

ETHICS, LAWYERING, AND REGULATION IN A TIME OF GREAT CHANGE: FIELD NOTES FROM THE (R)EVOLUTION

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I. TWIN FACTORS DRIVING CHANGE

From all directions, unmistakable signals show that the American legal profession and the business of law is currently in the midst of great change. A tour d’horizon reveals two broad categories of change—those driven by economics and those driven by regulatory reforms.

A. *The Economics of the Law Business*

Lawyers are withdrawing from providing legal services for individuals’ legal needs,¹ and more and more legal needs of consumers are today unmet.² At the same time, lawyers are providing more legal services to businesses.³

Where lawyers practice is changing rapidly. Lawyers are engaging in more practice, more frequently, across jurisdictional lines within the United States. More lawyers than ever are working remotely, whether associated with entirely virtual or more traditional office-based law firms.⁴

Nonlawyer⁵ legal services providers, including lawyer staffing companies or alternative legal service providers (ALSPs), are selling legal services to law firms and law departments.⁶ Other nonlawyers and nonlawyer

1. See Bill Henderson, *The Decline of the PeopleLaw Sector (037)*, LEGAL EVOLUTION (Nov. 19, 2017), <https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/> [<https://perma.cc/G2F6-3JWJ>].

2. See generally LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2022) [hereinafter JUSTICE GAP], <https://justicegap.lsc.gov/> [<https://perma.cc/823V-JAZ>].

3. See Henderson, *supra* note 1.

4. See Amanda Robert, *Working Remotely is Now a Top Priority, Says New ABA Report Highlighting Lasting Shifts in Practice of Law*, A.B.A. J. (Sept. 28, 2022), <https://www.abajournal.com/web/article/new-aba-report-highlights-lasting-shifts-in-practice-of-law-and-workplace-culture> [<https://perma.cc/E4BT-H4UJ>]; see also E-mail from Brian S. Faughnan, President, Ass’n of Pro. Resp. Laws., to Reginald M. Turner, President, A.B.A. (Apr. 18, 2022), <https://aprl.net/wp-content/uploads/2022/04/Letter-regarding-our-proposal-to-ABA-President.pdf> [<https://perma.cc/AQ4C-EZQR>].

5. “Nonlawyer” is our profession’s pejorative for those without law licenses. I would strongly prefer to avoid it. Still, it is used repeatedly in the ABA Model Rules of Professional Conduct, and it is hard to avoid.

6. See *Market for Alternative Legal Services Growing Dramatically, New Report Shows*, THOMSON REUTERS: LEGAL MARKETPLACE (Jan. 30, 2023), <https://www.thomsonreuters.com/en-us/posts/legal/alsp-report-2023/> [<https://perma.cc/3H7P-L35R>].

companies provide services that look and work like legal services, including DoNotPay and TIKD for addressing parking and traffic tickets.⁷

Lead-generators, lawyer-matching services, and other innovative marketing services, many powered by litigation funders and private equity, are pouring many millions of dollars into mass torts and other claims.⁸

Enormous amounts of capital are being poured into the delivery of legal services through investments in service companies associated with law firms in a two-company model for law firms borrowed from the medical-practice world, where the service company is owned by nonlawyer investors and provides to the law firm all that it needs to practice law—the law firm’s “back office.”⁹

This roiling sea of change affects almost all lawyers, but many of these changes are invisible to lawyers—even those directly affected. These changes also pose enormous challenges to lawyers and lawyer regulation.

B. Regulatory Reform

The changes identified above are quite distinct from the more visible, and hotly debated, changes in the rules governing lawyers and the business of law. The headlines in the legal press focus on nonlawyer ownership and fee-sharing, authorized recently in Arizona and Utah, 30 years after the adoption of limited nonlawyer-ownership rules in D.C.¹⁰ But other changes in lawyer regulation are occurring, too.

