at 53.

⁷ This calculation is based on data in Hadfield and Heine, *Law-Thick World*, *supra* n. 2. It uses a straight-line average of the percentage of households reporting at least one legal problem in state surveys (62%), the average number of problems experienced by these households (3) and an estimate of an hourly rate of \$200.

⁸ Alan W. Houseman, Civil Legal Aid in the United States: An Update for 2013 (April 2013). <http://www.clasp.org/resources-and-publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf>

percent of legal effort.⁹ Providing just one hour of pro bono assistance per problem to households facing legal difficulties would require over 200 hours of pro bono work per year by every licensed attorney in the country.¹⁰ No amount of volunteerism, ethical exhortation or political pressure for increased taxation to fund legal services can ever fill the gap.

The principal obstacle to increasing access to legal assistance is the cost of the business model in which legal services have conventionally been available to ordinary consumers.¹¹ That model relies on individual one-on-one lawyering, through traditional solo and small firm practices, generally billed on an hourly basis. The model foregoes the cost-reducing benefits of scale, branding, technology, and the ordinary efficiencies that would come from having lawyers specialize in legal functions, while others (software engineers, financial analysts, business managers, marketing experts, etc.) specialize in all the other functions.¹²

Why has the traditional model of legal service delivery not achieved greater efficiencies and lower costs?

⁹ An ABA survey calculated that licensed attorneys provide on average 42.8 hours of pro bono services directly to people of limited means in 2012. ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers*, at 6 (2013). Assuming 48 40-hour weeks of work for an average lawyer, this is a little over 2% of annual legal effort.

¹⁰ See basis for calculation in n. 7, *supra*.

¹¹ Hadfield, "The Cost of Law"

¹² *Id.*

The American approach to professional regulation is not the only answer, but it is clearly a major contributing factor. That approach is expressed primarily in the expansive rules on unauthorized practice of law and the restrictions on the corporate practice of law and fee sharing. Under that approach, all (paid) legal help must be provided by holders of an expensive graduate degree—the JD—who pass a state bar exam and hold a valid license from a state bar association.¹³ It must be provided by a law firm that is owned, managed and financed exclusively by lawyers.¹⁴ Lawyers who are employees of other entities can offer legal services only to their employer, not the public.¹⁵ Lawyers cannot enter profit- or revenue-sharing contracts with providers of complementary goods and services.¹⁶ These rules make the markets for legal services among the most, if not the most, intrusively regulated in the modern economy. Even the practice of medicine is far more openly organized, particularly since the advent of health maintenance organizations.¹⁷

The fierce preservation of a legal professional regulatory model first adopted in the 1930s but substantially abandoned in other professions rests on two driving forces. The first is sheer protectionism. As much as we would like to deny that lawyers are using their special

¹³ With limited exception now in Washington State, which we discuss *infra* at **.

¹⁴ See, e.g., ABA Model Rules of Professional Conduct Rule 5.4. Washington, D.C. is a limited exception, which we discuss *infra* at **.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ For a history of professional regulation in medicine see James C. Robinson, *The Corporate Practice of Medicine: Competition and Innovation in Health Care* (1999).

access to the regulatory levers to protect themselves from competition by alternative providers and business models, this is clearly part of the story.¹⁸ Anticompetitive behavior is, of course, a temptation for any self-regulating profession—as the U.S. Supreme Court recently acknowledged in a landmark decision finding that regulatory boards that are controlled by members of a profession are not exempted from application of the antitrust laws in the absence of active supervision by the state.¹⁹

The second impediment to new models for regulating legal services is the sincere worry that changes to the doctrines prohibiting the corporate practice of law and fee sharing, and relaxation of the boundaries of the unauthorized practice rules, will unleash a flood of shoddy, fraudulent and/or unethical behavior upon the public. Lawyers working for corporations, it is feared, will defer to their shareholders and act in the best interests of their employers rather than clients. In the absence of unauthorized practice rules, many worry that innocent consumers could be bilked out of thousands of dollars by scam artists with no legal expertise to offer.

This apocalyptic scenario is of instrumental use to those who want to cast protectionist motives in high-minded rhetoric. But the scenario also, we think, haunts those in the

¹⁸ Rhode's chronicles of these efforts span three decades. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stan. L. Rev.* 1 (1981); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public: Rethinking Unauthorized Practice Enforcement*, 82 *Ford. L. Rev.* 2587 (2014); Rhode, *The Trouble with Lawyers*, 42-44, 88-90.

¹⁹ *FTC v. North Carolina Board of Dental Examiners* (2015)

profession who recognize the need for change to promote access but who worry that the unintended consequences will take us in the wrong direction. And it is to this latter group that we address our analysis in this paper. Our aim is to demonstrate that there are a number of standard and well-developed regulatory approaches available to give comfort to this audience. (And, we'd like to think, take the wind out of protectionist sails.) Indeed, the regulatory models we explore would not only release the potential for innovation and cost-reducing efficiencies in the practice of law, they would improve protections for consumers. That's a win-win for the profession, as well as for access to justice.

Our paper is organized as follows. We first explore the reasons for regulating the provision of legal services—what are the risks that any approach to regulation seeks to mitigate? We consider here what other mechanisms might operate, even in the absence of specialized regulation, to serve the interests of the consumers of legal services. Against that backdrop, we can better appreciate when and where regulation can improve upon the unregulated marketplace. Next we survey various regulatory approaches. This overview helps to put the problem of regulating legal services in context, as an instance of the more general problem of regulation. We then explore in more detail how the major challenges that worry the profession—allowing non-lawyer controlled entities to supply legal services, allowing lawyers to share profits or revenues with nonlawyers, and allowing practice by lay specialists — are managed in the United Kingdom. Finally, we propose some concrete options for adapting these regulatory approaches to the American environment.

II. Why Regulate Legal Services?

Although many Americans speak as though markets are natural objects on which government regulation is imposed, all markets are regulated markets. Standard economy-wide regulation shapes any market for services through contract and fraud law, public policy limits, anti-discrimination legislation, truth-in-advertising oversight, health and safety protections, and antitrust rules. In an industry regulated by just these basic regulations, the principal protection for consumers is market-based. Those who supply poor services don't get repeat business. Low quality providers don't grow their client base through a good reputation. Consumers protect themselves by researching their options, choosing known and trusted brands, trying out the service with a small or low-stakes job or a probationary or free trial period, monitoring performance closely, or by switching providers.

Markets can also produce their own regulatory rules through market mechanisms. Where consumers face some difficulty in assessing quality, for example, voluntary groups can form to certify performance. Certifiers—such as professional groups, educators, or quality watchdogs—can establish standards of education or practice that providers have to meet to earn the certifier's seal of approval or the right to advertise that they possess certification.

Government-led regulatory frameworks buttress this market-based protection by providing consumers with legal oversight and state-supplied sanctions. The Federal Trade Commission and state departments of consumer affairs, for example, monitor and take action against misleading advertising. State and federal antitrust authorities can investigate, enjoin, and sanction anti-competitive conduct. Consumers can sue, individually and in class actions, for violations of many of these and other statutory rules, as well as contract and tort laws.

The more extensive regulation of traditional professional services such as law, medicine, dentistry, architecture, and engineering rests on concerns about the potential failure or attenuation of these basic market, legal, and regulatory mechanisms. These professional services are characterized by three key features. First, the service requires (at least in some core cases) substantial specialization and expertise on the part of the provider. Second, it can often be difficult if not impossible for the consumer of the services to judge the quality of the services provided, even after the fact; the services comprise what economists call a “credence good.” Third, the stakes are often substantial; the consumer is relying to a significant degree on the quality and fidelity of the service provider. If people’s health or liberty or large portions of their wealth are at issue and they have to trust their well-being to the discretion and judgment of a service provider, the case is easier to make for greater regulation.

Note that by “quality” here we mean many of the features that professionals think of as ethical attributes of service provision. So quality in lawyering means not only the competence of the service, but also the factors that lawyers allow to influence their performance. Do the lawyers choose strategies that are in clients’ best interest? Do the lawyers avoid conflicts of interest? Do the lawyers maintain the confidentiality of client information? Do the lawyers keep the client properly informed and do the lawyers remain adequately apprised of their clients’ changing needs and circumstances?

Quality also includes attributes that service professionals sometimes don’t think of as part of their job or as either legitimate or important expectations on the part of consumers. Other industries understand these attributes in terms of customer service. Are phone calls

returned promptly and reliably? Does the professional convey respect and empathy for the client? Does the provider make it easy for the client to understand his or her situation, make choices and implement solutions? Does the provider treat the client's time as valuable? Does the provider listen to what the client is saying? Is the provider an agreeable person to work with? Are the provider's procedures and modes of communication intuitive, easy to navigate and appealing?

Table 1 gives a snapshot of failures of quality in legal services. It shows the frequency of different types of errors in claims made against legal malpractice insurance in Missouri from 2005-2014.²⁰ It is clear that many failures in legal practice involve attributes of service delivery other than legal knowledge or judgment.

