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Rethinking Regulation and Innovation in the U.S. Legal Services Market

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Introduction ................................................................................................................. 2

I. How Market Structures and “Value Configurations” Limit Innovation ................................................................................................................................. 5
   A. Christensen’s Disruptive Innovation Theory: Understanding Disruptive and Sustaining Innovation .......................... 6
      1. Sustaining Innovations ................................................................. 6
      2. Disruptive Innovations ............................................................... 7
      3. Situations Ripe For Disruptive Innovation ................................ 8
   B. Why Incumbents Cannot Disrupt - Resources, Processes and Values Theory .......................................................... 11
   C. How Disruptors Take Over Markets - Value Chain Evolution Theory ...... 14
   D. How Business Models and ‘Value Configurations’ Impact Who Can Innovate .................................................................................................................. 16
      1. The Three Value Configurations ............................................... 16
      2. Captured By Success: Value Configurations As Barriers to Innovation ......................................................................................... 21

II. How The Regulation of Legal Services Limits Innovation ........................................... 22
   A. If It Is The ‘Practice of Law,’ the “Solution Shop” Value Configuration is Required .................................................................................................................. 22
      1. Possessing the Intensive Technology ......................................... 23
      2. Diagnosing and Solving a Problem Rather Than Selling A Product ......................................................................................... 24
      3. Implications of Requiring Solution Shop Services .................... 25
      4. The Corporate Side of the Legal Services Marketplace .......... 26
      5. The Individual Side of the Legal Services Marketplace ........... 28
   B. Defining and Enforcing “Practice of Law” Restrictions ................. 28
      1. The Difficulty of Defining The Scope of the “Practice of Law” ...... 28
      2. Permissible Legal Services That Are Not The “Practice of Law” ................................................................................................. 30
      3. Enforcing unauthorized practice of law On The Individual Side of the Market Through Private Suits and Class Actions ........... 33
      4. De Facto Deregulation on The Corporate Side of the Market .... 37

III. The Interaction of Legal Services Regulation and Disruptive Innovation Theory ................................................................. 38
INTRODUCTION

For decades, academics have argued that the US system for regulating the practice of law inhibits innovation. Lawyers are blocked from innovations they might pursue by the heavy hand of legal regulation. Even worse, not just lawyers are blocked – because lawyers have a ‘monopoly’ on legal services, other types of legal service innovators that could offer better or cheaper products cannot enter the marketplace.

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Despite that academic consensus, we live in an age of unparalleled innovation in the way legal services are provided to clients in the United States. Innovation has come in forms as varied as legal process outsourcers serving the US legal market, online legal document vendors providing personalized wills to consumers, database companies providing actionable information on IP holdings and enforcement, and marquee level lawyers leaving their pre-eminent law firms to set up flat rate boutiques with radically different firm structures.

What gives? How can we live in a regulatory environment that prevents innovation, and have such an abundance of it? Where is this innovation coming from, and from whence might more innovation come? The answers are neither simple nor obvious. Understanding this changing landscape requires a close look both at how innovations take root and at the US system of legal regulation.

This article first looks – as others have not – at legal services innovation in the light of disruptive innovation theory. Over the past three decades, economists and business scholars have studied how innovations take root. This body of work has matured to recognize that not just technology but business models and “value configurations” determine whether a given company can pursue disruptive innovations in a given market. Drawing on the work of business scholars such as Michael Porter, Clayton Christensen, Charles Stabell and Øystein Fjeldstad as well as at the writings of scholars focused on the legal industry such as Richard Susskind this article analyzes how innovation can either sustain or disrupt market structures.

[hereinafter, Rhode, Professionalism]. Pro. Campbell, you did not mention this article for a second time, shall we delete this hereinafter?


4 Legalzoom.com and its competitors offer such products.


6 Examples of boutique, alternative structure firms founded by leading big firm lawyers include Bartlit Beck Herman Palenchar & Scott LLP, Boies, Schiller & Flexner LLP, and MoloLamken LLP.

7 This article looks at lawyers as one type of provider of legal services, a rubric of increasing popularity with significant implications. See generally Laurel S. Terry, The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”, 2008 J. PROF. LAW. 189 (2008).


9 See infra at __.
This article next looks at the regulatory scheme, and finds very different dynamics in the corporate and individual client ‘hemispheres’ of the legal market. In the corporate hemisphere, a creeping \textit{de facto} deregulation of legal services provided to corporate clients has allowed innovation to flourish. While several scholars have noted the rise of non-lawyer “consultants” and other service providers, none have carefully connected this to innovation in the legal services marketplace. In the individual client hemisphere, this article examines how developments in enforcement of unauthorized practice of law provisions – notably, consumer class actions brought by private attorneys – have worked to slow entry of new services and products where individual consumers are involved, despite a perceived lessening in interest in unauthorized practice of law enforcement.\textsuperscript{10} Over the past two decades, such class actions have spread widely, and such enforcement has already played a role in driving some innovators from the market.\textsuperscript{11} While the Supreme Court’s recent holding in \textit{AT&T Mobility v. Concepcion}\textsuperscript{12} may stifle such cases, unauthorized practice of law enforcement remains a threat to innovation on the consumer side of the market.

Finally, this article, taking into account both disruptive innovation theory and the regulation of lawyers, seeks to illustrate how these forces can interact by looking at what might happen in several distinct niches of the legal services market. Predicting the future involves inherent uncertainties, but it helps illustrate how regulations can interact with market structures and business models to determine where innovation might flourish.

\textsuperscript{10} Geoffrey C. Hazard & W. William Hodes, \textsc{The Law of Lawyerizing} § 46.4 (3rd Ed. 2001 & Supp. 2010) ("Over a period of many years, there has been a gradual, uneven, but unmistakable trend toward liberalization.").

\textsuperscript{11} An example is the storefront legal forms business, We The People, whose substantial reduction in size and bankruptcy reorganization filing was attributed to, at least in part, the many unauthorized practice of law lawsuits filed against it. Richard Acello, \textit{We the Pauper}, A.B.A. J. 24, May 1, 2010, \url{http://www.abajournal.com/magazine/article/we_the_pauper/} (Consumer class actions one factor in driving We The People legal forms chain into bankruptcy).

\textsuperscript{12} \textit{AT&T Mobility v. Concepcion}, 131 S. Ct. 1740 (2011). Since this decision, legal product vendors such as LegalZoom have begun incorporating mandatory arbitration clauses in their contracts for services. While \textit{AT&T Mobility} certainly creates a major barrier to future consumer class actions where arbitration clauses are involved, substantial uncertainty remains about the full impact the case will have. \textit{See generally} Andrew Trask, \textit{The State of Class Action Arbitration - Six Months After Concepcion}, Class Action Countermeasures Blog, \url{http://www.classactioncountermeasures.com/2011/10/articles/motions-practice/the-state-of-class-action-arbitration-six-months-after-concepcion}. 
I. How Market Structures and “Value Configurations” Limit Innovation

In the early 1990s a young business school professor began a novel course of research. Clayton M. Christensen hoped to learn how and why new firms and technologies drive formerly entrenched incumbents out of business. He studied hard disk drive companies for the same reason geneticists study fruit flies – the life cycles from birth to death are short. The rapid life cycles of the hard disk drive companies of the era gave him the chance to see patterns repeated over a few short years.

Christensen came up with a counterintuitive insight – incumbent companies failed not because they were poorly managed, but precisely because they were very well managed. Companies failed because they were focused on their best customers, wanted to offer better products to those customers, and pursued those opportunities most likely to have a significant impact on the company’s profitability. These traits – customer focus, constantly improving products, pursuit of opportunities of sufficient size – more often lead to success than failure, but understanding when and how they can lead to failure unclocks how disruptive innovation works.

As Christensen studied what he came to call “disruptive innovation,” he focused on three elements. The first was innovation itself. As he studied technological breakthroughs within an industry, he theorized that there were two kinds of technical innovations – sustaining technologies, which helped to make the incumbents stronger, and disruptive technologies, which effectively changed the rules of the game. He called his theories about the market conditions that provided an opening to newcomers “disruptive innovation theory.” He called his theories about the aspects of firms that made it difficult for them to pursue disruptive technologies themselves “resources, processes and values theory.” Finally, he called the migration of innovators upmarket into more valuable niches, leading to direct competition with and defeat of the incumbents, the “value chain innovation theory.” The three theories together provide a coherent vision of when technological and other innovations can upend a market.

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13 Clayton M. Christensen, The Innovator’s Dilemma 3 (First HarpersBusiness Essential Ed. 2003) [hereinafter, Innovator’s Dilemma].
14 Id. at 269.
15 Id. at 4.
16 Id. at xviii.
17 Clayton M. Christensen, Erik A. Roth & Scott D. Anthony, Seeing What’s Next: Using the Theories of Innovation to Predict Industry Change XV (Harvard Univ. Press 1st Ed. 2004) [hereinafter, Seeing What’s Next].
18 Id.
19 Id.
A. Christensen’s Disruptive Innovation Theory: Understanding Disruptive and Sustaining Innovation

Every day, someone, somewhere, makes a technological breakthrough. When new technologies are developed, firms already in the market that might use those products have the best opportunity to incorporate them in products. They have the capital, the customer base and the knowledge of the market to put these new possibilities to use.

1. Sustaining Innovations

In many cases, this happens. A technology arrives, shows potential to make the existing products on the market better, and appears in the offerings of the current leaders. The technological breakthrough may be staggering but the market structure does not change. Christensen calls this sort of innovation sustaining innovation.20

There are many examples of sustaining innovations that help industry incumbents maintain their dominance. The switch to electronic from mechanical cash registers required a fundamental technical change, but as a business matter it was a sustaining innovation that left the incumbents in place.21 The same could be said of the switch from analog to digital telecommunications technology.22 Incremental technological improvements – such as the steady improvement in land line telephone technology from the invention of the telephone until the 1960s – also tend to sustain the dominant incumbent players.23

Online legal research provides an example of a sustaining innovation in the legal industry. It represented a radical new technology for delivering legal information. Whereas before legal publications relied on the printing press, which implied an investment in printing facilities for vendors and extensive print libraries for consumers, online legal research substitutes a completely different technology, with different facilities and different kinds of technological expertise required.

Back in the early 1980s, the advent of online law libraries might have seemed disruptive – small law firms unable to sustain the cost of a large print library now could compete with large firms in their access to recent cases, law reviews, and other raw materials of legal research. One could imagine a world where established law firms continued to invest real estate and capital in maintaining print libraries, only to be outmaneuvered

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20 Id. at 284; Clayton M. Christensen and Michael E. Raynor, THE INNOVATOR’S SOLUTION: CREATING AND SUSTAINING SUCCESSFUL GROWTH 34 (2003) [hereinafter, INNOVATOR’S SOLUTION].
21 INNOVATOR’S SOLUTION, supra note 20, at 40.
22 SEEING WHAT’S NEXT, supra note 17, at 10.
23 Id. There are many subtypes of sustaining innovations, and Christensen lays out various categorization schemes. SEEING WHAT’S NEXT, supra note 17, at 284. What they have in common is that they tend to reinforce, rather than disrupt, market structures.
by nimbler firms relying on online materials. At the same time, one could envision the legacy print publishers being driven from the market, replaced by new firms delivering legal research materials online.

It didn’t happen that way. Online legal research became a sustaining innovation for law firms – it allowed big law firms to do better what they were already doing, providing customized legal advice and services on high value matters. Rather than leaving online legal research to be exploited by new entrants, the dominant legacy law firms paid for access to online legal research. Having access from diverse locations to up to the minute legal materials made them more valuable, not less valuable, to their corporate clients.

Nor did online legal research completely rearrange the legal publishing market. Some existing publishers developed or acquired online research distribution, sustaining rather than disrupting their place in the marketplace. Others licensed their works to the firms that distributed research online, thus finding a new market.

Most technological innovations are sustaining. The incumbent players invent or acquire these technologies and use them to do better what they already do. Neither the pace nor the novelty of innovation necessarily forecast the demise of established players nor the advent of new entrants. What’s more, regulatory barriers that discourage new entrants will not prevent established players from adopting those new technologies that sustain their business model.

2. Disruptive Innovations

Then there are the innovations that do change markets. Market structure, not technology, determines what becomes a disruptive innovation. Christensen learned in his research that the market changing innovations were, at least at first, inadequate to meet the needs of the market leaders on those measures of quality that mattered most to their best customers. A new disk drive technology might fit in a smaller physical space, but if it held less data or retrieved data more slowly, the market leaders would reject the innovation in favor of incremental improvements to the existing market leading technology.

In these situations, the managers of the incumbent acted rationally in rejecting the new technology. Focused on their current customers, they saw little advantage in offering inferior products their current best customers would reject. Even if a niche market existed for the new technology, it would be irrational for the market leaders to divert resources to it because the size of the market would be too small to make a significant difference in

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24 INNOVATOR’S SOLUTION, supra note 20, at 32.
25 INNOVATOR’S DILEMMA, supra note 13, at 16.
the incumbent’s bottom line.\textsuperscript{26}

In some cases, rejection by the established market or defeat by entrenched incumbents means the end of the new technology.\textsuperscript{27} In other cases, however, the technology finds a market not served by the existing offerings. For this market, the attributes of desirability differ. Factors that matter little in the established market – small physical size, for example, or lower power consumption – may be prized in these markets. Once established at the fringe of the market, the innovator is poised to cause disruption.\textsuperscript{28}

3. Situations Ripe For Disruptive Innovation

Customer needs, and not the technical brilliance of an innovation, will determine whether an innovation will be disruptive or sustaining.\textsuperscript{29} When the innovation can be used by the incumbent companies to serve their current customers better, the innovation will be sustaining.\textsuperscript{30} Only when the innovation allows the targeting of new customers or the targeting of existing customers in ways not of interest to the incumbents will an innovation be disruptive.\textsuperscript{31} Christensen writes of innovations that allow new types of products to be offered to non-consumers, to those overshot by the current product offerings, and to those underserved by the current options.\textsuperscript{32}

\textsuperscript{26} Id. at 139, 148.