7. See, e.g., Sindhu Sundar, *It Might be Possible to Fight a Traffic Ticket with an AI ‘Robot Lawyer’ Secretly Feeding You Lines to Your AirPods, but it Could go Off the Rails*, BUS. INSIDER (Jan. 10, 2023), <https://www.businessinsider.com/donotpay-robot-lawyer-ai-chatgpt-fight-traffic-tickets-legal-risks-2023-1> [https://perma.cc/THB6-29U6]; Bailey Schulz, *DoNotPay Says It’s Pivoting From Plans to Argue Speeding Tickets in Court with AI*, USA TODAY (Jan. 9, 2023), <https://www.usatoday.com/story/tech/2023/01/09/first-ai-robot-lawyer-donotpay/11018060002/> [https://perma.cc/65L6-57Y7]; Debra Cassens Weiss, *Ticket-Fighting App Was Engaged in Unauthorized Law Practice, Top State Court Rules*, A.B.A. J. (Oct. 15, 2021), <https://www.abajournal.com/news/article/florida-supreme-court-rules-ticket-fighting-startup-was-engaged-in-unauthorized-law-practice> [https://perma.cc/8VRH-QQCV].

8. See, e.g., Roy Strom, *Camp Lejeune Ads Surge Amid ‘Wild West’ of Legal Finance, Tech*, BLOOMBERG L. (Jan. 30, 2023), <https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech> [https://perma.cc/W2QJ-PV6S].

9. See Lucian T. Pera, *The Two-Company Model for New Law*, A.B.A. L. PRAC. MAG. (Mar./Apr. 2020), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2020/ma2020/ma20ethics/ [https://perma.cc/NXX4-ZVE7].

10. See, e.g., Conrad J. Jacoby, *Practice Innovations: Non-Lawyer Ownership of Law Firms – Are Winds of Change Coming for Rule 5.4?*, THOMSON REUTERS: LEGAL PRAC. MGMT. (Mar. 29, 2022), <https://www.thomsonreuters.com/en-us/posts/legal/practice-innovations-april-2022-non-lawyer-ownership/> [https://perma.cc/G5NX-FA9R].

Slowly, changes in legal education and bar admission are occurring, including broader acceptance of the Uniform Bar Examination (UBE) and the portability of UBE scores.¹¹ Several jurisdictions have now licensed nonlawyer professionals to provide some legal services, including paralegals.¹² So change in the basic regulation of lawyers is clearly afoot.

These two trends—economics-driven and regulatory-driven change—are fundamentally changing the practice and regulation of the law business. They are each at work independently, and they are interacting with each other in important ways.

II. PRACTICING IN THE MIDST OF GREAT CHANGE

Observing these changes at close range in representing clients and working on ethics issues as a bar volunteer has led me to understand that we live in the midst of the greatest period of change in the business and practice and regulation of law in more than a century.

Lawyers are terrible students of history, but there was a period from the last decades of the nineteenth century through the first decades of the twentieth that saw the creation of the whole structure of the legal profession that has governed the American legal profession and the business of law.¹³ Those foundational institutions included law schools, law firms, bar associations, state-wide admission to practice, national legal ethics standards; all date from that period.¹⁴

Over the last two decades or so, a similar period of change has engulfed the business and practice of law, and a similar period of change is beginning in the regulation of the law business.¹⁵

11. See *List of UBE Jurisdictions*, NAT'L CONF. BAR EXAM'RS., <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> [<https://perma.cc/2S8H-SJQT>]; *UBE Score Portability*, NAT'L CONF. BAR EXAM'RS., <https://www.ncbex.org/exams/ube/score-portability/> [<https://perma.cc/L9Z7-ES7S>].

12. Tara Hughes & Joyce Reichard, *How States are Using Limited Licensed Legal Paraprofessionals to Address the Access to Justice Gap*, AM. BAR ASS'N: STANDING COMM. ON PARALEGALS & APPROVAL COMM'N BLOG (Sept. 2, 2022), <https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/> [<https://perma.cc/G2KZ-RESP>].

13. See *ABA Timeline*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/timeline/ [<https://perma.cc/Ry2M-9JHN>].

14. See *id.*

15. See *Overcoming Lawyers' Resistance to Change*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/overcoming-lawyers-resistance-to-change> [<https://perma.cc/W6YK-NXNB>].

Technology has been one driver.¹⁶ The internet and mobile tech have driven fundamental change in one business and profession after another.¹⁷ Law is now taking its turn.

Much more important has been the way technology and the forces of regionalization, nationalization, and globalization have changed the lives and work of clients.¹⁸ Lawyers exist to serve clients, and changes in their lives and businesses drive changes in ours.

But wait, there's more.