²⁰ For an in-depth review of evidence of malpractice, see Herbert M. Kritzer and Neil Vidmar "When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution" (Manuscript, Duke University Law School, June 2015).

Table 1: Missouri Malpractice Claims 2005-2014²¹

Error or Omission	Number of Closed Claims	Number of Paid Claims	Average paid per claim	Total paid
Failure to ascertain deadline correctly	301	84	\$131,962	\$11,084,808
Planning or strategy error	261	73	\$241,574	\$17,634,902
Failure to know or properly apply law	171	53	\$96,574	\$5,118,422
Procrastination/lack of follow up	129	34	\$230,188	\$7,826,392
Inadequate investigation	122	36	\$120,483	\$4,337,388
Failure to follow client's instructions	111	17	\$211,126	\$3,589,142
Failure to file documents (no deadline)	102	26	\$70,962	\$1,845,012
Failure to react to calendar	96	40	\$61,955	\$2,478,200
Malicious prosecution/abuse of process	85	14	\$23,774	\$332,836
Failure to calendar properly	75	41	\$67,707	\$2,775,987
Fraud	74	14	\$57,871	\$810,194
Conflict of interest	62	15	\$239,342	\$3,590,130
Clerical error	50	13	\$24,742	\$321,646
Failure to obtain clients' consent	47	8	\$25,885	\$207,080
Violation of civil rights	39	4	\$101,250	\$405,000
Error in math calculation	21	7	\$52,094	\$364,658
Improper withdrawal from representation	19	5	\$54,342	\$271,710
Error in public record search	16	6	\$68,768	\$412,608

²¹ Source: Missouri Department of Insurance, Financial Institutions & Professional Registration, 2014 Missouri Legal Malpractice Insurance Report. Available at (<http://insurance.mo.gov/reports/legmal/documents/2014LegalMalpracticeInsuranceReport.pdf>)

Libel or slander	14	1	\$15,000	\$15,000
Failure to anticipate tax consequences	12	3	\$455,000	\$1,365,000
Lost file, document or evidence	5	1	\$17,500	\$17,500
Other	549	68	\$72,266	\$4,914,088

A principal reason to regulate professional services is to raise the likelihood that consumers of legal services receive the quality that they (explicitly or implicitly) expect in those settings in which the ordinary regulated market does not adequately police quality. These are settings in which consumers (patients, clients, constituents) put themselves in a professional's hands and are not in a position to second-guess the choices the professional makes and where the failure to live up to the obligation that trust creates carries potentially serious consequences. They are settings in which we don't expect that reputation alone will police conduct and where it is expensive to pursue a breach of contract or tort claim given the difficulty a consumer will face in identifying and then proving professional failures. They are settings in which the problems go beyond those covered by standard marketplace regulations such as restrictions on fraud, advertising or anti-competitive conduct.

A second reason to regulate professional services beyond ordinary marketplace regulation arises from society's interest in the provision of competent and ethical behavior. There may be externalities arising from the service provided to a particular individual. Fidelity to the rule of law promotes public confidence in the legal system and supports compliance with legal rules. In high stake matters, the public cares about how members of the community are

treated. Society and third parties suffer from inadequate representation of those facing deportation, eviction, or loss of child custody.

However, the risk that the market and basic marketplace regulation will not adequately police quality is not the same across all quality attributes, consumers, and cases. Some attributes of service can be judged reasonably well by consumers. In those cases, with sufficient scale and some means for consumers to share experiences (online reviews, for example), providers can develop reputations and trusted brands. Many elements of customer service are in this category, such as returning phone calls, treating clients with respect, keeping clients informed, and providing easy-to-navigate materials and websites. Other quality dimensions can be judged by individuals who lack specific legal expertise and so can also contribute to reputations as well as decisions to pursue ordinary remedies for breach of contract or negligence. Many of these show up on the list of malpractice errors in Table 1, such as failing to ascertain a deadline correctly, procrastination, failing to file documents, failing to calendar properly or to react to a calendar entry, making a clerical error, failing to obtain consent, making an error in a math calculation, making an error in a public record search, and losing files or documents. These are errors arising from poor organization and process management—a type of error that larger organizations with sufficient scale and resources to develop and implement systematic protocols can avoid more easily than individuals or small firms.

In other cases, the stakes are relatively low and hence the need for costly specialized regulation is harder to justify. Courts and legislatures make judgments all the time about the

relative importance of the stakes in a case and the consequences of short-changing the quality of legal attention they receive. They do this when they decide, for example, to prohibit the use of lawyers in small claims cases. Cases involving small dollar amounts often (but not always) are relatively low stakes for the parties involved.

Not all consumers need the same kind of protection. Consumers with substantial market power need less protection than lone individuals—the former have a good threat against poor quality providers. Those who are repeat purchasers are in a better position to protect themselves through choice, monitoring, and the threat to switch providers than one-time purchasers. Experienced or sophisticated customers, and those purchasing a large volume of services, have an incentive to invest in research about service options and can judge quality better than inexperienced, vulnerable or small-volume purchasers.

Finally, some quality problems are just less frequent than others. The likelihood of a math error in online tax preparation software, for example, is very low. The potential for missing the opportunity to reduce estate taxes is limited to the tiny number of estates that exceed the multi-million dollar thresholds for estate taxes. The likelihood of any error is lower in cases that arise infrequently than in those that are commonplace. One of the factors leading deadline errors to top the list of Missouri malpractice claims (in addition to the ease of proof) is the sheer number of situations in which there is a deadline to be met; errors in public record searches may be much less frequent simply because there are many fewer searches of this kind that lawyers have to conduct compared to the number of deadlines of which lawyers have to keep track.

In short, attention to the differences in risks to quality in service provision is a critical consideration in intelligent regulation. And, as subsequent discussion suggests, it is systematically ignored by conventional approaches to regulation of the legal profession. That means that providers of law-related services bear the costs of regulation across the board, despite the fact that in many cases the risks are low and can be well handled by market incentives and ordinary marketplace regulation.

III. What Are the Regulatory Options?

There are four principal methods for regulating services when the incentives created by ordinary marketplace regulation are inadequate.²² The traditional approach to regulation is *prescriptive*, sometimes called *command-and-control*. Prescriptive regulation supplies specific and sometimes highly detailed rules about the training and qualifications that providers must possess, the practices they must follow, and/or the business models and techniques they must use to deliver the service. Violations of these rules can trigger fines or criminal sanctions. In addition, prescriptive rules can serve as prerequisites for a valid license to supply the service. Rule violations can then lead to license revocation.

By contrast, the second approach, *performance- or outcomes-based* regulation specifies results that a provider has to achieve, but does not specify how the provider has to achieve those results. Tort law is a familiar form of performance-based regulation. As noted earlier,

²² For an overview, see Peter J. May “Regulatory regimes and accountability” 1 *Regulation and Governance* 8 (2007).

tort law exposes service providers to damages if their services end up causing someone harm—liability might be strict or only attach if the harm was due to professional negligence. Unlike a prescriptive regulatory regime, however, tort law does not specify upfront what specific behaviors or procedures a professional has to follow; it is only after performance has fallen short of some level that certain behaviors give rise to remedies. More generally, performance-based regulation is implemented by specialized regulators—who may audit performance and/or rely on complaints from consumers and others to identify when required outcomes have not been achieved.

Both prescriptive regulation and performance-based regulation aim at the same target: ensuring that the quality of service delivered meets certain standards. The principal difference, however, is that with prescriptive regulation the regulator is relying on a *prediction* that the training and practice requirements specified in the regulations will produce the desired outcomes. With performance-based regulation, the regulator only targets behaviors that failed to produce desired outcomes in fact. Prescriptive regulation thus can miss the mark in two ways: 1) regulation may be ineffective, meaning that undesirable outcomes persist despite the requirements; and 2) regulation may be excessive, meaning that requirements could be relaxed or eliminated with no ill effects on outcomes. On the other hand, *validated* prescriptive regulations—that is, those for which there is good empirical evidence of a reasonably tight nexus between the rules and the likelihood of bad results—may be superior to performance-based regulations. This could happen, for example, if regulators are better at figuring out what practices reduce bad outcomes than practitioners are. For this reason, performance-based

regulation is often preferable when there are multiple and possibly complex ways of potentially reducing undesirable results, when there is substantial uncertainty about the relationship between training, practices and outcomes, and when practitioners are in a better position to innovate than state regulators.

Sometimes uncertainty extends even to the determination of what appropriate performance standards should be.²³ A third approach, *systems- or management-based* regulation, has developed in response to this challenge.²⁴ Under this approach, regulators specify neither required practices nor required outcomes. Instead, they require regulated providers to engage in a process of reviewing their practices and outcomes and to develop internal procedures for achieving goals they identify through this process. The procedures and goals are then approved and the regulator monitors compliance with the plan.