\textsuperscript{27} An example of a failed innovation would be the rise and fall of Metricom, a wireless internet company offering a data only service called Ricochet that absorbed around a billion dollars in capital before going into bankruptcy. Metricom suffered from a one-two punch. Not enough consumers subscribed to support the massive costs of building out a nationwide infrastructure, and the incumbents in the wireless communication space saw data transmission as an opportunity consistent with their business model. http://www.hamradio-online.com/1996/jan/metricom.html; http://news.cnet.com/2100-1033-269362.html.

\textsuperscript{28} See discussion of upmarket movement infra at ___.

\textsuperscript{29} Richard S. Rosenbloom & Clayton M. Christensen, Technological Discontinuities, Organizational Capabilities, and Strategic Commitments, TECHNOLOGY, ORGANIZATION AND COMPETITIVENESS: PERSPECTIVES ON INDUSTRIAL AND CORPORATE CHANGE233, (Giovanni Dosi, David J. Teece & Josef Chytry eds., Oxford Univ. Press 1998) (“If no mobility or change in strategic direction is required – if the new technology is valuable within a firm’s established value network – the consequences of the innovation are likely to be reinforcing, regardless of its intrinsic technological difficulty or riskiness. If realization of inherent value requires the establishment of new systems of use – served by new value networks – the consequences are likely to be radical – even if the innovation is technically simple. This may occur because such innovations require far more than technological activity – complementary assets must be created or acquired as new commercial capabilities become significant.”).

\textsuperscript{30} INNOVATOR’S DILEMMA, supra note 13, at 14.

\textsuperscript{31} Id. at 16. (“They offered a different package of attributes valued only in emerging markets remote from, and unimportant to, the mainstream.”).

\textsuperscript{32} SEEING WHAT’S NEXT, supra note 17, at 9.
a. Non Consumers

Sometimes disruptive innovation creates new markets, allowing those who previously were not consumers to become consumers. Existing customers do not, at least at first, shift to the new product. Rather, those without the option to be consumers at all have a chance thanks to the disruptive innovation to become customers for the first time.  

The history of computers provides many examples. The first minicomputers did not cannibalize the customer base of mainframes, but instead gave the option of computer ownership to organizations that could not afford the higher cost of mainframe computers. Similarly, when the first personal computers arrived in the marketplace, the owners of the early Altairs and Apple IIs did not replace minicomputers but instead entered the market for the first time.

These products cannot compete, at the time they enter the market, with the dominant legacy providers. A customer who needed an IBM 360 mainframe or a Control Data minicomputer would not have their needs met by the more rudimentary capabilities of an Apple II. The new technology, by virtue of its inferiority, had to seek out a different market.

A possible example of this kind of disruption in the current marketplace would be the offering of form legal documents to consumers. At a fundamental level, the form legal document is inferior to the services of a competent attorney. The attorney can use specialized expertise to evaluate the client’s needs, and can deliver not only a properly written document but also the correct document for the particularized needs of the client. On the other hand, even given uncertainty about selecting the correct form or filling it out properly, form legal documents may be the best available solution for those unable to afford the services of an attorney and incapable of drafting their own legal documents.

b. Overshot Consumers: Replacing Products That Provide More Than Consumers Need

Another opening for disruptive newcomers can come when the curve of technological improvement has allowed products to improve faster than customer demand. The existing products on the market are not just good enough – they are more than good enough. For these customers, a cheaper, simpler solution might meet their needs.

33 Id. at 6-8.
35 See infra form legal documents.
36 The documents themselves might be superior, but the lack of the ‘diagnostic’ function makes the difference.
37 SEEING WHAT’S NEXT, supra note 17, at 11-12.
The original discount long distance telephone services such as MCI provide an example of a disruptive innovation marketed to overshot consumers. The original MCI service was not as convenient to use as the existing ATT long distance service, and the quality of the connection was often not as good. It was, however, good enough to meet the needs of many corporate customers, and much cheaper.\textsuperscript{38} The same cycle has played out more recently with Voice Over Internet Protocol long distance services such as Skype, which once again provided a lower quality of service at a lower cost.

These lower cost options take advantage of changing consumer preferences as a product category matures. In the early stages of a product category’s life cycle, consumers tend to focus on criteria that define the core quality of the product such as base functionality and reliability. As technology improves and functionality and reliability become more of a given, the consumer preference determinants for at least some customers shifts to criteria such as ease of use, the ability to customize the product, and, finally, price.\textsuperscript{39}

In the legal market place, the rise of Legal Process Outsourcers (LPOs) reflects a response to an overshot market.\textsuperscript{40} Once upon a time, massive document production and review typically involved “bet the company” cases or transactions that demanded elite law firms. As corporate clients have become more accustomed to massive document productions in connection with more routine litigation or corporate transactions, the sense that only a few elite law firms were competent to handle these matters waned. This provided an opportunity for LPO firms to come into the market with a good enough but lower cost offering.

c. Undershot Consumers: Products That Are Not Good Enough

The ability to move upmarket as technology allows products to improve plays an important role in how disruption roils markets.\textsuperscript{41} Firms enter the marketplace in areas where the incumbents either offer no affordable services or offer services that overshoot the market. The initial entry into the market comes with a product that does not meet the needs of the best customers of the existing dominant players. In a world where either new technology or mastering experience curves allow constant improvement, the initial product offering only begins the story.

Once a firm establishes a foothold in a market, it may find that its customers want a better or more full featured product. Christensen terms these “undershot consumers,” and sees them as an opportunity for firms that

\textsuperscript{38} Id. at 13-14.
\textsuperscript{39} Id. at 12.
\textsuperscript{40} See the discussion of LPO’s infra at .
\textsuperscript{41} See the discussion of value chain evolution infra at .
Wish to market sustaining upmarket innovations. Faster personal computers, more feature rich software, smaller or more feature rich mobile phones, all offer examples of products that, once introduced to a market that previously had no chance to consume, moved upmarket by marketing more fully featured products to customers who wanted more.\textsuperscript{42}

In the legal market, automated document assembly may provide an example of a technology moving upmarket. Legal forms, as noted, are inferior in kind to the services of a competent lawyer, but may be all that a given consumer can afford. If interactive technology can increase the likelihood that the consumer gets the correct form, correctly filled out, some consumers of print forms will move upstream to the interactive version, and the improved forms may siphon business from lawyers.\textsuperscript{43}

\textbf{B. Why Incumbents Cannot Disrupt - Resources, Processes and Values Theory}

One might wonder why, when new markets are developed by disruptive entrants, the typically better funded, more resource rich incumbents do not simply move into those new markets themselves. Focusing on this issue, Christensen had a breakthrough insight: the incumbents do not pursue these opportunities because it would not make sense for them to do so.\textsuperscript{44} The incumbents don’t move into these markets because to do so would divert resources that could be more profitably used delivering better products and service to their best and most profitable customers.

Christensen lays out why this happens in what he terms RPV or “Resources, Processes and Values Theory.”\textsuperscript{45} By looking at how companies deliver the products they currently deliver, he makes clear why successful companies cannot easily switch to new kinds of products, particularly if those products are lower cost and less fully featured. The resources, processes and values that make a company strong in one setting also serve as a kind of cage.

\textbf{Resources.} Companies have resources they can draw on to serve their customers. These resources take many forms. Highly trained

\begin{footnotesize}
\begin{enumerate}
\item[42] \textit{Seeing What’s Next}, supra note 17, at 9 (“Undershot customers, for whom existing products are not good enough.”).
\item[43] Whether those regulating the legal marketplace will allow this is a different issue. \textit{See infra} at .
\item[44] Of course, after Christensen’s work, some companies did begin moving into markets that would not make sense for them to pursue on a short term profitability basis in order not to provide an opening to disruptive entrants. An example would be Intel, which moved aggressively into the market for low cost chips for low cost personal computers after consulting with Christensen. Toni Mack, Danger: Stealth Attack, Forbes, January 25, 1999, \texttt{http://www.forbes.com/forbes/1999/0125/6302088a.html}.
\item[45] \textit{Seeing What’s Next}, supra note 17, at 279-80; \textit{Innovator’s Solution}, supra note 20, at 189-211; \textit{Innovator’s Dilemma}, supra note 13, at 185-210.
\end{enumerate}
\end{footnotesize}
personnel, access to certain amounts of capital, physical plant, technology, brand power and distribution channels are all among the kinds of resources that a company can use to deliver value. No company has infinite or comprehensive resources; a company develops those resources it needs to serve its established customer base with its existing products, and cannot always cheaply or easily substitute new ones.

When a disruptive innovation arrives on the scene, the resources held by the incumbent company are unlikely to be those needed. Personnel have been assessed and trained in a different, typically stable environment, and will often need to abandon techniques and strategies that served them well in the past. Distribution channels might resist a new product that generates less profit than previous products. Brand managers may resist attaching a powerful brand to a disruptive innovation that, given the nature of disruptive products, falls short of prior products on traditional measures of quality.46

Processes. As businesses mature, they develop highly defined processes for creating the products and services they sell. Everything from capital budgeting to procurement to product development to marketing follows processes that have evolved to deliver successful products in the past. These processes are sometimes formal, but sometimes only implicit in the structure of an organization. The processes sometimes overlap – for example, a defined process may be followed to determine which potential projects to back with budgeted resources, while a less defined but equally inevitable process will be followed to advance the careers of those who back budget resources for products that succeed in winning corporate funding and to block the career advancement of those who support losers. These processes will determine what projects a company can pursue.47

Values. By values, Christensen does not mean just aspirational values (“promote justice,” say, or “delivery extraordinary value to our clients”). He looks to more basic matters – what kind of work does a firm want to do? What kind of employees does it want to attract? How much do firm profits have to increase before the increase matters?48 Values determine how a firm prioritizes projects and allocates resources.

An elite corporate law firm, by way of example, may have as an implicit value that it handles high stakes, high value matters. This sense of values – this sense of ‘who we are and what we do’ – will lead a firm to decline some opportunities that it could handle. Such a firm would not be particularly interested in collecting a $500 fee to handle a residential house closing, nor might it find it valuable to sell as low cost commodities those

46 INNOVATOR’S SOLUTION, supra note 20, at 178-183.
47 Id. at 274.
48 Id. at 183.
same legal documents it has previously sold at high prices as an element of custom services.

The values of successful firms derive from the firms’ past successes and generally make sense for the businesses those firms have been engaged in. A firm with $5 billion in annual profits cannot materially change its financial position with a new product that can only generate an additional $1 million in profits. A firm with a reputation for the most dependable hard drives will not enhance its brand by selling new hard drives that fail much more frequently, even if those drives consume less electricity or are smaller. A firm that has become profitable by valuing projects with 50% margins may have developed a cost structure that will make it insolvent if it moves to lower margin work.

The same value constraints apply in the area of legal services. For example, an elite law firm has certain skills and opportunities, but it also operates under certain constraints. Much of the firm’s value comes from its reputation, which depends on the kind of matters it handles and the kind of people selected to work there. If the firm drifts into low status work, its reputation might suffer. It also has a cost structure based on its existing business. A firm that hires elite law school graduates at top rates will have a hard time competing on price for low margin work (and a hard time keeping those associates if they are sufficiently dissatisfied with the work they are assigned). Firms take work inconsistent with their values at their peril.

RPV. Taken together, a firm’s resources, processes and values define what a firm has been able to do, but also critically limit what it can choose to do going forward. Top managers can only execute with the support of the organization, and the firm’s RPV programs the organization. Mid-level managers attuned to what has led to career success in the firm in the past or to what customers are currently demanding will make sure projects outside the firm’s established RPV are never presented to higher levels for review.


50 INNOVATOR’S DILEMMA, supra note 13, at 82-84 (“In most organizations, managers’ careers receive a big boost when they play a key sponsorship role in very
Much as a biological organism’s immune system fights off invaders, a firm’s RPV process will nudge the firm back towards what it has successfully done before and away from disruptive innovation.

Typically, incumbent firms do not pursue true innovative disruptions because they are inconsistent with a firm’s resources, processes and values. A firm wishes to deliver more highly performing products to its existing customer base. It also wishes to focus investment on those markets large enough to provide a meaningful impact on its bottom line. Developing inferior products for smaller niche markets will prove inconsistent with these factors, and well run firms not focused on closing off disruptive innovation will leave those new markets for others in order to concentrate on their core business. Incumbent firms that do pursue disruptive strategies typically succeed only if they set up new business units, separate from the legacy operations, so the firm’s RPV culture does not squelch the initiative.51

C. How Disruptors Take Over Markets - Value Chain Evolution Theory

The final piece of Christensen’s original analytic structure looks at how firms, once established at the low, disruptive end of a larger market, tend to move over time to the higher end.52 Over time, the new entrants improve the quality of their products, increasingly competing directly with the incumbents, and in some cases eventually driving them from the market. Christensen makes clear that disruption occurs not at all at once, but as the culmination of a process that can take a long time as incumbents beat a retreat up the value chain.