A. Demographics, Law School Debt, Access to Justice, and Private Equity Money

Lawyers serving clients, and the profession as a whole, face so many more challenges in our rapidly changing world—some *driven by* change and some *driving* change.¹⁹

Demographics alone are a challenge, with an outsized cohort of older lawyers in the midst of retiring and shortages of lawyers in some younger cohorts.²⁰ Our emerging understanding of the mental health problems that our profession almost uniquely faces is a challenge, even if you assume that the problems themselves are not getting worse.²¹ The increasing crisis—and crisis of confidence—in our criminal justice system, driven by a racial reckoning and exonerations of many convicted of crimes, is a challenge.²² The slow-rolling collapse of our civil justice systems with a *pro se* explosion and the

16. See Grace Lau, *Top 5 Legal Technology Trends You Need to Know*, AM. BAR ASS'N (July 11, 2022), https://www.americanbar.org/groups/business_law/publications/blt/2022/07/legal-tech-trends/ [https://perma.cc/H6FG-W4LM].

17. See *id.*

18. See William D. Henderson, *The Globalization of the Legal Profession*, 14 IND. J. GLOB. LEGAL STUD. 1, 1 (2007).

19. See *id.*

20. See Bruce Lithgow & Brian McMahon, *Law Firm Succession Planning: Preparing for the Baby Boomer Retirement Wave*, BLOOMBERG L. (May 17, 2018), <https://news.bloomberglaw.com/business-and-practice/law-firm-succession-planning-preparing-for-the-baby-boomer-retirement-wave> [https://perma.cc/B9CJ-LGKN].

21. See Justin Anker & Patrick R. Krill, *Stress, Drink, Leave: An Examination of Gender-Specific Risk Factors for Mental Health Problems and Attrition Among Licensed Attorneys*, 16 PLOS ONE at 11–12 (2021); Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT. MED. 46, 51 (2016).

22. See Alex Dobuzinskis, *Nearly Half of Young Americans Lack Confidence in Justice System: Survey*, REUTERS (Apr. 29, 2015), <https://www.reuters.com/article/us-usa-justice-study/nearly-half-of-young-americans-lack-confidence-in-justice-system-survey-idUSKBN0NK2BS20150429> [https://perma.cc/3JW7-M5KW].

wholesale abandonment of the judicial system for so many ordinary disputes is yet another challenge.²³

Unconscionably inflated law school and college costs and student debt have affected the economics of every institution where lawyers practice, from law firms, to prosecutor and public defender offices, to in-house law departments, driving up the costs of legal services and fundamentally changing the lives of lawyers and their families.²⁴

Our epic access to justice problem continues to grow worse. Within the last year, the Legal Services Corporation issued yet another study of the profession's profound failure to deliver legal services to the poor and near-poor: Today, low-income Americans do not get any or enough legal help for 92% of their substantial civil legal problems.²⁵

And we have clear evidence that access to legal services is not much better for middle-income folks.²⁶ As noted above, there is a stark trend of lawyers steadily withdrawing from serving individual clients—not just poor people—while the dollars that businesses pay for legal services continue to grow.²⁷

That last point—that the legal needs of potential clients with money to pay are increasingly going unserved by lawyers—is clearly tied to the billions of dollars in new money flowing into the legal services business.²⁸ That includes litigation funding, lead generation, mass torts, legal tech, and new national consumer law firms.²⁹

It is true that an outsized portion of this new money is aimed at litigation funding, mass torts on the consumer side, and legal technology serving businesses' legal needs, rather than the delivery of consumer legal needs other than personal injury.³⁰ There is nevertheless substantial new capital funding law firms and legal services businesses of all kinds, including consumer-

23. See *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), <https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019> [https://perma.cc/U2Q7-DAMK].

24. See *Law School Costs*, L. SCH TRANSPARENCY, <https://www.lawschooltransparency.com/trends/costs/tuition> [https://perma.cc/JFG7-GHDX].

25. See JUSTICE GAP, *supra* note 2, at 7.

26. See *id.* at 58–60.

27. See Henderson, *supra* note 1.

28. See *id.*

29. JOHN H. BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, *SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER* 4 (2020), <https://instituteoflegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/> [https://perma.cc/H6YS-F9G3].