A fourth approach, one that is relatively novel in the regulatory world, is *meta-regulation or competitive* regulation.²⁵ Under this approach, government regulators regulate

²³ For a discussion of this problem, see Cary Coglianese, Jennifer Nash and Todd Olmstead “Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Regulation” 55 *Administrative Law Review* 705 (2003)

²⁴ Cary Coglianese and David Lazer, “Management-Based Regulation: Prescribing Private Management to Achieve Public Goals” 37 *Law and Society Review* 691 (2003). This approach to regulation also goes under the labels of enforced self-regulation, principles-based regulation, process regulation and meta-regulation. See Sharon Gilad “It runs in the family: Meta-regulation and its siblings.” 4 *Regulation and Governance* 485 (2010).

²⁵ Christine Parker *The Open Corporation* (Cambridge: Cambridge University Press, 2002); Gillian K. Hadfield *Law for a Flat World* (forthcoming, Oxford University Press). Parker’s

regulators. That is, the particular rules and processes that are imposed on providers are developed by third-party, possibly private, possibly multiple, regulators. Those regulators are in turn subject to oversight by the state. Government requires providers to specify a regulator from among a set of approved regulators. An advantage of this approach is that private regulatory entities can specialize in the tools and techniques of regulation, achieving even a greater level of innovation and investment in regulatory design than is possible with management-based regulation. A key challenge of this approach is ensuring that any entity to which the state has effectively delegated regulatory oversight authority achieves results consistent with the state's regulatory goals and is not captured by the regulated entities. As we discuss below, this approach to regulation is playing a central role in the U.K. and thus can inform discussion of reforms in American professional regulation to promote access, reduce costs, and increase the quality of lawyering.

A regulatory regime could combine elements from several of these approaches. Providers might have to satisfy certain educational requirements in order to obtain a license, for example. Once licensed, they might then be subject to prescriptive, performance-based or management-based regulation, or a combination of these three—with some performance standards and practices imposed by the state, for example, and others developed by the regulated entity. The regulator that directly oversees the provider might be the state itself, or an entity such as a professional association that is responsible to the state.

use of the term “meta-regulation” is expansive and includes what we called management-based regulation, above—where the “regulator” is the self-regulating provider.

There are several other elements that figure in the design of regulation. Regulators can choose among different methods to identify regulatory violations. They can be *reactive*—responding to complaints from consumers or others, or *proactive*—engaging in regular auditing of providers and their practices. They can enforce regulations by revoking, suspending or placing conditions on a license; publishing a violator’s name; requiring remediation of inadequate service; and/or imposing fines. They can be enforced administratively, through the creation of criminal liability for violations and/or through the creation of a private right of action that allows a consumer who has suffered a loss to sue, individually or as a member of class, for damages or injunctive relief. They can regulate individual providers and/or the entities through which providers supply their services. They can require providers to take out insurance and/or establish compensation funds to cover losses when quality fails to meet required standards. Last, they can choose to finance the cost of regulation in multiple ways: through general tax revenues, transaction-specific sales taxes, licensing fees, professional dues and/or revenues generated from fines.

The design of a regulatory system has to take into account all of these considerations, and then assess the actual benefits of a particular approach as against the costs. On both dimensions, regulation of the American legal profession is seriously misaligned with the objective of ensuring that consumers have affordable access to quality legal help as they navigate a complex legal environment. As we, and many others, have noted elsewhere, existing professional regulation focuses almost exclusively on ensuring particular quality attributes—loyalty, independence, confidentiality—for those few clients able to afford to hire lawyers at

current rates under current business models.²⁶ Even for these clients, the protections available come at too high a cost, inhibiting innovation of lower cost and higher quality approaches to solving legal problems.²⁷

IV. How the U.K. Regulates to Promote Access, Innovation and the Quality of Lawyering

Many current discussions of the need for reform of the American approach to legal professional regulation eventually circle around to the U.K. alternative model. This model diverges substantially from the modern American approach, and it is because of the ways in which it diverges that it succeeds in promoting access and innovation without sacrificing the quality of lawyering. In this section, after a quick summary of the American approach, we show how the U.K. model achieves these goals.

The modern American approach to regulating the practice of law dates to the late nineteenth and early twentieth centuries, led primarily by deliberate efforts in the American Bar Association to regulate admissions and practice and to wrest control from state legislatures and lodge it in state supreme courts.²⁸ The resulting scheme, however, went far beyond the common law history of granting courts the power to determine who could appear before them. In effect, state courts delegated authority to bar associations to set rules (most of which

²⁶ Rhode, *The Trouble with Lawyers*, 30-52, 98-102.

²⁷ Hadfield, “Legal Barriers to Innovation” *supra* n. 1.

²⁸ See H Kritzer, *Legal Advocacy supra*; Laurel Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—the Roots of the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 *Cal. Western. L. Rev.* 65 (2009).

followed the lead of the ABA Model Rules) that encompass all aspects of the practice of law. The power of these rules to exclude practitioners who did not meet bar standards or adhere to bar practice requirements (such as prohibitions on the corporate practice of law and fee-sharing) was often buttressed with legislation making it illegal to practice law without the authorization of the state supreme court.²⁹ As many have recounted, the boundaries of this regulatory authority have always been expansive, with the definition of what constitutes the “practice of law” stretching to incorporate effectively everything done by lawyers: legal advice, drafting, negotiation, representation and support in dispute resolution processes.³⁰ Moreover, state supreme courts have claimed an inherent authority, grounded in the constitutional separation of powers, to regulate the legal profession in all of its activities.³¹

The British approach to regulation of the legal profession has never followed the same path. From the earliest days, the U.K. has always had multiple legal professions—originally barristers, solicitors, attorneys, and scriveners.³² At no time has the provision of legal advice or the drafting of documents (other than those required to participate in a lawsuit or convey real estate) been subject to regulation. And since the passage of the Legal Services Act (LSA) of 2007, the regulatory approach in the U.K. has diverged even further from the American model.

²⁹ Rigertas, *Lobbying*, *supra* n. 25.

³⁰ Hadfield, *Legal Barriers*, *supra* n. 1.

³¹ Rigertas, *Lobbying*, *supra* n. 25.

³² Michael Burrage, *From a gentlemen’s to a public profession: status and politics in the history of English solicitors*. 3 *International Journal of the Legal Profession* 45 (1996).

The current regulatory approach of the LSA begins with designation of regulatory objectives. These regulatory objectives are:

- a) Protecting and promoting the public interest;
- b) Supporting the constitutional principle of the rules of law;
- c) Improving access to justice;
- d) Protecting and promoting the interests of consumers;
- e) Promoting competition in the provision of regulated services
- f) Encouraging an independent, strong, diverse and effective legal profession
- g) Increasing public understanding of the citizen's legal rights and duties;
- h) Promoting and maintaining adherence to the professional principles.³³

The professional principles mentioned in (h) are set out in the Act:

- a) Authorized persons should act with independence and integrity,
- b) Authorized persons should maintain proper standards of work
- c) Authorized persons should act in the best interests of clients
- d) Those who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons should comply with their duty to the court to act with independence in the interests of justice, and
- e) Affairs of clients should be kept confidential.³⁴

Thus, the U.K. professional principles thus track *all* of the core values of the legal profession as articulated by the ABA—with the important difference that the LSA adds a commitment to promoting competition and does not elevate as a goal in itself the preservation of a single (self-regulated) profession.³⁵

³³ Legal Services Act 2007, Part 1, section 1(1).

³⁴ *Id.*, Part I, section 1(3).

³⁵ The maintenance of a single profession of law was added to the list of core values of the profession in the ABA House of Delegates' resolution in 2000 rejecting recommendations

The strategy of the LSA is to designate particular instances of legal work as *reserved activities* and then to require that those activities only be performed by “authorized persons.”

These reserved activities are:

- a) The exercise of a right of audience;
- b) The conduct of litigation;
- c) Reserved instrument activities;
- d) Probate activities;
- e) Notarial activities;
- f) The administration of oaths.³⁶

This is where we see a major difference between the U.K. and American approaches. The approach taken by American bar associations and state courts is effectively to say “the practice of law is open only to bar-licensed attorneys and we reserve the right to add anything to the category of the practice of law that we haven’t thought of.” This approach forces alternative providers to seek carve-outs for things like document assembly, supplying blank contracts (real estate agents), tax advice (accountants), non-profit assistance to immigrants in some hearings, and appearances before some federal administrative bodies such as the U.S. Tax Court, the

from the ABA Commission on Multidisciplinary Practice to allow lawyers to share fees with nonlawyer professionals.

http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html. As discussed in Hadfield, “Legal Barriers to Innovation” at 1692-1694, this suggests lawyers have an ethical duty, comparable to their duty to protect the public, to make sure that only traditionally licensed lawyers provide any form of legal services. This minimizes, rather than promotes, competition.

³⁶ Legal Services Act 2007, Part 3, Section 12(1). Reserved instrument activities refer to transactions involving real and personal property (sales, long-term leases, liens, etc.) but do not include wills, short-term leases, powers of attorney or stock transfers that do not involve a trust or limitation on the transfer. See LSA, Schedule 2.