The value chain evolution theory relies on a core observation – in the modern world, technology tends to get better faster than consumers get more demanding. Moore’s law,53 and related phenomena allow what were low end products to deliver more functionality relatively quickly. As a result, products that were at first not good enough for the dominant market become, after iterative improvements, good enough. At the same time, the successful projects – and their careers can be permanently derailed if they have the bad judgment or misfortune to back projects that fail.”).

51 The classic example of a disruptive innovation that succeeded within a legacy company is the establishment of IBM’s personal computer division far from headquarters in Boca Raton, so that it could pursue a business where margins, average product price and product capabilities were all inconsistent with what had made IBM successful. INNOVATOR’S PRESCRIPTION supra note 34, at 197.

52 INNOVATOR’S DILEMMA, supra note 13, at 77-95. 198 (“[W]ell managed companies are generally upwardly mobile and downwardly immobile. . .”).

53 Moore’s law is the heuristic attributed to Intel cofounder Gordon Moore which states the number of transistors that can inexpensively be placed on an integrated circuit doubles about every two years. See http://download.intel.com/museum/Moores_Law/Printed_Materials/Moores_Law_Background.pdf.
products that formerly were good enough now become better than good enough, offering excess capability and often charging an excessive cost.

This theory shows how products that got their initial foothold precisely because they were not good enough for the existing market can come, over time, to drive the incumbent providers from the marketplace. Products and technologies do not stand still. The new entrants constantly improve their products, and can compete for markets that previously would have found their offerings inadequate.

Christensen gives an example of this process in the steel industry. Integrated steel mills are massive facilities that produce steel from raw materials, and require huge economies of scale to be competitive. In the 1960s a new technology – minimills – appeared on the market that made steel from scrap metal. At first, the quality of the steel was so low that it could only be used for steel reinforcing bars (rebar), a low margin commodity business relatively unattractive to the major mills. Over time, however, the quality of minimill steel improved and they were able to move upstream into the bar, rod and angle iron market and onto the structural beam market and eventually to the slab steel market. Each niche up the chain proved more profitable for the minimills. While ceding the lower markets was initially profitable for the integrated mills, it eventually left them restricted to the top tiers of the steel market, and still facing further attacks from below.54

At the same time, the incumbent players cannot generally move down the value chain to compete for the newly developed markets. In some cases, these markets continue to prize attributes (smaller size, lower power consumption, etc.) that they are not capable of offering as well as the new entrants. In other cases, the market size is too small or the margins too low for it to make economic sense for the incumbent to pursue these opportunities.

In his hard disk drive research, Christensen saw, time after time, new entrants come into the market with products that were acceptable only to the lowest segment of the computer market. As they improved, they moved up a niche in the value chain – from personal computers to desktop workstations. As the new entrants took what had been a higher value niche, the incumbents in that niche moved up a step – from desktop workstations to minicomputers. The prior incumbents there were themselves pushed up a notch, from minicomputers to mainframes. In the end, the incumbents reached a point where there was no higher spot on the value chain to move to, or with a market share too small to support fixed costs, leading inexorably to bankruptcy.

54 Innovator’s Dilemma, supra note 13, at 87-93; Innovator’s Solution, supra note 20 at 35-39.
D. How Business Models and ‘Value Configurations’ Impact Who Can Innovate

In Christensen’s more recent work, technology as the source of innovation has taken a backseat to business model innovation. As we have seen, market structure, rather than radically new technology, determines whether an innovation proves sustaining or disruptive. This being so, innovative business models or processes can disrupt markets as much as new technology.

When discussing business models, Christensen uses the term specifically and somewhat more broadly that some other scholars and commentators, who sometimes equate marketing techniques or revenue models with a business model. For Christensen, a business model has four interdependent elements: A ‘value proposition,’ resources, processes and a profit formula. The value proposition is the offering to the customer, suggesting to them that the company can do more conveniently, quickly or cheaply a ‘job’ that the customer wants done. The other three enable the firm to deliver on that proposition, near and long term.

Christensen has broadened the kinds of businesses he examines. Christensen’s original work was framed in terms of Michael Porter’s “value chain” theory. Porter’s value chain was developed in the context of manufacturing and distribution businesses. In these sorts of settings, a business adds value to inputs. The added value can come in the form of a factory, bringing raw materials in one door and shipping out finished product through another.

1. The Three Value Configurations

In incorporating business models into his analysis, Christensen has relied on work that extends Porter’s theory beyond its original product manufacturing setting to other types of “value configurations” that better fit services and companies that are not centered on physical products. Porter’s work speaks of the process by which value is added in business processes as being a “value chain”. A model developed by Charles B. Stabell and Øystein D. Fjeldstad sees value chains as one of three possible “value configurations.”

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56 INNOVATIVE PRESCRIPTION, supra note 34, at 8-10.
57 Michael Porter, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE __ (1985) [hereinafter, COMPETITIVE ADVANTAGE].
58 Configuring Value, supra note 49, at 413.
### VALUE CONFIGURATIONS

<table>
<thead>
<tr>
<th>Value Creation Logic</th>
<th>Value Chain</th>
<th>Solution Shop</th>
<th>Value Network</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transformation of Inputs Into Products</td>
<td>(Re)solving Customer Problems With Expertise</td>
<td>Linking Customers</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Primary Activity Categories</th>
<th>• Inbound logistics</th>
<th>• Problem-finding and acquisition</th>
<th>• Network promotion and contract management</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Operations</td>
<td>• Problem-solving</td>
<td>• Providing Service</td>
<td>• Operating Infrastructure</td>
</tr>
<tr>
<td>• Outbound logistics</td>
<td>• Solution Choice</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Marketing</td>
<td>• Solution Execution</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Service</td>
<td>• Control/evaluation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Main Interactivity Relationship Logic</th>
<th>Sequential Add value to input</th>
<th>Cyclical, spiraling, iterative</th>
<th>Simultaneous, parallel</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Exemplary Solution</th>
<th>Standardized Product</th>
<th>Custom Service</th>
<th>Community Interface. If product (e.g., insurance policy) arbitrages members of network</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Examples</th>
<th>Factory</th>
<th>Lawyers, Doctors, Consultants, Detectives, Engineers</th>
<th>eBay Insurance Company</th>
</tr>
</thead>
</table>

### a. Value Chain Businesses

Porter’s Value Chain configuration (renamed by Christensen the Value Adding Process Business Model)\(^{60}\) describes the familiar industrial process. Raw materials enter into one door of a factory, and finished products exit from another. Porter observed that the cost of each step might bear little relationship to the value added – for example, the materials cost and time involved for a diamond cutter to cut a diamond is quite low, but the value added to the diamond at this step is very high.\(^{61}\) The concept of the Value Chain breaks apart how companies add value and focuses a company’s activities on those parts of the chain where the most value can be captured. The framework has had broad influence since Porter

\(^{59}\) Adapted from a chart from Configuring Value, supra note 49, at 415.

\(^{60}\) INNOVATOR’S PRESCRIPTION, supra note 34, at xxv. In this paper we will use the term Value Chain because of the wide acceptance and clarity of Porter’s term.

\(^{61}\) COMPETITIVE ADVANTAGE, supra note 57, at _.

introduced it more than 30 years ago.

Services as well as hard products can be delivered through the value chain configuration. For example, a carpet cleaning franchise offers a service, not a product, but the franchised service follows the value chain configuration. The service provider eschews diagnostic and suitability analysis (e.g., shouldn’t the consumer instead buy new carpet or restore the underlying wood floors?) and delivers based on standard inputs the service selected by the customer. Value chain services can be automated and impersonal – for example, Google Translate offers a remarkably powerful translation service from a value chain format.62

Stabell and Fjeldstad start with the realization that the “value chain” described by Porter does not fit all businesses. While some businesses do involve transforming inputs into finished or at least higher value products or services, many do not. Asking what the raw materials and finished products would be for an insurance company, they observe, “Few insurance companies would perceive uninsured people as the raw material from which they produce insured people.”63 Stabell and Fjeldstad add two other radically different ways companies can organize to deliver value.

b. Solution Shop Businesses

One, the Value Shop (relabeled the Solution Shop business model by Christensen)64 will be familiar to those who have worked in law firms or law departments or have familiarity with the sociological literature discussing the professions.65 Customers come with problems. Frequently, the true nature, scope, and best solution to the problem are unclear, precluding the application of standardized off-the-shelf solutions in the first instance. “Knowledge-intensive service firms not only sell a problem-solving service, but equally a problem-finding, problem-defining, solution-

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63 Configuring Value, supra note 49, at 414.
64 INNOVATOR’S PRESCRIPTION, supra note 34, at xxiv. In this paper we will use the term Solution Shop because it succinctly describes the concept.
65 See, e.g., Andrew Abbot, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 4 (1988) (“Professions were organized bodies of experts who applied esoteric knowledge to particular cases. They had elaborate systems of instruction and training, together with entry by examination and other formal prerequisites. They normally possessed and enforced a code of ethics or behavior. This list of properties became the core of later definitions.”); Eliot Freidson, PROFESSIONAL POWERS (1986); Robert Eli Rosen, LAWYERS IN CORPORATE DECISION-MAKING (2010). The specialized asymmetric knowledge and application of it in light of the specific facts of the matter maps directly from the value shop model to the traditional conception of professions; the additional elements of licensing, ethical codes and striving for status appear in some but not all applications of the model. Interestingly, on the corporate side, some of the non-law practice competitors in the legal services market have retained the solution shop value configuration while disclaiming a ‘professional’ role.
execution and monitoring service." The solution shop value configuration demands that the solution be tailored to the problem identified. There must be “a strong information asymmetry between the firm and its client” with the firm possessing an “intensive technology.” Firms in the solution shop zone must be able to deal with unique cases, even if the solutions employed after diagnosis are standardized. The “intensive technology” can be a command of ERISA regulations or could be remote sensing technology for finding undersea oil and gas deposits. The process is iterative and evaluative, with a key component being ongoing evaluation of whether the solution provided is the right one. From the customer’s viewpoint, cost matters less than obtaining the right solution.

Christensen’s “solution shop” label is apt, because what firms with this value configuration principally offer are solutions, and services or products only as a means to that solution. A doctor’s prescription of medicine, for example, has value only in the context of the correct diagnosis of the disease causing the symptoms, and the selection of an appropriate treatment for the disease. As with the pills prescribed by the doctor, components that have been produced through a value chain process may be incorporated in the solution shop service, but the service remains inherently individualized and directed at diagnosing and solving the customer’s problem.

c. Value Network Businesses

The third value configuration, the Value Network, has become increasingly familiar to those of us living in the internet age. The value configuration of eBay, for example, is neither products nor services. Its value comes from providing a network in which connections get made. It achieves success when a sufficiently large network is built and sufficiently

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67 This value configuration explains, among other mysteries, why identifying a clear value chain for legal services has eluded analysts. Law, when practiced as a consultative profession, is not a value chain business configuration, and so there is no value chain. Value chain analysis applies to standardized products and services where value is added at various steps in a process toward a more or less standardized product or service, and the traditional “profession of law” is by nature customized and not product centered. While it uses inputs and resources, these resources and inputs are not transformed in a value adding process, but used in a solution shop process to solve a problem. From this perspective, to refer to the resources and inputs used by law firms or general counsels as part of a ‘value chain’ is a misnomer. But see Disaggregation of Legal Services, supra note 3, at 2167, referring to a “legal services value chain.”
68 Configuring Value, supra note 49, at 421.
69 Id.
70 Id. at 422.
71 Id. at 426.
avidly used so that it can help users resolve their unmet needs. The network model includes all businesses where the value comes from mediating between the diverse constituencies of the business. Banks, insurance companies, telephone companies and postal services are all examples of value networks.

For network businesses, the primary value lies in the network, with the value growing as the network achieves scale; a competitor with equivalent technology and facilities will fail without the right members in the network. Network value companies succeed in part by being “club managers” who exclude inappropriate members, while achieving sufficient scale to make use of the network valuable. In pursuit of the network, network companies will provide mediating technologies, perhaps reinforced by common standards, but it is the network rather than the facilities that ultimately matters.

Most substantial companies are not pure examples of any one of these value configurations. As Stabell and Fjeldstad note, a telephone company may employ a mediating network model for its basic telephone service, but source its equipment using a value adding process model. A company can provide a solution shop front end, and then incorporate selected products that have been developed through a value chain model.

From the perspective of a customer, it may not matter which value configuration a given company follows. If the ‘job’ the customer needs filled is having a hole in put into the wall, to borrow an example from Richard Susskind, they can obtain that hole from any of these value configurations or business models. They can buy a drill or a shotgun created by someone pursuing value adding chain business model and create the hole. They can hire a solution shop with expertise in putting holes in walls and, after the solution shop has verified that a hole in the wall really is the best solution, let them punch the best possible hole in the wall. They can access a network and, perhaps after seeking advice and guidance from other consumers of holes in the wall, be connected with someone with a need for round pieces of drywall.

Stabell and Fjeldstad portray these value configurations as co-existing in the market. Put differently, the world is not in the midst of an evolutionary progression from old forms of value configurations (say,

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72 Id. at 427.
73 Id. at 428.
74 Id. at 434.
75 END OF LAWYERS, supra note 8, at 158-59. Christensen tells a story of how a fast food company analyzed the “job” done by a milkshake, which turned out to involve several non-obvious attributes such as the ability to be consumed neatly with only one hand while driving. INNOVATOR’S PRESCRIPTION, supra note 34, at 11-14.
solution shops) to new ones. At any given moment, all three generic value configurations can co-exist.