30. Jeff Cox, *Litigation Finance, Lawyer Independence & Legal Tech*, ABOVE LAW (Sept. 1, 2020), <https://abovethelaw.com/legal-innovation-center/2020/09/01/litigation-finance-lawyer-independence-legal-tech/> [https://perma.cc/99J3-UGLC].

facing law practices other than personal injury firms.³¹ There is no doubt that this new money is chasing real legal needs of both consumer and business clients, and no reasonable person can doubt the fierce economic power driving change.³² In my opinion, the whole landscape of consumer legal services appears to be on the verge of massive disruption.

There has also been considerable news coverage for years of the significant changes in the delivery of legal services to business clients, including the advent of a “legal tech” sector largely aimed at the needs of business clients and the development of “legal operations” as a profession and a field of study.³³

B. Reregulation by a Few Jurisdictions

And now, in the last two years, two jurisdictions have entered upon dramatic market deregulation of the legal profession.³⁴

Arizona leads the pack. Borrowing a term from regulatory reform in England and Wales, the Arizona Supreme Court authorized in January 2021 the licensing of “alternative business structures” (ABS), i.e., law firms that may be owned, in whole or in part, by nonlawyers, even to the exclusion of any lawyer owners.³⁵ An authorized ABS can now deliver legal services just like a law firm—at least in Arizona.³⁶ Bear in mind, however, that Arizona has *not* repealed their law on unauthorized practice of law (UPL), meaning that every ABS must still deliver legal services through lawyers (or authorized nonlawyer practitioners), even though lawyers may not have any ownership

31. See, e.g., Sara Randazzo, *Business News: Litigation Funders Are Awash in Cash --- Promise of Sharing in Legal Settlements Lures More Investors; New \$500 Million Fund*, WALL ST. J., Sept. 18, 2017, at B3 (“Competing litigation-finance firms have raised and deployed hundreds of millions of dollars in recent months.”); Bob Ambrogi, *Hello Divorce Raises \$3.25M to Span More of the Divorce Lifecycle, Including Financial Planning*, LAWSITES (Oct. 19, 2022), <https://www.lawnext.com/2022/10/hello-divorce-raises-3-25m-to-span-more-of-the-divorce-lifecycle-including-financial-planning.html> [<https://perma.cc/8RAU-3B6B>].

32. See *id.*

33. See generally Legal Ops, LEGAL EVOLUTION, <https://www.legalevolution.org/category/legal-ops/> [<https://perma.cc/VE24-MP5X>].

34. Sam Skolnik, *Law Firm Deregulation Programs Gain Speed in Utah, Arizona (1)*, BLOOMBERG L. (May 25, 2021), <https://news.bloomberglaw.com/business-and-practice/law-firm-deregulation-programs-pick-up-speed-in-utah-arizona> [<https://perma.cc/6MRB-9TV7>].

35. See Nuno Garoupa & Milan Markovic, *Deregulation and the Lawyers' Cartel*, 43 U. PA. J. INT'L L. 1, 7–8 (2022); Ariz. Sup. Ct. Admin. Ord. No. 2020-173 (2020); LYNDA C. SHELLEY, ARIZONA ABS ENTITIES, PAYING REFERRAL FEES, LEGAL PARAPROFESSIONALS, AND ADVERTISING RULE CHANGES, THE SHELLEY FIRM, PC 1 (Feb. 2022), https://iaals.du.edu/sites/default/files/documents/publications/2022_shely_az_abs_lp_advertising_overview.pdf [<https://perma.cc/WSY3-GCVS>].

36. Ariz. Sup. Ct. Admin. Ord. No. 2020-173 (2020).

of the ABS.³⁷ Arizona does permit some nonlawyer professionals to be authorized to perform some legal services, and they could work through an ABS, too.³⁸ The advent of ABSs has led to a “land rush” of lawyers and nonlawyers who want to take advantage of the economic benefits of this new form of law practice and hope to export its reach beyond Arizona.