Patent Office and the Social Security Administration.³⁷ The U.K. approach, in contrast, carves out specific activities for licensed lawyers, and leaves the residual open for competition from alternative nonlawyer providers.³⁸

A second major difference is that the category of “authorized person” in the U.K. includes multiple legal professions and licenses. Currently in the U.K. there are nine different professional licenses/designations for those performing reserved activities: solicitor, barrister, legal executive, notary, licensed conveyancer, patent attorney, trademark attorney, costs lawyer, and chartered accountant.³⁹ Professionals practicing under these licenses have non-exclusive authorization to perform particular reserved activities and hence there is inter-professional competition.⁴⁰ Barristers, solicitors and legal executives can perform all reserved activities with the exception of notarial activities, which only notaries can perform. Notaries, however, can, alongside licensed conveyancers, also engage in reserved instrument and

³⁷ See Kritzer, *Legal Advocacy*.

³⁸ The Legal Services Board estimated in 2015 that 20-30% of expenditures on legal services are made to unregulated providers, noting “This is permitted under the Legal Services Act 2007, which provides that individuals or firms must only be authorized and regulated if they wish to provide one of the six ‘reserved legal activities.’” http://www.legalservicesboard.org.uk/Projects/Unregulated_Legal_Services_Providers/index.htm

³⁹ A Legal Executive is someone who has generally pursued a non-University training path to practice and worked under the supervision of a licensed provider for a number of years. Legal Executives are able to engage in the same services as a solicitor or barrister under the Legal Services Act 2007. A Costs Lawyer is a practitioner who focuses specifically on resolving disputes involving the allocation of expenses under the British rule which allows a court to require a losing party to pay a portion of the winning party’s legal fees and costs.

⁴⁰ Legal Services Act 2007, Schedule 4, Part 1.

probate activities; neither can exercise a right of audience or conduct litigation. Patent and trade mark attorneys can appear in court, conduct litigation and engage in reserved instrument activities. Costs lawyers can appear in court and conduct litigation. Chartered accountants can engage in probate activities only; they are the only legal professionals who cannot administer oaths.

Regulation of each of these professions is carried out by a different *approved regulator*. The Law Society regulates solicitors and the Bar Council regulates barristers, for example. Approval and oversight of these front-line regulators is carried out by the Legal Services Board (LSB), an independent administrative body accountable to Parliament and operating out of the Ministry of Justice.⁴¹ With the exception of the Chief Executive (who is appointed by the Board), Board members are appointed by the Lord Chancellor.⁴² The Legal Services Act requires the LSB to have a lay chair and a majority of lay members.⁴³ The Act also requires front-line regulators, which operate as trade associations promoting the interests of their members, to establish independent regulatory arms (the Solicitors Regulatory Authority and the Bar Standards Board, for example.)⁴⁴ Under the authority of the Act, the LSB has established internal governance

⁴¹ Legal Services Act 2007, Schedule 4.

⁴² Legal Services Act 2007, Schedule 1.

⁴³ A layperson is defined as someone who has never been an authorized person with respect to a reserved legal activity. LSA Schedule 1, Section 2(4). Committees and sub-committees of the Board must also have a majority of lay members. LSA Schedule 1, Section 20(4).

⁴⁴ LSA Part 4, Sections 29 & 30.

rules requiring the regulatory bodies set up by approved regulators to be governed by a board with a nonlawyer chair and a majority composed of nonlawyer members.

This is an example of what we earlier called *competitive or meta-regulation*: a legal practitioner who wishes to conduct litigation, for example, can choose from which professional body authorized to regulate that particular activity he or she wants to secure a license. This means that not only are existing practitioners engaged in inter-professional competition across dimensions such as cost and quality, so too are the front-line regulators in competition in the design and implementation of their regulatory requirements.

Competition between regulators occurs under the umbrella of oversight by the Legal Services Board, which must approve regulators' rules and processes.⁴⁵ Ultimately, the LSB is responsible for ensuring that regulators are fostering regulatory objectives. This involves reviewing, for example, proposed rule changes, monitoring the performance of the approved regulators, conducting research and investigation of the performance of legal services markets, and making recommendations to the Lord Chancellor about changes to the regulatory scheme implemented by the Legal Services Act.⁴⁶ In carrying out its activities, the LSB is required to consult with the Lord Chief Justice (the head of the judiciary), the U.K. antitrust authority (the Office of Fair Trade) and a Consumer Panel.

⁴⁵ Legal Services Act 2007 Schedule 4.

⁴⁶ This includes investigations to determine whether regulatory boards are operating independently of the representative arm of an approved regulator.

The U.K. scheme also provides for the licensing of entities. These are known as *alternative business structures (ABS)*, which supply an alternative to the law firm through which lawyers have traditionally offered their services. The LSB approves and oversees the bodies authorized to license ABSs. There are five licensing authorities (the Solicitors Regulatory Authority, the Bar Standards Board, the Council of Licensed Conveyancers, the Institute for Chartered Accountants and the Intellectual Property Regulation Board—which regulates both patent and trade mark attorneys.) Collectively, these five licensing authorities had as of 2015 licensed over 800 entities, including solo practitioner entities, law partnerships, for-profit corporations, entities owned by unions and other non-profit organizations, and cooperatives. Most are private, not publicly listed, companies and include such recognizable names for Americans as Ernst & Young, LegalZoom, KPMG and PriceWaterhouseCoopers.⁴⁷ Slater & Gordon LLP (an Australian firm with approximately 12% of the UK market in personal injury law in 2015) is one of the few publicly-traded companies on the list.

The regulation of ABSs is two-pronged: the entity is regulated and the authorized persons within the entity are regulated. Both are subject to losing their license/authorization to practice in the event of a breach of the rules of a licensing authority (in the case of an entity) or an approved regulator (in the case of an authorized person.) The licensing authority must

⁴⁷ The ABS register is at <http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page>

approve anyone who holds a material or interest in an ABS.⁴⁸ Approval is based on a determination that the holding of the restricted interest in the ABS will not interfere with the regulatory objectives of the LSA or the duties of the entity and any authorized person it employs to comply with their regulatory duties.⁴⁹ Reserved activities must be carried on within the entity only through people authorized to perform those activities.⁵⁰ There must be at least one manager who is authorized to engage in the reserved activities for which the ABS is licensed.⁵¹ Non-authorized persons—owners, managers, employees—are subject to the regulation of the licensing body and obligated to refrain from doing anything that might cause the licensed body or the authorized persons within it to violate their professional duties.⁵² An ABS is required to have a Head of Legal Practice, approved by the licensing authority.⁵³ That individual serves as a compliance officer responsible for ensuring that only authorized persons carry out reserved activities and that non-authorized persons (including owners and managers)

⁴⁸ LSA Schedule 13, Part 1. In general a material interest means at least a 10% ownership of shares (a licensing authority can establish a higher threshold) or the capacity to exercise “significant influence” over management by virtue of ownership or voting rights, either in the entity or its parent. Any change in ownership must be reported to the licensing authority and the authority can place conditions on ownership. LSA Schedule 13.

⁴⁹ Individual licensing authorities can impose further restrictions on owners. For example, the Bar Standards Board requires all nonlawyer owners to also be managers. BSB Handbook rS108.

⁵⁰ LSA Schedule 11, Part 3, Section 16. This includes activities that are carried out by non-authorized persons but at the direction and under the supervision of an authorized person.

⁵¹ LSA Schedule 11, Part 2, Section 9, Section 10.

⁵² In some cases, submission to the regulatory authority is accomplished through contract. See Bar Standards Board.

⁵³ LSA Schedule 11, Part 2, Section 11

do not violate their duty under the Act not to cause the licensed body or its employees and managers to breach applicable regulations. The LSA also requires approved regulators to have systems in place to protect confidentiality.⁵⁴ The traditional privilege against disclosure of confidential information covers any authorized provider or licensed entity.⁵⁵

The U.K. approach foregoes none of the traditional framework of professional regulation. It preserves all of the profession's long-held duties. And it preserves the capacity of the professional body to revoke the authorization to practice of individual lawyers regardless of practice setting.

In terms of enforcement, the U.K. scheme relies on multiple strategies in addition to license revocation. It is a criminal offence punishable by fine or imprisonment for an entity to carry on a reserved activity through someone who is not an authorized provider.⁵⁶ Approved regulators can also impose substantial fines: the maximum fines approved by the LSB are £250 million for an ABS and £50 million for a manager or employee of an ABS.⁵⁷ Regulators can disqualify individuals from serving as owners or managers of an ABS.⁵⁸ Licensing authorities are authorized to intervene and take over management of an ABS that has violated regulations

⁵⁴ LSA Part 1, LSA Part 3, Section 17.

⁵⁵ LSA Part 8, Section 190.

⁵⁶ LSA Part 3, Sections 14-17.