With regard to a ‘job’ that needs to be done, however, there can indeed be a progression. At first, a need can seem complex and fully in need of a custom solution from a high end solution shop. As the solution shop addresses the ‘job’ multiple times, the contours of the problem may become clearer, opening the way to standardized value chain solutions. It is one of Richard Susskind’s core arguments that many law related ‘jobs’ are, with the aid of technology, becoming solvable with value chain solutions.  

From the perspective of the business, however, it is very difficult to move from one value configuration to another. As Christensen shows, companies become captured by their competencies. They also reside within an intermeshed network of vendors, partners and customers that will resist changes from a counterpart they rely on. To the extent companies view a shift as necessary, radical change usually can only be achieved by setting up a separate operation to pursue the new operation, unconstrained by existing relationships.

2. Captured By Success: Value Configurations As Barriers to Innovation

Looking only at Christensen’s earliest work, theorists of legal innovation such as Richard Susskind have focused primarily on what coming technological leaps will make possible, but technology can be sustaining as well as disruptive. As disruptive innovation theory has matured, business models and value configurations have taken center stage as the real enablers of disruptive innovation.

The different types of value configurations – or business models – help illuminate the challenges facing the incumbents in the legal profession today. As will be discussed below, law firms live in the solution shop business model. They don’t live alone in that model, but wrap themselves in a set of value relationships that will steadily and persuasively push back against radical attempts at change. While, in a changing world, it might be a better business to become a vendor of information products following a

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76 Id. at __. Susskind does not use the ‘value chain’ or ‘solution shop’ concepts developed by Stabell and Fjeldstad, but the recognition that formerly complex tasks are becoming commoditized and are subject to being systematized recurs throughout his work.

77 INNOVATOR’S PRESCRIPTION, supra note 34, at 3 (“Historically, it is almost always new companies or totally independent business units of existing firms that succeed in disrupting an industry.”).

78 Susskind does discuss Christensen’s older work, raises the objection posed to him that perhaps business models get short shrift in his analysis in contrast to technology, but essentially concludes that technology is what he wants to focus on. As a technologist and futurist, Susskind seems less concerned with which institutions win or lose in the market than with the possibilities of technology. END OF LAWYERS, supra note 8, at 97. (“[F]or the purposes of some of this book I do want to be technology-led.”).
value chain model, that switch will not be made easily by incumbent law firms. Even if a law firm’s management sees the future as belonging to commoditized information products, it will be an unusual firm that can make the switch.

The business literature on innovation, which has been largely ignored by legal scholars addressing legal markets, helps make many things clear. Successful incumbents cannot easily change their business model; their resources, processes and are optimized to their current clients and will resist change. Incumbents can use radical new technologies to sustain their business model, but tend to leave alone new technologies or business processes that do not enhance their offerings to their current clients. Disruptive entrants can enter the low end of the market with new technologies or business processes, and disrupt the market through a sequence that sees them improving their offerings in an iterative matter, eventually allowing them to challenge for the incumbent’s best customers. Innovation can be driven by technology, but it also can be driven by firms targeting the same customers with different business models and value configurations, and it always depends on market and business structures being open to disruptive entrants. In a world where incumbents cannot implement disruptive change, regulation that excludes entrants from different value configurations excludes not just the potential entrants but the possibility of disruptive change itself.

II. HOW THE REGULATION OF LEGAL SERVICES LIMITS INNOVATION

Disruptive innovation theory, it should now be clear, turns only in part on actual technical or business model innovation. Understanding how innovation takes root depends on understanding the market. In the realm of legal services in the US, that market has been shaped by regulation of the legal profession\(^\text{79}\) and the rules limiting competition from non-lawyers.

A. If It Is The ‘Practice of Law,’ the “Solution Shop” Value Configuration is Required

Those who “practice law” in the United States must operate in a circumscribed way. State rules based on the ABA’s Model Rules of Professional Responsibility and other rules regulating lawyers set out in

\(^{79}\) Most state rules are based on model rules promulgated by the American Bar Association, MODEL RULES OF PROF’L CONDUCT (2003) [hereinafter, MODEL RULES]. In addition, malpractice liability and the duties implied by malpractice standards also serve to regulate the profession. In addition, lawyers are increasingly regulated as service providers by rules that are not necessarily lawyer specific. See generally Fred C. Zacharias, The Myth of Self-Regulation, 93 MINN. L. REV. 1147 (2009).
painstaking detail the characteristics of acceptable legal practice. The purpose behind some – such as education requirements or the difficulties encountered in limiting the scope of an engagement – might seem obscure.

The rules have been described as controlling what constitutes a ‘legal product’ and who can sell legal ‘products’ and services. While this description makes sense from some perspectives, it would be misleading to view lawyers as delivering some kind of value added product. The rules are best seen not as defining a product at all, but as mandating a particular kind of method for addressing the “job” the client wants done.

Understanding the various generic business models helps make clear what is going on - the regulatory scheme tracks and imposes the solution shop business model. It imposes requirements to make sure lawyers are able to meet the expectations of this model. The regulatory framework mandates that lawyers deliver their services according to this model. Lawyers practicing law cannot simply sell products or create networks; they must incur the overhead and meet the obligations of the value shop business model.

The prescription of the Solution Shop business configuration impacts innovation vastly more than any one regulatory requirement. Modifying or voiding specific regulations will have limited impact so long as lawyers are committed to the Solution Shop model. So long as lawyers are controlled by the underlying architecture of the solution shop model, tweaking individual rules will amount only to painting the trim.

1. Possessing the Intensive Technology

In the solution shop business model, the expected information asymmetry means the provider will know more about the intensive technology used to solve the problem than the client base. The regulatory scheme enforces this information asymmetry in many ways, most specifically by requiring high levels of specialist education tailored to solving legal problems. States typically require graduation from law school, typically an ABA accredited law school, as a prerequisite for taking the bar exam and joining the bar. Both the educational and testing requirement correlate with ensuring that the lawyer has mastered the “intensive

80 Hadfield, Legal Barriers, supra note 1 at 1706 et seq.
81 The difficulties lawyers face in offering limited scope services help drive this home. For a thoughtful examination of the ethical burdens faced by lawyers wishing to offer limited scope services, see Pennsylvania Bar Association Committee On Legal Ethics And Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2011-100, Representing Clients In Limited Scope Engagements.
technology” critical to lawyering and with preserving an information asymmetry between lawyers and lay people. Mandatory continuing legal educations requirements help ensure licensed lawyers remain current in their command of the technology. Other rules, including virtually every rule requiring “informed” consent, take as a given that there will be an information asymmetry, and build into the fiduciary relationship the duty to not abuse the asymmetry by making sure the hidden implications of the consent have been disclosed.

2. Diagnosing and Solving a Problem Rather Than Selling A Product

The rules also define a process a lawyer must follow, and this model closely tracks the solution shop model. As a practical matter, it precludes lawyers selling products or precut solutions without becoming significantly involved in investigating and diagnosing the client’s problem. Rather, lawyers must inquire into the facts, and analyze the factual and legal elements of the client’s problem before offering any solution. While, in theory, lawyers can limit the scope of the representation, in practice limiting representation also requires personalized involvement. The lawyer must determine for herself whether limiting services is reasonable under the circumstances, and must also sufficiently inform the client of the issues and consequences so that the client can give informed consent. Malpractice liability adds a further bite to these duties should the lawyer fail to reasonably extend his services to solve the underlying problem, even if the full nature of the problem has not been recognized by the client.

Once embarked on this course of analysis and diagnosis, the rules place further restrictions that prevent variance from the solution shop model. The lawyer must act with reasonable diligence and promptness. The expectation is that the lawyer will not stop the representation prior to delivering a solution. Consistent with the solution shop model, lawyers are required to communicate with their clients, so that the problem solving lawyer understands the full nature of the problem and the clients understand the solution being offered.

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83 See, e.g., Model Rules of Prof'l Conduct R. 1.0 (e), 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9, 1.11(a)(2), 1.12(a), 1.18(d)(1), 2.3(b), 6.5, Comment 2.
84 Model Rules of Prof'l Conduct R. 1.1, comment 5.
85 Model Rules of Prof'l Conduct R.1.2.
86 Id.
87 Id.
89 Model Rules of Prof'l Conduct R.1.5.
90 Id. at comment 4; Model Rules of Prof'l Conduct R. 1.16.
91 Model Rules of Prof'l Conduct R. 1.4.
3. Implications of Requiring Solution Shop Services

Recognizing that lawyers – and other professionals – operate in the solution shop business model also has implications for reforming legal services. The solution shop model makes sense in certain kinds of situations, typically where problems are complex and inchoate. Regulatory requirements that ensure that solution shop providers have the skills to meet the requirements of the model make some sense. Where, however, situations can be identified where standardized solutions can be applied safely without the vendor having a command of the intensive technology, vendors following other business models might deliver more value at a lower price. Reformers can both identify niches where full legal training is not required, and change the substantive law so as to be amenable to off the shelf services.

In the medical setting, Christensen tells story of nurse practitioners relying on automated diagnostic tests. Technology allows diagnostic tests to be performed without recourse to a physician, allowing in turn the dispensing of standard, appropriate solutions to a range of common ailments. The MinuteClinic offers such walk-in nurse staffed clinics without a single doctor on site, and without ever having faced a malpractice claim. While the diagnostic function can be more difficult in law, perhaps in part because lawyers and judges keep law complicated, such para-professional solutions incorporating value chain solutions could meet consumer needs for legal services.

In law, the rules governing lawyers prevent those who ‘practice law’ from pursuing a value configuration other than the full bore ‘practicing law’ solution shop. This business model applies to all US lawyers – even though the bar, and more importantly, the customer base is divided. On one side of the divide are lawyers who serve large corporations, and on the other those who serve individuals and small businesses.

While there are sociological and cultural consequences of this divide within the bar, for our purposes what matters is that there are different markets. Corporations and individuals have different needs when it comes to legal services. If consumers looking for a service or product have a job they want done, as Christensen says, corporations and individuals have different jobs that need doing. The two types of customers also approach the

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92 INNOVATOR’S PRESCRIPTION, supra note34, at 118-20.
93 At least, as of the time of Christensen’s writing. Id.
market with vastly different resources and capabilities. Both, to the extent they use lawyers, must buy the custom solution shop package. As we shall see, however, well-served, sophisticated corporate clients have been more successful in evading these constraints than the underserved, less sophisticated individual consumers.

4. The Corporate Side of the Legal Services Marketplace

On the corporate side, the rise of the general counsel has changed everything. Once upon a time, corporate General Counsels were peripheral players in the providing of legal services to corporations. Today, senior lawyers happily leave major firm partnerships to join a General Counsel’s office, where the pay can be at least equal and the job satisfaction higher. If there are “wise counselors” advising major corporations today about their social as well as legal obligations, they almost certainly will be found in the General Counsel’s office.

The purchaser of legal services on the corporate side almost always is a lawyer herself, a point of some importance. Corporate clients are also repeat players, and so are more likely to anticipate and plan legal costs. Often global in scope, major corporations are more likely to be able to access legal providers outside the United States. As powerful repeat players, corporations are likely to get an attentive if not sympathetic ear from legal regulators if a legal innovation that could be characterized as unauthorized practice of law proves helpful to their business.

With regard to the general practice of law, there is no information asymmetry between the General Counsel and the firms she hires. The General Counsel is just as qualified through the bar admission process to practice law. This perhaps has forced a change in the nature of law practice in major law firms. The solution shop model depends for its value proposition on an information asymmetry between vendor and customer. Put simply, to flourish the solution shop service provider needs to know how to do things the client cannot do more cheaply by themselves. To


97 Ronald Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 MD. L. REV.869, 902 (1990) ("Increasingly, general counsel are former partners in large corporate firms who are capable of internalizing both the diagnostic and referral functions they previously performed on behalf of clients as outside counsel.").

98 For an interesting discussion of the changing relationship between outside lawyers and corporate clients, see Robert Eli Rosen, “We’re All Consultants Now”: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 ARIZ. L. REV. 637 (2002) (Lawyers increasingly just one of many flavors of consultants used by corporations).
preserve this asymmetry, lawyers in law firms can no longer be generalists if they wish to be marketable to general counsel; aside from a very few especially wise counselors, they must seek and have indeed sought the needed information asymmetry by becoming specialists in narrow areas of law.\footnote{Michael Ariens, \textit{Know the Law: A History of Legal Specialization}, 45 S. C. L. Rev. 1003 (1994); Herbert M. Kritzer, \textit{The Future Role of “Law Workers”: Rethinking The Forms of Legal Practice and The Scope of Legal Education}, 44 Ariz. L. Rev. 917, ___ (2002); William D. Henderson, \textit{Three Generations Of U.S. Lawyers: Generalists, Specialists, Project Managers}, 70 Md. L. Rev. 373, 379-80 (2011).} Without such specialization the solution shop model would no longer work in the corporate setting.\footnote{Even if the demands of the solution shop model force specialization on lawyers serving corporate clients, the new model of practice in which lawyers become narrow technicians rather than ‘statesmen’ has had wrenching impact. \textit{See generally}, Rosen, \textit{Lawyers in Corporate Decision Making}, supra note at Kindle 512 -1857 (discussing professional impact of “differentiated specialization,” which Rosen views as a path corporate advisors are free to choose or not choose); KRONMAN, \textit{The Lost Lawyer}, supra note 96 (discussing impact on profession of new modes of practice).}

The rise of the general counsel has also begun to have a substantial impact on the business models available to vendors of legal services other than law firms. This is because, from the perspective of the business people in the corporation, \textit{the ultimate “solution shop” providing answers to legal problems on the corporate side is the General Counsel’s office}. The General Counsel may retain other “solution shops” to help it improve its level of service, and those solution shops may include law firms with specialized expertise along with management and information technology consulting firms.