At least as important and often overlooked is a parallel set of Arizona reforms that affect how every Arizona lawyer and law firm may practice. The same set of Arizona rule changes that took effect in January 2021 also repealed Arizona’s version of ABA Model Rule 5.4.³⁹ Now, any Arizona lawyer or law firm may freely share attorney fees with nonlawyers and pay for referrals.⁴⁰ No other jurisdiction permits this. Lawyers are exploring the business opportunities opened by this rule change, but this change has also made Arizona a mecca for litigation funders, legal technology companies, lead generators, and private equity investors who want business relationships—though not ownership—with law practices through which they can be paid without regard to any fee-sharing concerns.⁴¹ It is this change, more than the advent of ABSs, that has led some to talk about Arizona as the “Wild West” of lawyer regulatory reform.⁴²

In contrast, Utah’s revolutionary “regulatory sandbox” was created by their Supreme Court to permit specially licensed lawyers, law firms, and other entities to experiment with nonlawyer ownership, otherwise-prohibited fee-sharing, and similar techniques, specifically for the purpose of encouraging innovation aimed at increasing access to justice.⁴³

While only Arizona and Utah have taken such direct action, they do join the District of Columbia, which has authorized a form of nonlawyer

37. *See id.* at 15–16; ARIZ. SUP. CT. R. 31.

38. SHELLEY, *supra* note 35.

39. Jacoby, *supra* note 10; ARIZ. RULES OF PRO. CONDUCT r. 5.4 (ARIZ. BAR ASS’N 2010) (repealed Jan. 1, 2021).

40. *See* ARIZ. RULES OF PRO. CONDUCT r. 1.5(e) (ARIZ. BAR ASS’N 2022).

41. *See* Skolnik, *supra* note 34.

42. *Id.* Of particular note is that the revised Arizona rules do not generally require an Arizona lawyer who is, in fact, sharing fees with a nonlawyer, or paying for referrals, to disclose this fact to lawyer regulators or even to clients, in most instances. Thus, there is no way to know how prevalent these practices are. This is reminiscent of the D.C. nonlawyer ownership regime, which allows limited nonlawyer ownership, but does not (as Arizona does the ABSs) require that a lawyer with a nonlawyer owner register with the D.C. lawyer regulators or disclose nonlawyer ownership to clients. *See* D.C. RULES OF PRO. CONDUCT r. 5.4 (D.C. BAR ASS’N 2007).

43. *What We Do*, THE OFF. OF LEGAL SERVS. INNOVATION: AN OFF. OF THE UTAH SUP. CT., <https://utahinnovationoffice.org/about/what-we-do/> [https://perma.cc/PX8Z-4364] (providing brief history of regulatory reform in Utah and explaining regulatory sandbox model).

ownership of law firms since 1991.⁴⁴ In D.C., individual nonlawyers—not entities of any kind—can own law firms under certain restrictions.⁴⁵ That restriction has caused many who wish to try new business models to choose to set up operations in Arizona or Utah, rather than D.C., so that they may operate in a nonlawyer business organization that can accept investments or be sold if successful like other startup businesses.

Thus, three jurisdictions now permit different structures of ownership and revenue-sharing to lawyers and law firm. This has dramatically increased both the interest of nonlawyers in the business of law and the pace of actual investment and business activity by nonlawyers in the business of legal services.

C. *The Possible Future of Reregulation?*

Clients ask me all the time: “Where will regulatory reform be adopted next? And how soon?”

The truth is that no one knows what the near-term future holds for further regulatory changes of the type adopted in Arizona and Utah. That said, some of us believe that there is no meaningful evidence that any other jurisdictions will take a similar leap over the next few years.

There are a few states that are actively considering such reforms.⁴⁶ More seem to be considering licensing of paraprofessionals. All these efforts are undertaken in the name of increasing access to justice (more on this below).⁴⁷

But there are also forces opposing or resisting these changes.

44. Sam Skolnik, *D.C. Nonlawyer Partner Rule Spurs Interest as States Mull Change*, BLOOMBERG L. (Oct. 30, 2019), <https://news.bloomberglaw.com/us-law-week/d-c-nonlawyer-partner-rule-spurs-interest-as-states-mull-change> [https://perma.cc/43LA-24GN].

45. *See id.*; D.C. RULES OF PRO. CONDUCT r. 5.4(b) (D.C. BAR ASS’N 2007).