⁵⁷ The Legal Services Act 2007 (Licensing Authorities) (Maximum Penalty) Rules 2011.

⁵⁸ LSA Part 5, Section 99-100.

when necessary to protect clients.⁵⁹ Approved regulators carry out annual compliance surveys and spot-checks. They can also impose supervision on individuals and entities, as well as conditions on licenses.⁶⁰

The U.K. regulatory approach also takes other steps to protect the interests of clients. The major approved regulators require individual lawyers and ABSs to hold indemnity (i.e. malpractice) insurance.⁶¹ Those licensed by the Solicitors Regulatory Authority (the largest licensing authority) must have client compensation funds. The LSA establishes an Office of Legal Complaints (OLC), with which any consumer can lodge a grievance. The OLC operates a Legal Ombudsman scheme, consisting of a Chief Ombudsman (who must be a layperson) and assistant ombudsmen. Ombudsmen are authorized to resolve complaints by remedies such as apologies, fee rebates, compensation, and rectification of errors.⁶²

The U.K. approach thus substantially relaxes or eliminates the traditional restrictions on the business models within which lawyers can practice and the financial and managerial

⁵⁹ LSA Part 5, Section 102 and Schedule 14.

⁶⁰ See, e.g., Bar Standards Board, Licensing Authority Application at 23 (2015) (spotchecks and sampling to confirm compliance); LSA Schedule 16 Section 10(3)(b); LSA Part 5 Section 85;

⁶¹ BSB Handbook rC76; SRA Indemnity Insurance Rules 2013, CILEX Professional Indemnity Insurance Rules, IPReg Code of Conduct Rule 17, ICAEW Professional Indemnity Insurance Rules, Rule 3.1.

⁶² LSA Part 6, Section 137. The value of compensation or the cost of rectifying errors cannot together exceed £30,000. LSA Part 6 Section 138. Both respondent and complainant are bound by the ombudsman's resolution as final if the complainant accepts the resolution. LSA Part 6 Section 140(4).

relationships they can enter into with nonlawyers without sacrificing the professional values that have so worried American judges and bar associations.

These tradeoffs—between the benefits arising from greater competition and flexibility in business models and the risks to consumers of failures of the quality they expect or are entitled to—are in fact an overt part of the regulatory framework. The U.K. approach is self-consciously risk- and outcome-based; it identifies the nature of risks and the outcomes that regulation seeks to achieve. For example, in its rules for determining whether to approve a regulator, the LSB has set out a chart that specifies the evidence it will be looking for to confirm that specific principles and risks are addressed. To gain approval, the regulators must “ensure that authorised persons must keep clients’ money separate from own” and “must be able to compensate clients;” “demonstrate how regulated persons and entities are indemnified against losses arising from claims;” “have a code of conduct that “enshrines the primacy of acting in the client interest and subjugates other pressures be they commercial or otherwise to that principle;” and “ensure that definitions of appropriate skill and competence are proportionate in order to ensure both value and professionalism.”⁶³

The largest approved regulator, the Solicitors Regulation Authority (SRA), has defined four outcomes they expect to achieve and adopted an explicit risk framework to guide approvals for ABSs. They have expressly stated that their approach “is in contrast to our

⁶³ LSB Rules for Applications for Approved Regulator or Qualifying Regulator Designation, Schedule Part 2.

historical rules-based approach: we no longer focus on prescribing how those we regulate provide services, but instead focus on the outcomes for the public and consumers that result from their activities.” They focus “attention and activity upon issues, firms and potential risks that pose the greatest threat to our regulatory outcomes.”⁶⁴ The SRA publishes annually a Risk Outlook that reports on their ongoing assessment of where the risks lie.⁶⁵

How well is the UK approach working? As one of us has documented elsewhere, the evidence to date is promising. Both as a result of the longstanding acceptance of the idea that useful legal help can be provided by a variety of legal and lay professionals, and as a result of

⁶⁴ http://www.sra.org.uk/solicitors/firm-based-authorisation/authorisation-recognition.page#Collection_3. The attention to risk is not just hortatory: the LSB denied the Council of Licensed Conveyancers application to become an approved regulator for litigation activities because the CLC “failed to demonstrate an appropriate understanding of the specific risks of the new activities” and failed to demonstrate that its proposed regulatory arrangements were outcomes focused and risk-based. “Key to this,” they noted, “is that the applicant needs to be able to demonstrate that they have a good understanding of the risks and issues presented by the activities and that proposed regulatory and operational arrangements have been designed or adapted to mitigate those risks. They need to be able to satisfy us that they have considered the different market in which they will be operating including (but not limited to) the types of clients that might use the new services and the different types of businesses (e.g. size, business models, ownership, financing arrangements) that may seek authorization. An understanding of the risks and issues is necessary if the applicant is to be able to be effective at targeting is [*sic*] authorization, supervision and enforcement arrangements and resources in a risk based way.” Legal Services Board—Decision Notice Issued under Part 2 of Schedule 4 and Part 1 of Schedule 10 to the Legal Services Act 2007 (April 2012) http://www.legalservicesboard.org.uk/what_we_do/regulation/rights_of_audience_and_litigation_application.htm.

⁶⁵ The Risk Outlooks for 2014/2015 and 2015/2016 identified as priority risks: misuse of money or assets; money laundering; bogus law firms; lack of a diverse and representative profession; failure to provide a proper standard of service, particularly for vulnerable people; breach of confidentiality as a result of failure of information security and cybercrime; a lack of independence due to pressure from large clients (including corporate employers of in-house lawyers); and improper or abusive litigation. <https://www.sra.org.uk/risk/risk-outlook.page>

the licensing of ABSs, the U.K. framework includes many more options for English and Welsh consumers of legal services than the American model. Many of these options come in the form of unbundled services to support what in the U.K. is called “DIY” law and a wide range of advisory services to help people manage legal questions and issues that have not turned into lawsuits (yet).⁶⁶ Total revenues in the legal sector increased 18% between 2010 and 2014.⁶⁷ There has been no loss of employment for lawyers. The number of practicing solicitors increased 2.3% from May 2014 to May 2015 and the number of vacancies advertised for law firms increased 48% in 2014. There has been substantial consolidation of practice, with the percentage of solo practitioners falling from 46% to 39% and the percentage of firms with 2-4 partners growing from 41% to 46% between 2008 and 2011.⁶⁸ As of 2013, ABSs were more likely than other practice entities to use technology: 91% reported having a website to deliver information and services, compared to 52% of solicitor firms using a website for advertising.⁶⁹ Overall, ABSs showed higher productivity and innovation⁷⁰ and were statistically more likely to have seen an increase in revenues (57% compared to 49%).⁷¹ A 2015 study found that ABSs were 13-15% more likely to introduce new legal services and that 25% of all legal services providers had introduced a new or improved service in the three years following the

⁶⁶ Hadfield, *The Cost of Law*; Hadfield, *Innovating to Improve Access*.

⁶⁷ LSB, *Strategy 2015-18* (March 2015).

⁶⁸ LSB *Market Impact of the Legal Services Act (2012)* p. 82.

⁶⁹ *Id.*

⁷⁰ *Id.* p. 80

⁷¹ LSB *Evaluation: Changes in competition in different legal markets. An empirical analysis.* (October 2013) at 6.

introduction of ABS licensing. In short, “the major effect of innovation in legal services has been to extend service range, improve quality and attract new clients.”⁷²

Consumers are clearly benefitting from the U.K. changes. Although we lack systematic studies of the impact of changes on pricing, it is clear that the U.K. environment offers much more flat fee pricing than the U.S. environment—a pricing model that supports increased access by reducing uncertainty and risk and promoting transparent choices among providers. In 2014, 46% of consumers reported paying a fixed fee for services, up from 38% in 2012.⁷³ Moreover, there are clear improvements in choice and perceptions of value, with the greatest gains in family law. The percentage of fixed fees in this area increased from 12% in 2012 to 45% in 2014. Between 2011 and 2014 the percentage of consumers saying they shopped around for services increased from 21% to 41%; and the perception that they had received value for their money increased from 50% to 62%.⁷⁴

⁷² Enterprise Research Centre, *Innovation in Legal Services: A report for the Solicitors Regulation Authority and the Legal Services Board* (July 2015) at 4. Available at <https://research.legalservicesboard.org.uk/news/innovation-in-legal-services-2015/>

⁷³ Legal Services Consumer Panel, *Tracker Survey 2014 Briefing note: A changing market*. Available at http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/index.html. “The five areas where fixed fees are most common are: will-writing (71%); power of attorney (65%); conveyancing (66%); immigration (55%); and family (45%).”

⁷⁴ *Id.* Across all categories, choice satisfaction increased from 65% to 68%, shopping around increased from 21% to 23%, those finding it difficult to compare providers dropped from 28% to 14%; those using the same lawyer as before dropped from 25% to 21% and those perceiving value for their money increased from 57% to 63%.