The General Counsel can also, however, purchase services or products from firms that pursue value adding process or network business models. The corporation need not accept bundled services from a law firm, but can construct its own network of vendors.\footnote{\textit{Disaggregation of Legal Services}, supra note 3, at 41.} The General Counsel can disaggregate the services provided by law firms, and select a la carte. In practice, this means the dominance of the General Counsel’s office has created a potentially disruptive opening for non-lawyers and non-solution shop vendors to sell their products and services to the General Counsel’s office.

This opening can be limited by the resources, processes and values that control the activities of the in-house legal departments. Like any other organization, in-house departments have developed resources and processes in order to do what they do, and values that help them rank priorities. In many cases, these resources, processes and values reflect the law firm backgrounds of the lawyers in the law department. These resources,
processes and values often lead to a symbiotic relationship with law firms. Innovations that are viewed as sustaining to the way the law department does business – say, assigning a severable portion of the work on a matter that might have gone to a less expensive law firm to an LPO instead – can fit into the department’s resources, processes and values. Innovations that do not mesh with the established resources, processes and values of a given law department will have a much harder time gaining traction in that department.102

5. The Individual Side of the Legal Services Marketplace

The story is quite different on the individual side of the market. Here, the core information asymmetry will likely exist. Individuals and small businesses are less likely to be repeat players with regard to a given kind of legal matter, are more likely to be limited to a local market, and are not likely to be members of the bar themselves. They are less likely to have the ability to build their own vendor network for legal matters, and are more likely to be dependent on the services offered on a matter by a selected firm or lawyer.

At same time, they more likely to be absolutely constrained by cost than massive corporations. Some evidence suggests that, more than similarly situated consumers in other countries, US based individuals choose to forego legal services altogether.103

Last but not least, they are the consumers most likely to be “protected” by the organized bar against those who might engage in the unauthorized practice of law. When state authorities or private lawyers bring challenges to those allegedly engaged in the unauthorized practice of law, the customers of those services tend to be individuals and small companies rather than major corporations.104 It is within the solo and small practice groups of the bar associations – the groups most likely to serve individuals and small businesses – that the most vocal defenders of unauthorized practice of law enforcement can be found.105

B. Defining and Enforcing “Practice of Law” Restrictions

1. The Difficulty of Defining The Scope of the “Practice of Law”

No one, it seems, has adequately defined what is meant by “the

102 By way of example, an in-house department with highly developed processes for managing firms that bill by the hour but without the resources or processes to evaluate a flat rate fee may avoid firms that offer only alternative billing options.
104 See infra at
105 See Deborah L. Rhode, The Delivery of Legal Services By Non-Lawyers, 4 Geo. J. Legal Ethics 209, 220-221 (1990) (Elite bar feels little competition from lay services and has been willing to liberalize UPL, but attorneys with small, non-corporate practices feel more need to protect their status and their incomes).
A blue ribbon ABA task force labored and failed. State definitions tend to be circular, describing the practice of law as what lawyers do. Some commentators now seem to view even pursuing a definition as a fool’s errand.

There is a general sense that the practice of law involves the application of legal knowledge in a personalized way to a particular situation. This notion excludes general statements about what the law is but still draws in too much – a policeman advising a suspect of his Miranda rights could be charged with the unauthorized practice of law if this approach were applied broadly. When statutes attempt to provide a list of what is included, the list generally includes court appearances, drafting of legal documents, and personalized legal advice. In general, the US definition is broader than that found in other developed countries, where scope generally is allowed for non-lawyers to give personalized legal advice so long as they do not misrepresent their qualifications or their status. The gap between the US and other countries in this respect is growing broader as countries such as Great Britain and Australia pursue reform of their legal marketplaces.

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106 See generally, Hadfield, Legal Barriers, supra note 1, at 1706-07.
107 http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html.
108 See, e.g., Nebraska Statute § 3-1001, which provides as a “General Definition”:

“The practice of law,” or “to practice law,” is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer.” See generally, statutes discussed in Rhode, Professional Monopoly, supra note 2, at 45.
109 Geoffrey C. Hazard & W. William Hodes, THE LAW OF LAWYERING § 46.4 (“[I]n our law-dominated society, no logically satisfactory and practically workable definition is possible.”); Kathleen Blanchard and Bonnie Howe, Attorney Sanctions: Unauthorized Practice of Law, 3 GEO. J. LEGAL ETHICS 93, 97 (1989) (“Formulation of a standard or logical definition of the unauthorized practice of law has not been successful”).
110 The ABA task force on the definition of the practice of law recommended that each state adopt a definition, and that “each state’s and territory’s definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.” http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf.
112 See e.g., Washington General Rule of Court 24, WA R GEN GR 24.
113 See generally Rhode, Professional Monopoly, supra note 2, and Hadfield, Legal Barriers, supra note 1.
2. Permissible Legal Services That Are Not The “Practice of Law”

Commentators sometimes suggest that lawyers have a monopoly on providing legal services in the United States.\textsuperscript{115} From a market perspective, this is not quite accurate. Lawyers have a monopoly on engaging in “the practice of law” but there are legally related products and services that do not constitute the practice of law.\textsuperscript{116} While lawyers must conform to the “value shop” business model prescribed by the rules, non-lawyers are free to select\textsuperscript{117} different business models and value configurations. Through these exceptions innovation has been able to flourish on the corporate side of the market. In fact, setting aside the barrister function of court appearances, the corporate side of the legal market seems to be close to \textit{de facto} deregulation.\textsuperscript{118}

i. Non Personalized Information products

Non-personalized information products can be sold by non lawyers, even though they provide a kind of a substitute for the services of a lawyer. Examples include books explaining how to achieve a certain legal task, such as the \textit{Avoid Probate!} book popular in the 1960s\textsuperscript{119} or the range of titles available from Nolo Press. Also included in this category would be legal forms or form documents such as leases.

Technology promises to change the nature of this niche. Computer technology, relying on document assembly software that presents different documents based on answers to questions, can go beyond the “one size fits all” forms and present tailored documents. Despite a temporarily successful effort to ban it in Texas, Intuit’s Will Maker Plus software is now legal throughout the US. Online, companies such as LegalZoom.com offer a wide variety of documents. LegalZoom claims to have created more than a million legal documents, and has attracted funding from A list venture capitalists that clearly see a substantial business opportunity. Whether companies like LegalZoom can withstand unauthorized practice of law

\textsuperscript{115} See Rhode, \textit{Professional Monopoly}, supra note 2.
\textsuperscript{116} Thomas D. Morgan, \textit{On The Declining Importance of Legal Institutions}, Mich. St. L. Rev. (forthcoming) (\url{http://ssrn.com/abstract=2007273}) (\textquote{\textit{L}awyers’ monopoly over the delivery of legal services has eroded . . .\textquotec})
\textsuperscript{117} In some contexts, to avoid falling into the “unauthorized practice of law” they may be required to pursue other value configurations that do not purport to provide customized solutions based on legal knowledge asymmetries.
\textsuperscript{118} This has happened as commentators urge that it be formally deregulated. SeeClifford Winston, Robert W. Crandall & VikramMaheshri, \textit{FIRST THING WE DO, LET’S DEREGLATE ALL THE LAWYERS} (2011); Hadfield, \textit{Legal Barriers, supra} note 1.
challenges will be discussed below.

ii. Legal Document Assistance

Some states allow non-lawyers to assist the public with completing standardized forms.\textsuperscript{120} While such services are no doubt welcomed by consumers unable to afford lawyers, the providers of these services face an obvious slippery slope. To the extent they attempt to improve their service by offering guidance beyond that allowed, they cross into the unauthorized practice of law. The travails of the We The People chain indicate how quickly and pervasively charges can be brought. It remains true, however, that a firm that is able to operate within the constraints of simply filling out forms does not cross the line into the unauthorized practice of law where this practice is legal.

iii. Under Supervision of a Lawyer

Non-lawyers can provide legally related services so long as they do so under the supervision of a lawyer.\textsuperscript{121} It is not the unauthorized practice of law, for example, if a paralegal asks questions of client, following a list prepared by an attorney, and prepares legal documents for the attorney’s review. In certain areas relevant to individual clients, this exception allows attorneys to achieve local scale and offer fixed fee services in practices such as uncontested divorces and personal bankruptcies; the lawyer’s time is leveraged not just off associates but off lower paid staffers following defined protocols.\textsuperscript{122}

In the large corporation context, this exception has major importance. Because the customer is also a lawyer, almost all services can be provided under the supervision of a lawyer. In responding to inquiries about whether offshoring US legal work to offshore lawyers was facilitating the unauthorized practice of law, several local bar associations and the ABA all reached the conclusion that it was not the unauthorized practice of law so


\textsuperscript{121} Model Rules of Prof'l Conduct R. 5.3 (“Responsibilities Regarding Nonlawyer Assistants”); For a discussion of the permissible scope of paralegal activity, see, Paul R. Tremblay, \textit{Shadow Lawyering: NonLawyer Practice within Law Firms}, 85 Ind. L.J. 653 (2010);

\textsuperscript{122} This appears to have been the business model of Jacoby & Meyers and Hyatt Legal Services in their heyday. See Jerry Van Hoy, \textit{FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF LEGAL SERVICES} 40-41 (1997) [hereinafter Van Hoy] (“It is clear that secretaries aided by computer boilerplate are the essential element in office productivity. Staff attorneys are . . . extra help to facilitate selling services to clients.”).
long as a US attorney supervised the work.\textsuperscript{123} This allows, as a practical matter, offshore LPOs to provide any services that could be provided in the US by associates or paralegals.\textsuperscript{124} A US licensed attorney must ‘supervise’ the work, but that is not hard to arrange. Neither, it seems, are corporate clients facing searching inquiries second guessing whether the level of supervision was adequate. The significance of this for current and future innovation will be discussed below.

iv. Non US Services

The US unauthorized practice of law mandates are limited by their nature to situations with a US nexus. Particularly where major corporations are involved, the governing legal regime can be a matter of choice.\textsuperscript{125} For some matters, a different legal system can be selected, making US unauthorized practice of law rules irrelevant. An example of where this has happened, allowing substantial expertise and sophisticated systems to be developed, would be those countries in Europe and elsewhere that allow lawyers to practice within the context of multidisciplinary firms.\textsuperscript{126} The different capital structure and deeper resources of these organizations allow an investment in systems.

v. Some Services, Dependent on Legal Knowledge, That Do Not Purport to Be Practice of Law

Outside the practice of law are a variety of consulting services that appear to be rich in legal content but that do not purport to be the practice of


\textsuperscript{125} For example, through choice of law or arbitration provisions, corporations can direct resolution of a dispute away from the United States. Erin A. O’Hara & Larry E. Ribstein, \textit{The Law Market}, 85-106 (2009). Interpretation of international treaties such as GATS would also seem to be amenable to selection of non-US legal service providers.

Despite the overlap of what these firms offer with what law firms offer, they do not appear to have been subjected to unauthorized practice of law challenges. These firms might advise on regulatory compliance, advise on risk or human resource management, conduct internal investigations, or provide litigation consulting. Some of the consultants are licensed, but as employees of corporations the services they offer are not styled as the practice of law.

The core competencies of these firms sometimes appear to be different from that of law firms, as they typically draw on specialized expertise in knowledge management, business processes, evidence presentation, or information technology. At other times, it is hard to tell how services such as litigation consulting differs from the practice of law. For example, the founder and owner of Cornerstone Legal Innovation is a pilot, not a lawyer. Despite the legal expertise of some of its staff members and the close nexus to legal strategy and advice, the firm does not claim to practice law. Nonetheless, the web page for the litigation support practice of Cornerstone Legal Innovation claims, “We are trial lawyers serving trial lawyers. . . . We are not spectators but rather active members of your litigation team.” These “legal consultants” operate outside the constraints of the rules, and are so free to explore value configurations and business models different from that required of attorneys.

3. Enforcing unauthorized practice of law

Lack of definitional clarity does not prevent enforcement of unauthorized practice of law provisions. Most states have statutes prohibiting the unauthorized practice of law, and some of those that have no statutes nonetheless have court rules enabling contempt of court proceedings. In years past, state bar associations and state court systems used these rules to police the unauthorized practice of law. While some states have shut down their unauthorized practice of law committees and

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129 Derek A. Denckla, Nonlawyers And The Unauthorized Practice Of Law: An Overview Of The Legal And Ethical Parameters, 67 FORDHAM L. REV. 2581, 2585 (1999)
130 See, e.g., Arizona – Rules of the Supreme Court of Arizona, 31, Regulation of the Practice of Law.
132 See, e.g., In re Dissolving the Commission on the Unauthorized Practice of Law, 356 Mont. 109, 242 P.3d 1282, 2010 MT 82 (2010) (Court without authority to promulgate
commentators have detected a gradual liberalization in unauthorized practice of law rules. It would be a mistake to assume unauthorized practice of law restraints have faded away. Unauthorized practice of law provisions continue to provide an active constraint on the individual consumer side of the market.

In part, unauthorized practice of law remains vital because enforcement has moved from official bodies to individuals – and their attorneys – pursuing private rights of action. In some cases, this private right of action has been based directly on violation of a legal duty to not practice law without authorization. In other cases the private right of action has been based on theories such as deceptive trade practices.