46. *See* Letter from Charles T. Canady, Chief Justice, Supreme Ct. of Fla., to John M. Stewart, President, Fla. Bar (Nov. 6, 2019) (authorizing study of legal regulation of lawyer advertising, referral fees, fee splitting, entity regulation, and other topics) (on file with author); ALICIA MITCHELL-MERCER & S.M. KERNODLE-HODGES, PROPOSAL FOR A LIMITED PRACTICE RULE TO NARROW NORTH CAROLINA’S ACCESS TO JUSTICE GAP (2021) (proposing limited licensing program for nonlawyers); Andrew Cline, *How N.H. Could Increase Access to Justice Through Occupational Licensing Reform*, THE JOSIAH BARTLETT CTR. FOR PUB. POL’Y (May 10, 2022), <https://jbartlett.org/2022/05/how-n-h-could-increase-access-to-justice-through-occupational-licensing-reform/> [https://perma.cc/8DKL-X2LK] (“If House Bill 1343 passes [in New Hampshire], paralegals would be able to provide limited legal representation to lower-income individuals in district, circuit and family court.”).

47. *See, e.g.*, Cline, *supra* note 46; *infra* Section IV.B.

III. THE FORCES OF RESISTANCE

In California, elements of the bar vigorously opposed reforms including a regulatory sandbox like Utah's.⁴⁸ Ultimately, the California legislature stepped in—they have a strong and fairly unique role in California lawyer regulation, unlike most other jurisdictions—and firmly stopped these reform efforts.⁴⁹

At the ABA in August 2022, the Illinois State Bar Association, long opposed to any relaxation of the barriers to nonlawyer economic participation in the business of law, joined with the New York State Bar Association and others to have the ABA House of Delegates approve a resolution designed to cement the ABA's position as one opposing nonlawyer ownership for all time.⁵⁰ As things stand today, there is no effort underway at the ABA to even consider any change in its traditional position—embedded in ABA Model Rule of Professional Conduct 5.4—banning nonlawyer ownership of law practices and fee-sharing with nonlawyers.⁵¹

The simple truth is that no one knows whether lawyer regulatory changes of the type advanced in Arizona and Utah will be adopted in other jurisdictions.

IV. WHAT DO WE KNOW?

We do not know whether these regulatory changes will spread or even survive where they are being tried. But we do know two things: (1) the uncertainty of the direction and success of regulatory reform and (2) the likely persistence of a mixed regulatory environment for at least the next few years, if not longer.⁵² Recognizing these facts is crucial to any meaningful understanding of the current state and near future of the market for legal services and its regulation.

48. See Karen Sloan, *California Lawmakers Pull Plug On Legal Industry Reforms*, REUTERS (Aug. 29, 2022), <https://www.reuters.com/legal/legalindustry/california-lawmakers-pull-plug-legal-industry-reforms-2022-08-26/> [<https://perma.cc/4WVK-6XCM>]; Assemb. Bill No. 2958, Chap. 419, Reg. Sess. (Ca. 2022).

49. See *supra* note 48.

50. That's not exactly what the resolution said, but that's a story for another time. See Ed Finkel, *The Nonlawyer Ownership Issue*, 110 ILL. BAR J. 22, 23 (2022); Resolution 402, A.B.A. House of Delegates (2022).

51. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2020).

52. See Karen Sloan, *Loosened Lawyer Regulations Show Promise in Utah, Ariz., Stanford Study Says*, REUTERS (Sept. 27, 2022), <https://www.reuters.com/legal/legalindustry/loosened-lawyer-regulations-show-promise-utah-ariz-stanford-study-says-2022-09-27/> [<https://perma.cc/3ED5-KJA9>].

A. *The Overarching Uncertainty*

First, both Arizona and Utah are wisely attempting to generate and collect data on the effect of their regulatory reforms. Researchers have produced some preliminary studies of that data.⁵³ Some of us who closely follow regulatory reform find the data fascinating, and we expect to have more data. It is clear, however, that it is too soon to tell whether these experiments are a success, regardless of the metric for success.

Still, in my view, it is quite possible that, whatever data and analysis comes out of these jurisdictions, the data will not be conclusive about the effect of these reforms on access to justice.

The forces of resistance are clearly entrenched in their position opposing nonlawyer ownership and broader fee-sharing.⁵⁴ There are surely some opponents of these rule changes who are willing to engage in reasoned discussion and debate about the merits of various approaches to removing or limiting some of these prohibitions. Still, as to the most vocal opponents, it is hard for a reasonable reader of their stated positions to conclude that they welcome real discussion or debate.⁵⁵ The tenor of many of their arguments suggests that, even if the data were to conclusively show that more Americans obtained access to justice from these reforms, some advocates would not soften their opposition, which is expressly based on what they consider to be “core values” of the legal profession and their perception of client and public protection.⁵⁶ Data rarely defeats ideology.