There is no evidence of a flood of problems along lines that American commentators have raised. The SRA Risk Outlook for 2014/2015 indicates, for example, that dangers that the SRA in previous years had identified as possible risks—a lack of due diligence over outsourcing arrangements and a lack of transparency in complex alternative business structures—had failed to materialize.⁷⁵ The rate of errors by unregulated will providers, while substantial, was equivalent to that of regulated solicitors, which led the government to reject a proposal to make will-writing a reserved activity.⁷⁶ Law firms with non-solicitor managers and partners, known as Legal Disciplinary Partnerships (LDPs), generated fewer complaints on a revenue-adjusted basis than solicitor-only firms in 2011-2013. ABSs resolved a higher percentage of complaints received than solicitor firms (93% compared to 83%).⁷⁷ Although these are still early

⁷⁵ SRA Risk Outlook 2014/2015.

⁷⁶ Legal Services Consumer Panel, Regulating will-writing (July 2011) at 20-22 (rate of errors); Legal Services Board, Final reports: Sections 24 and 26 investigations: will-writing, estate administration and probate activities (February 2013) (proposing to make will-writing a reserved activity); U.K. Ministry of Justice, Decision notice re: extension of the reserved legal activities (14 May 2013) (rejection of recommendation to make will-writing a reserved activity). All materials available at http://www.legalservicesboard.org.uk/projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm.

⁷⁷ LSB Evaluation: Changes in competition in different legal markets. An empirical analysis. (October 2013) at 77-78. The SRA allowed solicitors to form Legal Disciplinary Partnerships with nonsolicitor owners who were also managers and partners beginning in 2009; these converted to ABS licenses (which allows approved nonlawyer owners who are not also managers or partners) in 2012 when ABS licensing first became available.

days, if anything the call has been for further loosening of restrictions to prompt even greater innovation and improvements for consumers.⁷⁸

V. American Options

The U.K. regulatory scheme, which balances the need to promote innovation, quality improvements, and cost-reductions against the potential for harm to consumers, has clear advantages over the United States' approach. American unauthorized practice enforcement is not dependent on actual client harm.⁷⁹ Nor do American discussions of regulatory reform rest on evidence of probabilities and harms. In a recent discussion, for example, one opponent of regulatory change told an ABA Commission that *all* legal services raise tremendous risks for

⁷⁸See, for example, Legal Services Board, *The Case for Change: legislative options beyond the Legal Services Act 2007* (July 2015) available at http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/20150727_The_Case_For_Change_Legislative_Options_Beyond_The_Legal_Services_Act_2007.html, Stephen Mayson, *The Legal Services Act: What Might Replace it and When?* (April 2015), available at <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/Mayson-2015-LSA-what-might-replace-it-final.pdf>; Richard Moriarty, *Innovation and legal services regulation* (July 2015), available at http://www.legalservicesboard.org.uk/news_publications/speeches_presentations/index.htm; Sir Michael Pitt, *The future of legal services regulation* (September 2014), available at http://www.legalservicesboard.org.uk/news_publications/speeches_presentations/index.htm;

⁷⁹ Deborah L. Rhode and Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *Fordham L. Rev.* 2587 (2014).

clients that only licensed attorneys can manage.⁸⁰ No evidence was cited and our previous discussion suggests why.

The need to guard against the way in which professional self-interest can cloud assessment of the public interest is a central feature of the U.K. approach. It ensures that regulatory bodies have lay chairs and a majority of lay members who are not the subjects of regulation. Acknowledgement of even sincere confusion between professional and public interest is also a central feature of American antitrust law. The U.S. Supreme Court has recently recognized that when the state delegates regulatory power to active market participants, as state supreme courts do,

ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.

⁸⁰ Larry Fox, Submission to ABA Commission on the Future of Legal Services (July 2015). “Even the most routine divorce can and *will* cascade out of control.” “*All* clients, particularly the poor, deserve real lawyer supervision, responsibility and control for *all* that is undertaken on their behalf. And that is because the only routine surgery is surgery that is being performed on someone else, and *only* a full-fledged lawyer will be able to identify when it is that the legal services required are anything but routine.” (emphasis added) Fox’s approach rejects the very idea that risks vary across settings or that it can be possible to identify higher risk cases and divert those that need higher-level services to avoid bad outcomes into that appropriate level without sending all into high-cost solutions. There is after all a category in fact of routine surgery and not all surgery calls for or is conducted by a specialist. And indeed much of health care is not surgery but routine treatment of routine medical needs. The medical profession relies heavily on non-MD professionals such as nurse practitioners, certified nurse anesthetists, pharmacists and physical therapists to appropriately allocate expensive MD services where they are needed and reduce the cost of routine care. Fox offers no answer to the point that it is simply not possible, even with massive increases to legal aid and pro bono, to provide the millions of people who currently get *no* help on these important matters with services from “full-fledged” lawyers. Nor does he identify any evidence to suggest that this is necessary.

In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.⁸¹

In what may be a new era for antitrust enforcement of self-regulated professions,⁸² bar associations and state supreme courts must ensure that their regulation of lawyers is based on systematic attention to real, not imagined, risks, and that those risks are appropriately balanced against the costs of regulations that raise costs, inhibit innovation, and fail adequately to protect consumers.⁸³ The evidence from the U.K. demonstrates that relaxation of many American restrictions on practice poses little risk and significant gains for the public.

⁸¹ *North Carolina State Board of Dental Examiners v FTC*, slip op. at 8 (2015). The Court expressly notes that the concerns extend to legal professional regulation, citing (slip op at 7) *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (the fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members)

⁸² LegalZoom, for example, filed an antitrust suit against the North Carolina Bar in 2015, shortly after the North Carolina Board of Dental Examiners case, alleging antitrust violations arising from the Bar's refusal to register its legal aid plans. *LegalZoom.com, Inc. v North Carolina State Bar*, United States District Court for the Middle District of North Carolina, Case No.: 1:15-CV-439.

⁸³ Bar association leaders are hardly circumspect about the extent to which their regulatory actions are responsive to the interests of lawyers. In testimony before the ABA's Ethics 20/20 Commission, the chief deputy counsel in Colorado's office of attorney regulation maintained that a Colorado open-border policy, allowing attorneys licensed in other states to practice in Colorado up to the point of litigation, as long as they don't become domiciled there or open an office, has "worked well." Former ABA president Carolyn Lamm responded that advocating such an approach would impair the Commission's credibility and would "not go over in the ABA House of Delegates." Joan C. Rogers, *Ethics 20/20 Commission gets Earful About Its Draft Proposals on Foreign Lawyers*, *MJP*, 27 *ABA/BNA Lawyers' Man. Prof'l Conduct* 669, 671 (2011) (quoting James Coyle and paraphrasing Carolyn Lamm.) That objection underscores the problems of vesting so much authority over regulatory policy in the organized bar, which is anything but disinterested concerning issues affecting professional competition. Similarly, efforts by the 20/20 Commission to develop proposals for relaxed rules on nonlawyer participation in law firms was squelched by, among other things, opposition from the New York State Bar Association based on a survey of its members and the discovery that there was little demand among lawyers for change. See Hadfield, *The Cost of Law*, for a

As we have argued elsewhere, the four changes to regulation needed to improve access, reduce costs, promote innovation and improve quality are: 1) to develop a licensing scheme under which entities in addition to lawyer-only law firms are authorized to provide legal services; 2) to relax rules on the contractual relationships possible between lawyers and nonlawyers to allow revenue and profit sharing; 3) to expand the number and diversity of licensed legal professions and 4) to allow some legal help to be provided by licensed non lawyer experts or by lay individuals subject to ordinary protections of the market supplied by consumer protection, contract, and tort law.⁸⁴

While we believe that the ideal reforms would follow the British model and establish specific legal activities that require licensing, leaving the residual to the ordinary protections of the market, we recognize that such a shift is only likely to be acceptable in the U.S. on the basis of evidence that these protections achieve acceptable outcomes for American consumers. Although the U.K. evidence here is very promising, we realize that the American marketplace may differ from the U.K. marketplace, which has a long tradition of non-lawyer-based legal

discussion and citations. We also note that Larry Fox has been unabashed in his comments to the ABA's Commission for the Future of Legal Services about the fact that he sees the significant commercial threat to lawyers, and corporate law firms like the one at which he practices, as a basis for putting the brakes on the Commission's reform agenda. He titles his submission to the Commission "A Message from the Legal Profession: SOS." Mr. Fox also subsequently sent to the Commission an email containing a link to a story about how accounting firms are make inroads into corporate M&A work in Australia under Australia's UK-style approach to regulation with the subject line "Help!"

⁸⁴ Hadfield, *The Cost of Law*; Hadfield, *Innovating to Improve Access*; Rhode, *The Trouble with Lawyers*, *supra* note 1, at 40-51. .

advice and assistance.⁸⁵ In the United States, a wait-and-see approach that seeks to test the impact of relaxed constraints on the scope of authorized practice is consistent with the prudent outcomes- and risk-based approach to regulation that we advocate. Similarly, although we also think it would be ideal to have multiple separately regulated professional bodies, allowing a form of inter-professional regulatory competition as there is in the U.K., this too seems like something that would need to emerge over time in a changed regulatory landscape in the U.S.