The shift to private enforcement took on new importance when class actions were added to the mix. At one time, unauthorized practice of law class actions were brought by and for the organized bar membership, and added little in enforcement risk to injunctive actions by the bar. In more recent years, private attorneys operating independently have turned not only to private rights of action for violation of unauthorized practice of law rules but also to consumer protection statutes as a vehicle for unauthorized practice of law enforcement. In addition to allowing consumer class actions, the consumer protection statutes sometimes provide statutory

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133 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyer § 46.4; Rohde 1990.
attorney’s fees and/or treble damages. In some states, such statutes have been the tools of state agencies charged with protecting the public against the unauthorized practice of law, but in others private attorneys decide whether to pursue legal service competitors with these tools.

A recent example is Janson v. LegalZoom.com, Inc. LegalZoom.com sells legal documents online, with a ‘clerical review’ by a human. Private lawyers brought a class action in Missouri state court, alleging claims for unauthorized practice of law, seeking injunctive relief to bar LegalZoom from charging Missouri customers and seeking money damages under Missouri Merchandising Practices Act. The case was removed to federal court which, in its decision of summary judgment, held that the website’s ‘clerical review’ constituted unauthorized practice of law under Missouri law, and was therefore suitable for class certification. The lawsuit finally reached a settlement which in principle includes compensation to Missouri customers and LegalZoom’s promise to modify its business in Missouri.

For would be innovators, these private class actions change the nature of the risk they face in daring to innovate in legal service markets. The opponent is not a bar association with broader policy considerations or an elected official responsive to consumers as well as the organized bar, but a private attorney pursuing a cash recovery from a potential competitor. The remedy is not just cessation of activities, but as in the Missouri LegalZoom case might instead include treble damages, with the damages calculated as three times the total amount paid for the services deemed to be unauthorized practice of law. Providing useful products or disclosing non-lawyer status may not constitute defenses to the charges of consumer deception and harm; in some states, if the behavior constitutes the unauthorized practice of law it is, per se, a deceptive practice. If a bar association or a state attorney general brings enforcement proceedings a provider may have to abandon

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139 See Thomas v. State, 226 S.W.3rd 697 (Texas App. Corpus Christi 2007) (Action by state agency against We The People franchisee for unauthorized practice of law, obtaining injunctive relief, restitution, statutory damages, statutory penalties and attorney’s fees).
144 Id.
doing business in a given state; a wave of class action lawsuits can force a provider into bankruptcy.

In at least one case, unauthorized practice of law class actions seem to have played at least a contributing role in the bankruptcy of an alternative provider of legal services. We The People sells legal forms to consumers from franchised storefront offices. The business model calls for the storefronts to only sell forms, and to provide no assistance beyond clerical help. The temptation for franchisees to offer advice related to the forms that goes beyond the clerical into more substantive advice is obvious. Equally obvious is the potential of such a lower cost service to attract consumers with perceived “simple” legal problems away from licensed lawyers. We The People and its franchises did face a wave of class actions,\(^\text{145}\) and this, along with business issues, seems to have contributed to its insolvency.\(^\text{146}\)

One noteworthy aspect of private lawyer unauthorized practice of law enforcement efforts is that they fall largely, if not exclusively, on the consumer side of the legal market. State attorney generals and private attorney generals are not filing, to the extent the reported cases reveal it, class actions to protect Fortune 100 general counsels from the deceptive activities of legal process outsourcing firms. The actions target products and services aimed at consumers, and that would compete with the small firm and solo practice members of the bar.

As has long been noted, individual consumers have been conspicuously reluctant to express gratitude for the protection provided them by unauthorized practice enforcement.\(^\text{147}\) Anecdotal and some empirical evidence suggest that, to the contrary, individuals and small businesses struggle and often fail to obtain legal services that meet their needs at an affordable price.\(^\text{148}\) Class actions remove regulation of legal service innovations from contexts where non-lawyers might have a voice, and instead put it in a context where neither democratic pressures nor regulatory processes can serve as a counterweight.

\(^{145}\) See e.g., http://www.canhr.org/newsroom/releases/2007/Press_Release20070925.html (California action targeting services provided to elders and brought by elder services attorney); http://www.smithlawfirm.com/firm-news/ (Missouri). We The People and its franchisees also faced non-class litigation. See, e.g., Statewide Grievance Committee v. Goldstein, 1996 WL 753092 (Conn. Super. 1996) (Injunction); In re Mark Albert Boettcher, Jr., http://www.canb.uscourts.gov/node/600 (Fine, Suspension as Document preparer, and injunction against WTP franchisee Terry Mohr).

\(^{146}\) Richard Acello, We the Pauper, A.B.A J. 24, May 1, 2010, http://www.abajournal.com/magazine/article/we_the_pauper/ (Consumer class actions one factor in driving We The People legal forms chain into bankruptcy).

\(^{147}\) See, Rhode, Professional Monopoly, supra note 2.

\(^{148}\) See Deborah L. Rhode, ACCESS TO JUSTICE (2004).
The Supreme Court’s recent holding in *AT&T Mobility v. Concepcion*\(^{149}\) may curb these class actions. Some vendors of legal products such as LegalZoom have begun to incorporate *AT&T Mobility v. Concepcion* compliant arbitration clauses in their consumer contracts, and this can be expected to spread. It remains too early to say, however, that the door has closed on these lawsuits: *AT&T Mobility v. Concepcion* has proved controversial and is subject to future interpretation, and courts considering unauthorized practice of law class actions have shown themselves unusually eager to override on public policy grounds contractual provisions such as forum selection clauses.\(^{150}\)

4. **De Facto Deregulation on The Corporate Side of the Market**

It overstates the case to claim that the market for legal services to corporation has become deregulated – but such a claim appears to be closer to the truth than a claim that this side of the market currently faces substantial barriers to innovation due to regulation. Three exceptions to the rules governing the unauthorized practice of law affect his side of the market: the cleansing of what would be unauthorized practice by the supervision of a lawyer, the ability to ship work out of US jurisdictions, and the ability of ‘consultants’ to offer legally related services that do not claim to be the practice of law. Short of the barrister function of appearing live in US court proceedings, there appears to be little non-lawyers do not do for US corporations.\(^{151}\)

Looking at what non-lawyers do for US corporate law departments operating in the US helps make the point clear. Corporate law departments, despite unauthorized practice of law provisions, can and do get help from non-lawyers to review the language of the form contracts they use in their US business,\(^{152}\) review and produce documents related to US court litigation,\(^{153}\) advise on litigation management and strategy,\(^{154}\) put in place programs advising employees on how they should act to comply with US laws,\(^{155}\) and draft briefs and memoranda to be filed with US courts.\(^{156}\) The

\(^{149}\) *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

\(^{150}\) See, Janson, supra, at ___.

\(^{151}\) In some cases, LPOs and consultants apparently also offer work alongside licensed, but lower status, lawyers such as contract lawyers, with the systems and processes from the LPOs or consultants enhancing the ability of the lawyers to deliver acceptable work.


\(^{154}\) See supra note 123 (Kroll Litigation Consulting).

\(^{155}\) See, e.g., Duff & Phelps, Legal and Regulatory Compliance Program Development and Monitoring,
purchasing these services from non-lawyers, corporations can work with vendors following value chain as well as solution shop business models.

Those arguing that innovation on the corporate side of the legal services market has come too slowly should look for explanations beyond regulation. In-house lawyers have substantial leeway to obtain services from a diverse range of vendors. Some have; others lag. Disruptive innovation theory points to a cause other than regulation. To the extent adoption of disruptive change has been slow the explanation might lie with habitual resources, processes and values that lock corporate counsel into established patterns. In-house law departments developed in partnership with outside law firms, hiring law firm alumni as counsel and assigning work back to law firms. Law department resources, processes and values reflect that linkage, and are not as directly sensitive to market pressures as they would be if law departments were profit driven entities. In a changing world, these patterns may no longer serve the best interests of the in-house legal departments or the companies they serve.

III. THE INTERACTION OF LEGAL SERVICES REGULATION AND DISRUPTIVE INNOVATION THEORY

Both regulation of lawyers and innovation theory impact innovation in the legal services market. The regulation of lawyers defines not a product, but a business model. This business model applies to all lawyers, even though the legal marketplace breaks into corporate and individual submarkets with very different clients with very different needs. Innovation theory teaches that incumbents – both the large law firms dominating the corporate market, and the solo practitioners and small firms dominating the individual and small company side of the market – will welcome sustaining innovations but will not propagate disruptive innovations that do not fit their resources, processes and values.

The impact of regulation must be seen in light of disruptive innovation theory’s core insight – dominant legacy providers of products and services are not unwilling to pursue disruptive innovation, they are unable. The values, resources and processes of those organizations prevent them from adopting disruptive models. What’s more, the legacy providers are especially unable to move down market to smaller or less lucrative niches.

To the extent that lawyers provide legal services, the innovations that take hold will be sustaining, rather than disruptive, innovations. Such innovations can bring benefit to consumers. In Christensen’s study of the


156 Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 (2006).
disk drive industry, for example, the legacy providers were able to use sustaining innovation to increase quality and lower prices until the time they were driven from the market by the disruptive entrants. In the same way, lawyers can leverage sustaining innovations to improve services or lower costs. The service provided, however, must by definition involve enough customized, solution shop component to comply with the regulatory environment, and hence remain a personalized service inherently resistant to transparent price competition.

While the business model decreed by the regulatory structure applies to all lawyers, it does not apply all vendors of legal services, and non-lawyer competitors have become important market participants. On the corporate side of the market, unauthorized practice of law has been less aggressively enforced, and appears to be less of a barrier to innovation than the market structure forces that generally circumscribe incumbents.

The rise of the general counsel’s office enables innovation in the corporate legal services market. While general counsel are subject to their own resource, process and value restraints, in meeting those demands they are customers who can mix and match vendors and products. If a ‘job’ that needs doing by a corporate legal department can be better done by access to an automated database, by purchase of standardized products, or by the use of ‘good enough’ non-lawyers, corporate counsel can and have pursued those options. Innovative disruptors can find an entrée in such a market.

On the individual side of the market, both regulation and market structure impede disruptive innovation. While lawyers may use sustaining innovation to reduce costs and improve quality, they must necessarily provide solution shop answers. The popularity of class actions against alleged unauthorized practice of law violators has made the business risk related to unauthorized practice of law greater than ever before.

It remains clear that unauthorized practice of law enforcement has the capacity to deter innovation. In some cases, the impact is direct – the challenges brought against We The People seem to have accelerated the firm’s bankruptcy. In other cases, the impact is indirect. The potential for enforcement creates uncertainty that inhibits investment in methods of delivering legal services that might be prohibited as unauthorized practice of law. The potential for enforcement also can lead vendors to offer products that fall short of their technological potential in order to avoid charges of providing personalized services; businesses just outside the scope of unauthorized practice of law may avoid taking the logical next step that would make their products or services more desirable to consumers.

The impact of this on the individual side of the market, where

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157 Hadfield, supra note 1, at __.
Unauthorized practice of law provisions retain substantial bite, can be substantial. Evidence suggests there are masses of un-served and underserved legal consumers in the United States, with the lack of access to legal services impacting not just consumers but the court system itself. Disruptive innovation theory teaches us that traditional solution shop providers cannot move down market to serve them. The new, disruptive vendors that might deliver services not as good as those delivered by lawyers – but better than nothing – will have to overcome unauthorized practice of law barriers in order to participate in the markets.

IV. THE STATE OF INNOVATION IN LEGAL SERVICES: WHAT IS HAPPENING AND WHAT TO EXPECT

We now turn to the state of innovation in the legal services market today, and what we can expect in the future. As shown, innovation will not be just a matter of technology. The laws regulating lawyers will surely play a role. Just as importantly, however, value configurations and market structures will confine the ability of incumbents to disruptively innovate. Looking at the near future of legal services allows us to show how these forces interact.

Regulatory requirements in the US require many legal services to be delivered through the particular “solution shop” value configuration that is the practice of law. This reflects and also institutionalizes the historical solution shop model of professional firms, which means that many of today’s incumbents will be locked into the solution shop model. Both the markets and the regulatory reality differ based on whether we are discussing the corporate or individual client submarkets. We treat the large corporate client marketplace as being significantly different from the individual client, small business marketplace.

One current question is whether the solution shop value configuration will survive as a significant part of the legal services solution mix. Richard Susskind has projected that legal services innovation will occur along a continuum. In his view, legal services will move from the traditional bespoke services model to, ultimately, commoditized products, as problems become routine and as technology allows more sophisticated and complex automated solutions. Disruptive innovation theory and value


160 END OF LAWYERS, supra note 8, at 29.
configuration analysis teach us that, if this does happen, the players in the marketplace will very likely change. Those processes, resources and values that make firms succeed at bespoke services will set them up to fail in a world of low cost commoditized products. Law firms, along with other incumbents faced with disruptive change in the structure of a market, will find it difficult to move downstream in the value chain.\textsuperscript{161}

**Richard Susskind - Legal Services Evolution**

Christensen, Stabell and Fjeldstad, suggest however that the change will not be as total as Susskind’s chart suggests. Susskind is surely right when he suggests that not all legal services will be delivered through “bespoke” or solution shop models, and also surely right services that are now custom can be delivered as standardized commodities. It would be an unusual market, however, to end up in a place where all vendors operate from the value chain configuration that delivers commoditized product and services. Networks (as Susskind recognizes elsewhere) will likely become increasingly important parts of the mix, and solution shops will remain important for complex problems. Innovation will more likely take the form of more business models and value configurations entering the mix.