Based on my personal observations, the attitudes of the most vocal current opponents to change, or even to the discussion of change, are deeply visceral and not tied to evidence. Still, even if the most vocal claim to speak for many lawyers (and some absolutely do), I have seen little evidence of deep or broad support among lawyers for these deeply-held positions. In my experience, there are many lawyers, bar leaders, and regulators who are open to discussion, debate, data, and the experience of experimenting jurisdictions. In my view, there is great reason to doubt that the vocal minority speaks for the majority of lawyers. That may matter more than many believe.

53. See Stephanie Ashe, *Stanford's Rhode Center on the Legal Profession Publishes First Comprehensive Report on Emerging Legal Innovations*, STAN. L. SCH. (Sept. 27, 2022), <https://law.stanford.edu/press/stanfords-center-on-the-legal-profession-publishes-first-comprehensive-report-on-emerging-legal-innovations/> [https://perma.cc/MDX3-XRRL]; see also WILLIAM W. LARGE, *SELLING OUT: THE DANGERS OF ALLOWING NONATTORNEY INVESTMENTS IN LAW FIRMS*, U.S. CHAMBER INST. FOR LEGAL REFORM (2023), <https://instituteforlegalreform.com/research/selling-out-the-dangers-of-allowing-nonattorney-investment-in-law-firms/> [https://perma.cc/PF4W-4QT9]; Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J. 259, 264–67 (2022).

54. See Younger, *supra* note 53, at 267.

55. See *id.* at 275.

56. See *id.* at 267.

It is worth remembering that, for all the legal profession's romantic claims that it is a self-regulated profession, supreme courts and, to some lesser extent, legislators regulate the legal profession and thus most of the business of law, not lawyers *en masse*, or even their bar associations. The reach of current lawyer regulation today does not effectively or directly reach much of the innovative activity going on in the business of law. Some activity on these frontiers is regulated through the law regulating the unauthorized practice of law (UPL)—also under attack on various fronts—and this law is often the province of legislatures, not supreme courts. And there is some indirect regulation of nonlawyer activity and innovation through the indirect effect of lawyer ethics rules governing lawyers—as lead generators are regulated through regulation of advertising—solicitation, and lawyer referral activities. Regulatory reform has happened, and may continue to happen, through the actions of supreme courts (not bars) as bar regulators, whether some lawyers oppose it or not.

Anyone who cares about achieving the best and most effective lawyer regulation in the public interest wants discussion, debate, experimentation, data collection, and analysis of possible regulatory reform to move forward. Since there were lawyers, the profession's ideals have mandated that we have a professional and moral obligation to provide and support *pro bono publico* legal services. But the current broken market for legal services—broken because it does not offer legal services to those who need them, including those willing and able to pay—imposes a different and greater obligation. To the extent that we are a self-regulated profession, we as lawyers have a professional and moral obligation to clients and the public to improve the ability of the legal services market to deliver those services to those who wish to buy them.⁵⁷ I am optimistic that lawyers, bar leaders, regulators, and others who care about the rule of law will carry forward this crucial discussion, debate, experimentation, data collection, and analysis.

B. *The Access-to-Justice Rationale*

To be clear, the advocates of regulatory reform have rhetorically staked a great deal on the potential benefits—the increase in access to justice that could result from such reforms.⁵⁸ They point to studies—most notably, the Legal Services Corporation's very credible work—revealing the high and growing proportion of legal needs of poor American citizens who do not get legal help for their legal problems.⁵⁹ At the same time, some in the legal services community have publicly opposed relaxation of UPL restrictions, such as

57. *See id.* at 275.

58. *See generally* JUSTICE GAP, *supra* note 2.

59. *See id.*

those at issue in the *Upsolve* litigation in New York.⁶⁰ What if the data does not bear out a clear positive effect of regulatory reform on access to justice however measured? What are the backup arguments of regulatory reform proponents?