For these reasons, we focus our discussion of American options on the development of a licensing regime in which attorneys have more flexible relationships with nonlawyers, and legal services entities are able to operate at national scale. We propose that such a regime begin with a clear statement of guiding principles. These should include promotion of access to legal services through cost-reduction and innovation as well as the observance of lawyers' traditional professional duties: competence, loyalty, independence, confidentiality, the avoidance of conflicts of interest, and the obligation to uphold the rule of law and the impartial administration of justice. An appropriate registration and licensing regime should then focus on identifying specific risks and balancing prescriptive rules with performance-based oversight. Regulatory enforcement should focus on cases in which risks have in fact materialized.

⁸⁵ The U.K. history of nonlawyer legal services also developed within the framework of extensive legal aid—many of those providing such services have done so through publicly-funded legal help centers or were paid for by government. Because of public funding, these providers have been under some government oversight, if only on the basis of maintaining their eligibility for and success in obtaining legal aid contracts. For evidence that nonlawyer legal services have provided high quality assistance in the U.K. in the context of legal aid, see Richard Moorhead, Avrom Sherr and Alan Paterson, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *Law & Soc'y Rev.* 765 (2003).

Oversight should rest with independent regulators who have sufficient accountability to the state and public interest to satisfy the requirements of active state supervision and avoidance of anti-competitive conduct by practicing attorneys. The discussion below offers greater detail on how such a system might operate in practice. But first we address a major challenge in the American context: supporting the operation of entities and legal practices at national scale in light of the constraints of federalism and the long history of state-by-state regulation of lawyering.

In order to achieve national scale, entities ideally should have a single regulator. With fifty different regulators, the barriers to entry are significant, particularly in light of the way in which professional regulation is now conducted through bar committees that operate with little transparency and little active supervision from state courts.⁸⁶ One obvious route to a single regulator is for Congress to create a national licensing authority, exercising authority under the Commerce Clause to regulate interstate commerce. Proposals for a national bar exam and system of admission are not new—state-by-state licensing has been a longstanding barrier to mobility and national practice for attorneys. Prior objections to a centralized governance scheme have included concerns that federal licensing of attorneys is inconsistent with state

⁸⁶ Although formal enforcement processes such as disciplinary proceedings against a licensed attorney and criminal proceedings against those charged with unauthorized practice are carried out with state court participation, most regulatory oversight and intervention is carried out by bar committees composed entirely of practicing attorneys who open investigations and send out warnings or cease and desist letters without state court oversight or who refuse to register legal aid plans. See Legalzoom complaint. These are the practices found anticompetitive in the North Carolina Board of Dental Examiners case.

courts' inherent regulatory power and that the federal bureaucracy necessary to administer the system would be vulnerable to political capture and would pose an undue risk to the independence of the profession.⁸⁷

A federal licensing authority for entities, however, need not entirely displace existing state-by-state bar admissions and regulation of attorneys. As we've seen with the U.K. example, the introduction of entity licensing need not terminate judicial control and discipline of lawyers. Nor need it displace professional control over education, bar admissions and lawyer discipline. Licensing and regulation of ABSs in the U.K. is layered on top of lawyer licensing and regulation. Federal licensing of such entities in the U.S. could obligate entities to ensure that legal services are supplied in a manner that is consistent with professional principles, and could require that legal work be conducted under the responsible oversight of licensed attorneys. Failure to abide by these requirements would result in enforcement against the entity: criminal proceedings, fines, suspension or revocation of the entity's license, for example. Entities could be required to hold minimum levels of malpractice insurance, establish compensation funds, and cooperate with remedial orders emerging from an independent complaints resolution process (along the lines of the U.K. Legal Ombudsman).

The only substantial modification to state-by-state professional rules of conduct that would be required in such a regime would be authorization for state-licensed attorneys to

⁸⁷ Wolfram, *Sneaking Around*, at 706; Davis, *Multijurisdictional Practice*, at 1359.

practice within or with a licensed entity.⁸⁸ This would mean modifying the rules that currently make it professional misconduct for an attorney to be an employee of an entity providing legal services to the public or to be in a revenue-sharing arrangement with an entity. State regulators could continue to prohibit any employment or fee-sharing relationships with *unlicensed* entities. All other professional duties imposed by state regulators on attorneys could remain in place: competence, the avoidance of conflicts of interest, loyalty to the client, independence and upholding duties to courts and the fair administration of justice. Attorneys would still be subject to state-based discipline including suspension and revocation of a license for misconduct. Attorneys would still be required to meet state-based standards for admission to the bar. State courts would continue to determine who could appear before them.

Specific concerns about the impact of federal licensing on the independence of state-licensed attorneys and the inherent authority of state supreme courts to oversee the administration of justice in their states could be addressed with appropriate provisions in the federal licensing law or state statutes or court rules. For example, as with the U.K. regime, the client's privilege against the disclosure of confidential communications could be expressly

⁸⁸ Depending on the business model pursued by the licensed entity, other changes might be needed to ensure that attorneys working with and within licensed entities are not at risk of violating state professional conduct rules. For example, bar associations sometimes suggest that lawyers who participate in websites that review or rate lawyers or who are identified as specialists are in violation of bar rules about advertising. See e.g., South Carolina Bar, Ethics Advisory Opinion 09-10; New York State Bar Association, Committee on Professional Ethics, Opinion 972 (6/26/2013). Other possible changes include allowing attorneys to practice under a firm name other than a personal name and permitting licensed entities to direct work to a particular (appropriate) lawyer to perform services.

extended through federal and state rules in order to cover communications shared between the attorney and the employees of a licensed entity. Express obligations on entity personnel not to interfere with the exercise of independence by attorneys with whom they work could be written into the federal licensing law—as they are in the U.K. Legal Services Act—and enforced with the threat of license revocation.

To facilitate a federal entity-licensing regime, state laws prohibiting the unauthorized practice of law by corporate entities might have to be amended to allow a valid entity license to be recognized as a complete defense to prosecution. Alternatively, we can imagine that courts would be bound to recognize federal preemption of state law as applied to licensed entities. State prosecutors could still pursue charges against unlicensed entities and individuals engaged in the unauthorized practice of law, although they should be required to have evidence of public harm.⁸⁹ In effect, such a federal licensing scheme would leave in place existing state-based attorney regulation and unauthorized practices rules but create a safe harbor for entity practice.

An important advantage of federal licensing of entities is that a federal regulatory authority could achieve the independence from practicing attorneys necessary to ensure that oversight develops in the public interest and with protection of consumers as the primary consideration. Moreover, a fresh start on regulation makes it much more likely that a new regulatory authority could follow the U.K. model and adopt an outcomes- and risk-based

⁸⁹ See Rhode and Ricca, *supra* note.

approach to regulation that uses the data-collection advantages of national scale to ensure that regulation is evidence-based. Funding for a federal agency can also draw on license fees levied on regulated entities based on nation-wide revenues. The U.K.'s Solicitors Regulatory Authority, for example, in addition to collecting dues from solicitors, imposes licensing fees that scale with revenues.⁹⁰ For an entity such as LegalZoom, with U.S. revenues thought to be on the order of \$200 million, licensing fees at comparable rates would amount to about \$350,000.⁹¹ For entities hitting the billion-dollar mark, as the largest U.S. corporate law firms do, the fee to become a licensed entity on a nationwide scale would approximate \$1.5 million.

An alternative to a federal licensing body would be a cooperative regime between state regulators. This could take one of two forms. One possibility is the creation of a joint licensing authority among the fifty states. Individual state supreme courts could delegate the power to license and oversee entities to this joint agency. This approach, like the federal approach, retains the attractions of a single dedicated regulator and the potential for a fresh, independently funded and managed regulatory regime. State courts would, however, retain ultimate authority to revoke the power of the joint agency to license entities to practice in their state in the event that the agency failed to meet state standards.

⁹⁰ Solicitors Regulation Authority, Fee Policy 2014/2015.

⁹¹ Michael Carney, The \$425M LegalZoom deal is a win for VCs, but less exciting for the company or LA. Pando.com (January 6, 2014).

A second, but in our view inferior, possibility that does not involve federal legislation is the establishment of a national board for the development of uniform entity licensing standards and practices. Individual state supreme courts could then provide in their own rules that compliance with the national standards and practices will meet state standards. Alternatively, on the model of drivers' licenses, states could recognize as valid entity licenses obtained in any state that met national standards. This is the approach followed in Australia for attorney licensing. There, lawyers are admitted by a state or territory, but under uniform standards, so that their admission is recognized nationally.⁹² A drawback of this approach is that the burden of actual licensing and oversight would still fall on the states. In addition, as a practical matter, state supreme courts—heavily burdened with overwhelming caseloads and inadequate budgets—would still face the pressure they experience today to delegate substantial regulatory power to bar associations. That means that despite common nationwide standards, licensed entities could face the risk that the application and enforcement of standards would diverge across states and lack transparency. Such an approach might well fail to produce a single set of nationwide standards for entity practice.