As the transition toward a different mix of value configurations proceeds, law firms that offer standardized products as marketing tools should not be confused with those few rare firms that might try to pursue new business models. If a law firm publishes a periodic newsletter or circulates white papers on significant cases to clients and potential clients, that does not mean that they are considering a shift to a publishing business model. Rather, they are hoping to market their solution shop services to those who are impressed by the content of the free publications. Similarly, if a law firm offers a free online term sheet generator\textsuperscript{162} that should not be misread to suggest that the firm is moving to

\textsuperscript{161} INNOVATOR’S DILEMMA, supra note 13, at 77-95, 198 (“[W]ell managed companies are generally upwardly mobile and downwardly immobile . . .”).

\textsuperscript{162} Susskind seems at times to hope that firms that offer such products are moving to selling automated and commoditized products rather than customized services, at \textsuperscript{161}, but Kobayashi and Ribstein note that the automated service sometimes serves as a marketing tool to sell traditional legal services. Bruce H. Kobayashi and Larry E. Ribstein, Law’s Information Revolution, 53 ARIZ. L. REV. 1169, 1196 (2011) (‘Bundling’ automated services in order to sell traditional legal services). For an example of this kind of marketing, See Wilson Sonsini
online delivery of standardized products. Rather, just as with print or email newsletters, the firm most likely is marketing its solution shop products.

Regulation will also play in role in what innovative ideas can succeed. In a world where class action attorneys stand ready to enforce unauthorized practice of law rules against would be innovators, not every innovation that could succeed in an unregulated market will survive. The regulatory hand seems likely to be heavier where individuals and small consumers are involved. In the corporate setting, the ability to work with attorney oversight and to change jurisdictions have and will make regulatory barriers less effective.

The matrix below sets forth the possible generic value configurations and target markets for legal services. On the market side, the matrix distinguishes between large corporate customers on the one hand, and small businesses and individuals on the other. On the value configuration side, the matrix tracks the three generic value configurations developed by Stabell and Fjeldstad and used by Christensen – Solution Shops, Value Chains, and Networks. We list for illustrative purposes an example of at least one possible innovation in each cell of the matrix.


[63] Hadfield, supra note 1, at __.
<table>
<thead>
<tr>
<th>Solution Shop</th>
<th>Value Chains</th>
<th>Network</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual or Small Business Client</td>
<td>Automated Document Assembly (e.g., LegalZoom.com)</td>
<td>Peer Support Groups</td>
</tr>
<tr>
<td>Paraprofessionals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporate Client</td>
<td>Alternative Billing</td>
<td>Legal Process Outsourcing</td>
</tr>
<tr>
<td>Legal Consultants</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**A. Solution Shop – Small Client**

Lawyers have claimed the solution shop business model as their own. Private and public attorney generals have been very solicitous about protecting individual consumers from solution shop models that do not conform to the practice of law requirements. Innovators offer services in this cell of the matrix at their peril. At the same time, innovations can impact how lawyers price and deliver their services.

1. Automated Document Assembly Back Ends

Automated document assembly can be a sustaining innovation if it is used to make better and more efficient the delivery of services by lawyers, or taken to its potential it can be a disruptive technology.¹⁶⁴ For the general small firm lawyers that inhabit this cell, automated document assembly can help accelerate their delivery of services, and can even help ensure that the documents they provide are correctly drawn and compliant with the most recent changes in the law.

Small firm generalist lawyers face a nearly impossible task in staying current on legal requirements across a variety of fields. To serve clients properly, they must take into account complex new statutes that were not part of their law school curriculum, and deliver advice and documents that comply with the most recent changes in the law. At the same time, they

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bring to the task diagnostic skills that are lacking in current automated document assembly services, helping to make sure that the clients are getting the right kind of form for their needs.

Automated document assembly services (and, related, decision tree software that helps ensure all the bases are touched in diagnosing issues) can be a sustaining technology in such a setting. It’s not hard to see a world where small firm lawyers routinely subscribe to inexpensive document assembly services along the lines of what is now offered by LegalZoom. As was true with franchise law firm clients unaware that their supposed lawyer drawn will was actually being created by a secretary using boilerplate forms, the client may not be aware that the scrivener has a silicon brain. The firm providing the document assembly service can afford due the efficiencies of scale to hire specialists to stay current on developments in the law, modifying the form documents as needed, and spreading the cost across many users.

Some firms have gone beyond virtual secretaries to online law offices providing what are, in fact, computer assembled documents. Firms such as DirectLaw and products such as the VirtualLawOffice offering of TotalAttorneys provide lawyers with sophisticated document assembly services they can offer online. Attorneys can then review the product created after input by the software and deal with the client. There are numerous ethical rules implicated by such systems, all beyond the scope of this article and most quite solvable. The geographical restrictions on the practice of law create a mismatch between the borderless marketing potential of the internet and the practitioner’s authorized zone of practice, and only time will tell if this burdens this model too much for economic efficiency to be achieved.

If such practice enhancing software takes hold and becomes sufficiently sophisticated, it could even become a disruptive innovation with regard to large and medium sized firms currently occupying a higher rung than small firm lawyers. To the extent the software can help guarantee that appropriate documents are produced, smaller firm or in house lawyers can offer good enough services to companies that currently are paying more

165 Van Hoy, supra note 122, at 74; Jerry Van Hoy, Selling and Processing Law: Legal Work at Franchise Law Firms, 29 L. & Soc'y Rev. 703, 727 (1995) (When clients expressed concern that their simple will would be ready that afternoon, staff attorney told them that it would take until the next day for all the work to be done, so as to conceal the automated production process.).


167 Model Rule 5.5.
than they would like to retain specialists. The larger firms could be forced to retreat up market to areas that software does not serve.

2. Paraprofessionals

As a response to lack of access to lawyers that has left some communities woefully underserved, some scholars have proposed allowing paraprofessionals to offer some legal services in defined areas. A question arises: will these paraprofessionals possess sufficient intensive technology to deliver reliable and valuable services to clients? While unauthorized practice of law provisions as applied are neither necessary nor sufficient to protect the public, it does not necessarily follow that protectionism is the only justification for unauthorized practice of law enforcement. The solution shop model depends on an information asymmetry between the vendor and the customer, and on the vendor having access to an intensive technology not readily available to the customer. This is not an artifact of regulation, but related to developing a sustainable value proposition. The laws licensing lawyers have a rational if imperfect relationship to assuring that those offering solution shop services in the legal services market have the information advantages and command of the intensive technology that are assumed by the model.

The challenge, as yet not solved, for paraprofessionals in the legal space is defining and perhaps expanding the zone in which they do possess an information advantage that would sustain a value proposition. The organized bar has opposed efforts to train para-professionals who could solve simple problems. Some states allow nonprofessionals or paraprofessionals to provide help in the clerical aspects of filling out forms, but this provides a very constrained ambit. When such vendors go beyond clerical aid, perhaps in response to consumer desire, to advise on which form to use or which answers might work best, a real risk arises that they do not have the necessary asymmetric knowledge to be helpful. More
to the point, regulators and private attorneys have been quick to enforce unauthorized practice of law provisions in such settings.

One solution would be licensing and training paraprofessionals competent to handle specific tasks, such as transferring title or assisting in uncontested divorce proceedings. Providing a sufficient asymmetric skill base in well-defined areas can be done with far less expense than providing a full legal education. Some states have taken limited steps toward this kind of licensing. Such paraprofessionals could provide solution shop models in areas where they have expertise, much as nurse practitioners or midwives provide services in the medical arena. Their ability to deliver valuable services could be enhanced by technology that provides appropriate documents or helps to channel interactions. To the extent enforcement against those providing services to individuals remains a threat, however, this is only likely to happen in the wake of clearly defined regulatory change.

B. Solution Shop – Corporate Client

Large law firms offer solution shop services. The rise of the general counsel’s office has pressured them to change the kinds of services they provide, moving increasingly to specialization so as to offer services of value to clients who are themselves lawyers. Disruptive innovation theory suggests they will not easily switch from the solution shop value configuration to another configuration. Stuck in that configuration, they have and increasingly will compete with new kinds of vendors of legal services.

This does not imply that large firms can stand still, doing what they’ve always done. As in any industry, successful incumbents must embrace sustaining innovations that help them deliver their services to their best clients. Successful firms will embrace new technologies and new business processes that help them operate more efficiently, while at all times keeping in mind that they sell solutions, not products or commoditized services.

The changing competitive landscape will also force firms to pursue niches appropriate for solution shop offerings. Disintermediation and competition from value chain vendors have stripped away sources of revenue without alleviating the pressure to maintain high profits per partners. To remain strong, elite law firms must continue to develop expertise in areas not yet appropriate for commoditization and where in-

See supra n. __.

174 Rhode, Professional Monopoly, supra note 2, at __

175 For example, in some states the legal aspects of real estate closings can be handled by non lawyers licensed to perform just that task.
house departments do not have the depth of experience to develop comparable expertise.\textsuperscript{176} Value configuration analysis suggests the path forward for large law firms involves what amounts to a specialization arms race, with large firms seeking to develop and market asymmetric expertise in specialized areas of law, but necessarily moving on to new areas of specialization as older areas become commoditized. Cutting edge practice groups will be mobile and desirable, while groups with devalued specialties will become disposable. Managing careers and firms in such a setting will pose substantial challenges.

Large traditionally structured firms are not the only players, however, in providing solution shop services to corporate clients. Recent years have seen franchise level lawyers depart large firms to create new firms with alternative billing and organizational models. Non-lawyers have also begun openly offering legally-rich solution shop services while disclaiming professional status or obligations. While the US regulatory structure provides a level of protection that does not exist elsewhere, even in the US these alternatives will fight for solution shop market share on the corporate side of the market.

1. Alternative Billing Structures

One often touted innovation in business processes has been the arrival of flat and alternative fees for complex corporate matters. There are two ways to look at alternative or flat fee pricing: flat and alternative fees simply shift the risk for runaway engagements to the law firm, or they require law firms to redesign their business model and processes for delivering services. If it is the former, the impact on innovation will be small. Law firms who engage in alternative pricing either will or will not become acutely skilled at forecasting costs, and based on that they either will or will not stay in business. In either scenario, aside from how they price, the basic solution shop model for delivering value will remain in place.

With the second option more interesting questions arise. To prosper, alternative billing shops must deliver compensation to mobile partners that matches or exceeds that of traditional firms. Such firms must develop resources, processes and values consistent with the new billing structure.

Evidence exists that some of these new structure firms are doing just

\textsuperscript{176} It would premature to conclude that some large law firms cannot meet this challenge. Law firm specialty groups lead naturally to communities of practice that allow them to develop levels of expertise hard to duplicate in other settings. See generally, Etienne Wenger, Richard McDermott, and William M. Snyder, CULTIVATING COMMUNITIES OF PRACTICE (2002). While ‘generic’ big law firms will face problems, those with sufficient intensive technologies to meet the solution shop value configuration should still find clients in a legally complex world. In a world of hyper-specialization, however, the skills needed to avoid commoditization must constantly change.
that. Bartlit Beck Herman Palenchar & Scott LLP, for example, boasts of its ‘diamond’ structure in contrast to the leveraged ‘pyramid’ of the traditional hourly fee firm. Bartlit Beck hires fewer associates, suffers lower attrition, and staffs cases with more experienced lawyers. In order to do this, Bartlit Beck sends some commoditizable work out to other, lower cost law firms or to legal process outsourcers. Bartlit Beck’s resources, processes and values make it easier for them to incorporate inputs from different value configurations, even as they deliver a solution shop service.

Traditionally structured law firms will face challenges in offering flat rates. Their business model has been built on leveraging the “inventory” of non-partner hours. Shifting to other profit models will require a reconfiguring of resources, processes and values that disruptive innovation theory suggests rarely occur within dominant legacy providers.

The disruptive potential of these firms remains to be seen. Bartlit Beck has been joined by other firms pursuing alternative billing and firm structure models but most firms continue to default to hourly billing. At present, alternative firms appear to price in the shadow of hourly fees, committing to fees that are valued in comparison to traditional hourly packages. Wider adoption of this model may depend not just on law firms reinventing their resources, process and value configurations, but on their clients rebuilding their RPV structures to work with these new vendors. For this to happen, new kinds of in-house law departments will have to arise, with resources not limited by the paradigm of an in-house law firm, with processes that reach beyond managing hourly work, and with values that shift away from implicit alignments with prestigious law firms to a new sense of what matters.

2. Legal Consultants

While academics and the organized bar debated whether lawyers could practice law as lawyers in multidisciplinary practices, an

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178 The rapid collapse of AmLaw 100 firm Howrey & Simon led to a discussion of whether the firm’s embrace of alternative billing options led to its demise. In the case of Howrey & Simon, the use of alternative billing methods was not accompanied by a change in firm structure or revamping of the firm’s resources, values and processes. http://www.clientrevolution.com/2011/03/alternative-fees-kill-major-law-firm-or-not.html.

179 E.g., Valorem Law Group (former big firm lawyers in Chicago), MoloLamke (former big firm partners in New York), Boies Schiller (former big firm lawyers in New York).

interesting thing happened – lawyers and non-lawyers began dispensing legal services from multidisciplinary firms in the guise of consulting services. Disclaiming any intent to practice law, legal consultants nonetheless operate in a legally infused space. Not all legal consultants offer services equivalent to those offered by practicing lawyers – on the litigation side, for example, they may emphasize preparing demonstrative evidence, preparing expert testimony, or managing electronic discovery. Over time, however, the services offered can broaden. At times, based on their promotional materials and case studies, some services seem indistinguishable from practicing law.

Operating as consultants, rather than as lawyers, frees lawyers from many of the rules that govern legal practice. Some partner with experts from other disciplines, delivering solution shop services that go beyond law. Many of these consultants incorporate software platforms or routinized processes in their services, but deliver in the end what often seem to be solution shop services.

The most interesting aspect of these legally infused consultants is that they seem to have drawn little regulatory attention. In part, this could be because their corporate clients are sophisticated players who neither need nor want to be ‘protected’ in a way that interferes with their choice. In other areas, however, merely disclaiming an intent to “practice law,” has not

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182 For example, see http://208.71.239.82/services/ifai/litigation_consulting/, last accessed on 24 May 2011.
183 But not all, so long as they wish to remain licensed lawyers. Rule 8.4 applies, for example, to conduct not related to legal representations, and could apply if a lawyer operating as a consultant engaged in deception. Model Rules Of Prof'l Conduct R. 8.4(c) (forbidding “conduct involving dishonesty, fraud, deceit, or misrepresentation”).
184 John Leubsdorf, Legal Ethics Falls Apart, 57 Buffalo L. Rev. 959, 1042 (2009) (“To the extent that ‘law consultants,’ not subject to professional rules or benefiting from the lawyer-client privilege but able to offer ‘one stop shopping,’ compete successfully with traditional law firms, legal ethics will tend to become optional. Clients will have a choice whether it is worth its costs, and lawyers will find themselves switching in and out of professional rules as they change jobs.”).
185 For example, Kroll Ontrack provides a technological platform but also provides consultative advice. See http://www.krollontrack.co.uk/litigation-readiness.
186 Tanina Rostain, The Emergence of “Law Consultants,” 75 Fordham L. Rev. 1397, ____ (2007) (noting that while corporate clients are viewed as being to take care of themselves, the use of non-lawyers can have implications for the protection of third parties).
sufficed to end inquiries, and the organized bar proved resolute in opposing multidisciplinary practice innovations that would have created organizations similar to these consulting shops. Whether these consultants continue to expand their footprint will tell much about the risk of unauthorized practice of law enforcement against innovators in the corporate half of the market.

C. Value Chain – Individual Client

Documents assembled by computer without human interaction fit neatly into the disruptive innovation model. As products, at present levels of technology they are inferior to similar documents created or even reviewed by a competent lawyer. The most substantial defect has to do with diagnostics - consumers have difficulty knowing if the product they have purchased is indeed the right product for them. Automated document assembly currently has limited ability to address the diagnostic function. Consumers can purchase a document that, on its face, has been properly prepared, without really knowing if it is the right kind of document for their personalized needs. At the same time, for most consumers with limited assets and simple goals, a computer assembled will, for example, is not just a superior product to no will at all but probably all the will that is needed. The combination of less expensive and initial inferiority positions automated document assembly as a classic disruptive product targeting unserved customers.

Over time, as computers grow faster, the decision tree software grows more refined, and experience helps show where recurrent problems arise, the product can become better and the ability to target products to individual needs can improve. As the products get better, they can move up the value chain and challenge for more and more of the legal marketplace.

Computer assembled documents, at least in the claims of the vendors, do not involve the practice of law. This gives the vendors certain marketplace advantages over licensed lawyers. They do not need to track conflicts, for example, nor need they be cognizant of state borders when providing products.

Many vendors are now offering automated document assembly products directly to consumers. The best known, LegalZoom.com, claims a customer base in the millions. Based on strong customer response,

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187 Other defects would include lack of attorney client privilege and a fully comparable “insurance” element inherent in the right to pursue malpractice.
188 Courts and regulators do not always agree with this assessment, even when there is no human intervention. See, e.g., In re Reynoso, 477 F.3d 1117 (9th Cir. 2007) (Computer software to prepare bankruptcy petitions violated unauthorized practice of law and bankruptcy petition preparer rules; website had misrepresented to consumers that use of the software would allow them to hide bankruptcy from credit agencies, among other misrepresentations.).
LegalZoom has been able to attract the support of first tier venture capital firms and is poised for a public offering.

The organized bar has expressed some concern that LegalZoom’s model – which currently involves a “clerical” review of the finished documents by a human – constitutes the unauthorized practice of law.\textsuperscript{190}State bars have not, however, filed suits that have led to LegalZoom being prohibited from doing business in their states.

A more aggressive effort has come from the private attorney generals who have taken upon themselves the burden of enforcing the unauthorized practice of law regulations. Actions have been filed in several states, and a class was certified and set for trial in Missouri. Prior to the settlement of the case, potential damages and litigation expenses looked to be substantial in Missouri, and represented potential costs that could drive a less richly funded innovator from the market.

As a technology, automated document assembly looks sure to alter the legal services marketplace. The live question is whether lawyers must mediate between the machine and the client. At present, automated document assembly looks like an example of a situation where unauthorized practice of law regulations could stifle innovation that would benefit consumers. LegalZoom and its competitors do not need to be driven from the market for consumers to suffer; if such companies choose to “dumb down” potential technological improvements that would improve customization and diagnostics in order to avoid legal challenges, consumers will have less choice. Time will tell whether regulatory barriers will block such companies from marching up the value chain in a way that could disrupt the incumbent firms offering higher priced services to their potential customers.

\textit{D. Value Chain – Corporate Client}

On the corporate side, Legal Process Outsourcing (LPO) represents a value chain approach to legal services. LPO firms take on routinized and low value work, and handle it with attention to auditable processes. As with most value chain models, close attention is paid to driving down the cost

\textsuperscript{190} Pennsylvania without hearing or soliciting input form LegalZoom issued a formal opinion Pennsylvania Bar Association Unauthorized Practice of Law Committee’s Formal Opinion 2010-01 (LegalZoom engaged in unauthorized practice of law in Pennsylvania); North Carolina issued a letter of caution stating that creating papers for incorporation of businesses constituted the practice of law. Neither state, to date, has sought an injunction or otherwise taken action to block LegalZoom from operations in the state. LegalZoom’s responses are at LegalZoom Responds to Pennsylvania UPL Committee, http://www.legalzoom.com/perspectives/legalzoom-responds-pennsylvania-upl, and LegalZoom Serves North Carolina: High Quality, Affordable Legal Documents Remain an Option For North Carolina Consumers, http://www.legalzoom.com/perspectives/legalzoom-serves-north-carolina-high.
element of the service. Because LPO services can and will be delivered under the supervision of a licensed attorney to the corporate market, they have little to fear from unauthorized practice of law regulation.

LPO has arrived and promises to be disruptive at several levels for the currently dominant large law firms. By stripping off work that historically was done by associates, they take away leveraged associate revenues that have been an important part of large firm profits. To the extent they tempt major firms into competing with firm-branded low cost offerings provided by less elite lawyers, they can help to undermine the brand mystique that is essential to marketing high end solution shop services. Once entrenched in relationships with general counsels, LPOs can begin the march up the legal services value chain that ultimately results in the demise of incumbents.

LPO firms originally based their value proposition on labor arbitrage – equally talented and diligent lawyers are available at far lower prices overseas or in smaller markets. That has already begun change. Able to access the capital markets and with a secure and growing customer base, LPO firms will develop software and proprietary processes that will differentiate them from each other and from law firms. LPO firms will evolve to offer not just sufficiently equivalent services at lower prices, but new types of services and higher quality services.

Disruptive innovation theory teaches us to expect this, and to expect the current dominant players in the space – the large multinational firms – to beat a retreat up the value chain as the LPO firms take markets away from below. At present, the generic work of massive document productions and reviews on commoditized cases are being ceded to the LPOs. To a lesser degree, LPOs have moved into legal research and drafting legal documents. In the future, still putatively working under the supervision of attorneys, the LPO firms will move up the value chain, offering higher value legal research and drafting, higher value legal document creation, advice on litigation and corporate transactions, and services designed to


192 The work includes not just document review, but contract drafting and modification (Integreon, Case Study, Contract Drafting and Modifications for a Global Tech Company).

prevent the occurrence of future legal problems.

The LPO firms are better positioned than law firms to invest in technology and more robust business processes. Law firms divert earnings from partners at their peril, since such diverting income from current distributions can easily lead to the departure of the firm’s most marketable talent. Software development also draws on expertise, both in technology and in business processes, that law firms typically do not hold. At present, LPO software presents digitized versions of documents for coding by category. Already, this software is evolving with greater embedded intelligence, improving accuracy and requiring less human intervention. Over time, the pattern recognition abilities of this software will improve, and not just in ways that help manage the individual litigation or corporate matter. The software will help identify documents, individuals and even ad hoc collections of individuals that have been associated with problems.194

Imagine, for example, a LPO firm that reviews a massive set of documents in connection with a corporate acquisition, either for due diligence or antitrust review. Software can analyze the changing networks of contacts and the timing of communications in ways that can help reveal potential legal problems. Regression algorithms can identify patterns not visible to human document reviewers.

Look also for software development on the legal research and document creation side. As LPOs handle an increasing volume of legal research and drafting tasks, they can invest in proprietary document assembly software as well as data mining. A properly funded LPO could track, for example, not just the reported decisions, but filings in cases that later settle. Again, regression analysis will enable patterns to emerge that will escape even attentive lawyers.195

LPO firms will also develop proprietary business processes. Law schools do not teach business process management, and law firms can only teach the version of law process management that they use, a version inevitably tied to their solution shop business model. LPOs can invest in investigating and implementing business process better designed to deliver lower costs and higher quality. Performing the same disaggregated tasks over and over, they can track how well processes have performed, and in an iterative and planned manner develop better and better processes.

One might ask why, with the rise of LPO firms being so foreseeable, major law firms do not simply pursue the same strategies. Disruptive

194 The release into the public domain of a massive dataset of emails from Enron has spawned much research into analyzing such files with artificial intelligence. See, e.g., http://www.pcworld.com/businesscenter/article/249982/researcher_email_wording_a_dead_giveaway_of_whos_the_boss.html.

innovation theory provides the answer. Even aside from restraints imposed by regulation, law firms are captives of their resources, processes and values. The current big law firm model resists migration from a solution shop business model to a value adding processes model. Successful companies, even with plenty of capital, typically do not divert that capital to pursuing less profitable markets than the ones they currently dominate.\textsuperscript{196}

The possibility remains for a law firm to establish a captive or affiliate LPO, much as IBM spun out its personal computer project to a separate division at a separate location. Some law firms have set up onshore or offshore LPO subsidiaries; most have not. With the leading LPO firms already having achieved scale and having obtained substantial investment capital,\textsuperscript{197} the date may have passed when law firms not already up the curve could make a serious run at being a player in the LPO market. Once expertise has been developed, new entrants can have great difficulty displacing the established contenders, and in the LPO value chain space the established players are the LPO firms. That is especially true when the new entrants have less access to investment capital, higher cost structures, and lack essential skills.

At some point, the LPO firms may find that to finish their move up the value chain and fully leverage their assets they will need to hire lawyers of the type now found principally at the Magic Circle and leading US firms to provide a solution shop option. That will be no problem. If there is one thing the current market shows us, talented lawyers at big firms are willing to switch employers on short notice if the pay is right.

\textit{E. Network – Individual Client}

Network business models draw their value from the connections made in the network. In the medical arena, patients with chronic diseases join together at social networking websites such as PatientsLikeMe.com or CarePlace.com. From their peers, they learn techniques and responses that help them deal with the disease. They can seek help either through the named disease, or the symptoms they suffer from.

In theory, such websites could also serve a useful purpose in the legal arena. A host of legal issues beyond the scope of this article, such as confidentiality and waiver, could arise. To the extent the lay people engage in too much mutual help, however, a problem relevant to this article could

\textsuperscript{196} \textit{INNOVATOR’S DILEMMA}, supra note 13, at __.

arise – the participants, and the site, could be deemed to be engaged in the unauthorized practice of law. This, again, is an example of a situation on the consumer side where unauthorized practice of law provisions could block a potentially useful innovation.

F. Network – Corporate Clients

In the corporate sector, peer to peer networking sites could offer similar benefits. Some such sites have arisen – back in the 1990s, CounselConnect brought together in-house lawyers in private forums. Today, LegalOnRamp.com seeks to build a community centered around corporate counsel, while the American Corporate Counsel Association offers private members only web resources such as law firm ratings.

The issue on the corporate side will not be UPL, nor need one fear that sophisticated corporate counsel will be unmindful of issues such as confidentiality and privilege. Here, the issue goes right to the nature of the business model. Networks are only as valuable as their membership. The site must exclude undesirable members while persuading desirable members to participate actively. Given that corporate counsel time is a scarce and valuable resource, getting the networks to sufficient density to be useful has proved a vexing problem. In part, growing these networks to critical mass may depend on sufficient in-house departments developing new resource, process and value configurations to see such networks as meeting core needs.

CONCLUSION

Those who would reform and bring innovation to legal services have looked in the past to the regulatory structure governing lawyers. As this article shows, fostering innovation so as to meet the needs of the underserved requires considering as well market structures and the process through which disruptive innovation occurs. Regulation does not operate in a vacuum. Market structure, value configurations and business models constrain possibilities even in fully deregulated markets. Anyone seeking to reform legal markets must take the process of innovative disruption into account or the regulatory changes will not produce the expected results.