The creation of a national entity licensing authority, whether as a creature of federal law or of cooperation among the state supreme courts in their rulemaking capacity, also holds out the potential for other regulatory reforms, beyond entity regulation, that can improve access, promote innovation, and improve the quality of lawyering. We noted earlier that a narrowing

⁹² Murray Hawkins, *Australian Legal Education and Bar Admissions*, *Bar Examiner* Feb. 2008, at 18.

in the scope of legal practice for which a license is required in the first place—along the lines of what is permissible in the U.K. for example—would be likely to emerge in the U.S. only on the basis of evidence about actual risks of poor outcomes for consumers. A national licensing authority could move that process along by undertaking to license providers of designated likely low-risk activities. The national authority could then monitor performance in these market segments: collecting data on prices, serving as a central complaints office, auditing performance to assess the incidence of errors, for example. Licenses could be revoked on the basis of evidence that a provider has fallen beneath acceptable standards. Again, a major advantage of this approach is the capacity to collect evidence on a national scale in order to develop outcomes- and risk-based regulation that appropriately balances the goals of access, innovation and competition against legitimate concerns for client protection. Regulators, state and national, would then be able to determine which activities really do impose low risks of generating problems, and where enforcement resources should focus on to preventing the truly serious risks. The “notario” scams that haunt state regulators now merit close attention;⁹³ the development of online advice platforms for routine legal questions may not.

In 2015, Washington State took the first steps toward such a licensing framework by recognizing limited license legal technicians (LLLTs). The program, adopted after twelve years of study, will enable graduates to handle out-of-court family matters without a lawyer’s

⁹³ Amy Yarbrough, Limited-practice license idea faces challenging path, *California Bar Journal* (May 2013); State Bar of California Board of Trustees & Limited License Working Group, Meeting Agenda for Wednesday, May 22, 2013.

supervision.⁹⁴ Although only twelve individuals are in the initial class, the program has already attracted considerable attention. In 2014, the ABA Task Force on the Future of Legal Education released a report calling for limited licensing and the expansion of training programs for such practitioners by law schools.⁹⁵ California and Oregon are considering such proposals.⁹⁶ New York has adopted a pilot program that allows trained nonlawyer “navigators” in specific locations in the Brooklyn Housing Court and Bronx civil court to answer questions by the trial judge and assist pro se litigants in preparing papers and negotiating settlements.⁹⁷ A major virtue of limited licenses is that they can promise to provide higher quality, due to specialization, than that provided by general practitioners.⁹⁸

⁹⁴ Stephen R. Crossland & Paula Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. Rev. 611,612 (2014); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rukel: A National First in Access to Justice*, 82 Miss. L. J. 75, 90-92 (2013).

⁹⁵ American Bar Association Task Force on the Future of Legal Education, *Report and Recommendations*, 3, 24-25 (2014).

⁹⁶ See Elizabeth Chambliss, *Law School Training for Licensed “Legal Technicians”?: Implications for the Consumer Market*, 65 S. Ca. L. Rev. 579, 591-592 (2014); Legal Technicians Task Force, *Final Report to the Board of Governors of Oregon* (February 13, 2015).

⁹⁷ Jonathan Lippman, *The State of the Judiciary 2014 : Vision and Action in Our Modern Courts*, N.Y. State Unified Court System 8 (2014), <http://www.nycourts.gov/ctapps/soj2014.pdf>.

⁹⁸ See Moorhead, Sherr and Paterson. As Andrew Perlman notes, the LLLT licensing process is “arguably a greater degree of competence than the training most law students receive. After all, lawyers are permitted to practice in any area once they obtain a license, even if they have never had any formal training in the subject.” Andrew M. Perlman, *Towards the Law of Legal Services*, forthcoming.

The Washington State experience, however, also speaks to the challenge of developing alternative licenses that promote access to justice within the framework of our existing state supreme court-based system of regulation. First, there is the practical reality that state supreme courts are already overburdened and lack the policymaking and regulatory oversight resources necessary to develop brand new regulatory regimes. Given this reality, the Washington State Supreme Court, which ordered the creation of the LLLT scheme, chose to lay responsibility for its development at the doorstep of the Washington State Bar Association. This led to the reproduction of the shortcomings of existing professional regulation—an overreliance on prescriptive rules, with little in the way of evidence regarding the relationship between requirements and outcomes. In addition, the delegation to the bar association generated an inherent conflict of interest: asking one set of professionals—licensed JDs—to develop and oversee a regime for professionals they see as their competitors. The Washington program came into being only by order of the Washington State Supreme Court over opposition from the Washington State bar association.⁹⁹ The Limited License Legal Technician Board,

⁹⁹ The Washington Bar Association opposed the LLLT program, citing concerns that it would institutionalize “second class, separate but unequal, justice” and “take work away from young, rural, and less affluent lawyers.” Brooks Holland, *The Washington State Limited License Legal Technician Practice Rukel: A National First in Access to Justice*, 82 *Miss. L. J.* 75, 106 (2013) (quoting Washington Board of Governors). The chair of its Family Law Section claimed that legal technicians would lack the “competency to actually do for the poor what needs to be done. Just because you’re poor doesn’t mean your legal problems are simple.” Robert Ambrogi, *Washington State Movers Around UPL, Using Legal Technicians to Help Close the Justice Gap*, *ABA Journal*, January, 2015 (quoting Ruth Laura Edlund). California’s consideration of a licensing program has drawn similarly harsh criticism from practitioners. One commentator said she was “astonished that [the bar] would consider actions that would be detrimental to the honest attorneys who are trying to make a living in California.” Samson Habte, *California and Oregon*

controlled by lawyers, adopted stringent qualifications.¹⁰⁰ Whether these qualifications and other practice requirements will discourage large numbers of applicants, and thus prevent robust price competition or inhibit significant efficiency gains, it is too soon to tell. But it is not promising that only fifteen individuals enrolled in the program's initial class and only 7 passed the exam; only 20 enrolled in the second class and exam results are not yet public.¹⁰¹ Although the program is expected to grow significantly as more students are enrolled in community colleges providing the required curriculum, whether this will meet the need remains unclear.

The development of a new national regulatory authority for entity licensing could, however, offer a path to the development of a more robust licensing alternative. One straightforward advantage is the economies of scale inherent in the development of a single set of requirements at a national level. Individual states could then determine whether to recognize these licenses.. Furthermore, the development of alternative professional licensing categories could emerge on the basis of actual evidence developed from entity oversight regulation. The great promise of expanded professional licensing, we believe, lies not in licensing individuals who then are required to practice within the inefficient business model of

Task Forces Endorse Licensing of Nonlawyer “Legal Technicians, ABA/Bna Lawyers’ Manual on Professional Conduct, 2015?”

¹⁰⁰ The Board’s responsibilities are set forth in Wash. Admission to Practice R. 28 C (2). Admission requirements include an associate’s degree, 45 core credits of paralegal instruction, fifteen “practice area” credits developed in collaboration with an ABA –approved law school, and 3,000 hours of lawyer-supervised experience, as well as passage of core and practice area exams. Wash. Admission to Practice R. 28 (D)-(E).; Wash Admission to Practice R. 28 app. Reg. 3. LLLTs must also satisfy character and fitness requirements and carry liability insurance. Wash. Admission to Practice R. 28 (D)(2); Wash Admission to Practice R. 28 app. Reg. 12.

¹⁰¹ Email Correspondence from Paula Littlewood, October 7, 2015.

solo and small-firm lawyer practitioners, but rather in the development of specialized skills deployed within a larger organization. This is the model within which the multiple professionals in health care operate: as members of a broad-based health care team coordinated within a hospital or health care organization. That is, additional specialized and limited legal licenses make sense within the broader context of entity regulation. Within that framework and within those entities, many of the concerns lawyers now voice about alternative practitioners can be met much more effectively. The quality of practice by alternative practitioners operating on teams within an entity can be monitored both by the entity—which is able to implement protocols and internal oversight mechanisms—and by the entity regulator—which has the ability to fine or revoke the license of an entity that fails to appropriately supervise those operating under a limited license. Our hope, then, would be that establishing a national licensing authority—whether under federal law or as a result of joint action by state supreme courts and legislatures—would lay the groundwork for an informed development of alternative licensing frameworks.

VI. Conclusion

As scholars who have long advocated fundamental reform in the delivery of legal services and the regulation of the legal profession, we are not naïve about the political obstacles that stand in the way. But we are hopeful that recent changes in the conditions of practice and the examples from other nations can serve as a catalyst for rethinking current frameworks. Only through a substantial reconstruction of our regulatory approaches can we begin to make access to justice less an aspiration than a reality.