Based on my personal observations and discussions, few of the advocates for the existing reforms in Arizona and Utah have yet been willing to offer up other arguments for deregulation or reregulation, such as the need to reduce anti-competitive regulation to the minimum needed for client and public protection. Certainly, some advocates for change—mostly academics—take a broader view, arguing for a broader assault on the “law guild” as anti-competitive and fundamentally antithetical to consumer well-being and justice more broadly.⁶¹ Quite recently, in an extremely unusual move, the Antitrust Division of the U.S. Department of Justice formally commented to the North Carolina legislature in support of proposed legislation to authorize the licensure of legal paraprofessionals on pro-competition and public interest grounds.⁶² Those voices and efforts are currently isolated, but they could tap into nascent movements present elsewhere pushing for reform of professional regulation in other field.

In light of all these factors, no one can reliably predict the future, even near-term, of regulatory reform in the law business. That uncertainty concerning the future direction of the regulatory environment is an important consideration for any lawyer or businessperson interested in exploring new business models that push against the limits of current regulation.

V. THE REASONABLY CERTAIN MIXED REGULATORY ENVIRONMENT

Still, one thing about this emerging landscape is certain—the hard fact of a mixed regulatory environment.

U.S. lawyer regulation remains, almost exclusively, a jurisdiction-by-jurisdiction enterprise, though often led (or followed) by ABA models.⁶³ Decentralized lawyer regulation—in the spirit of constructive conversation, let us not call it balkanized—is here to stay for the foreseeable future.⁶⁴

That makes one conclusion just as unmistakable as the changes sweeping the profession and business of law: For the foreseeable future, at least the next

60. See generally Brief for the Institute for Justice as *Amicus Curiae* in Support of Plaintiffs’ Motion for Preliminary Injunction, *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022) (No. 22-cv-627 (PAC)), 2022 WL 1639554.

61. See Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 651 (2006).

62. Letter from Maggie Goodlander, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., to N.C. Gen. Assembly (Feb. 14, 2023).

63. See Younger, *supra* note 53, at 261.

64. See *id.* at 265–66.

five to ten years, we will be living, practicing, and regulating lawyers in a mixed regulatory environment. There may be value in this; there certainly is value in awareness of the reality of the regulatory environment.

Some jurisdictions will permit nonlawyer ownership and some nonlawyer provision of some legal services; some will not. Some jurisdictions will permit fee-sharing with nonlawyers; some will not. Some will reduce barriers to multijurisdictional practice (MJP) further; some will not. Some might even reform or clarify UPL restrictions; many will not.

For lawyers and law firms looking to take advantage of the business opportunities presented by lawyer regulation in Arizona, Utah, and D.C., as well as for investors, this mixed environment presents many serious questions.

A. The Questions Created by a Mixed Environment

Some of these questions have, in fact, been faced in the wake of D.C.'s 1991 rule changes that first permitted nonlawyer ownership.⁶⁵ A handful of jurisdictions addressed these questions, including whether a D.C. nonlawyer-owned law firm can take in, as a partner or associate, a lawyer licensed only in another jurisdiction prohibiting nonlawyer ownership.⁶⁶ They cannot.⁶⁷

But taking in partners and associates in other jurisdictions is not the only way lawyers and law firms expand their operations into other jurisdictions. A few opinions—including one from the ABA⁶⁸—make clear that a lawyer in jurisdiction that does not permit nonlawyer ownership (a “Model Rules” jurisdiction) may ethically co-counsel with a nonlawyer-owned D.C. firm on a case and thus lawfully share fees with a (lawfully) nonlawyer-owned D.C. firm.⁶⁹ Only one jurisdiction (Maryland) years ago bought into the notion that this sort of fee-division agreement, even though it complied with the Maryland fee-division rule, was unethical.⁷⁰

65. See *infra* note 67.

66. See, e.g., N.Y.C. Bar Ass'n. Comm. on Pro. Ethics, Formal Op. 2020-1 (2020).

67. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 91-360 (1991). To be clear, bar associations and regulators have never fully explored whether a D.C. nonlawyer-owned law firm can operate fully in a jurisdiction that itself prohibits nonlawyer ownership. It is conceivable that some more explicit middle-ground on this issue could be reached, permitting nonlawyer-owned D.C. or Arizona law firms, or Arizona or Utah firms that have regularly shared fees with nonlawyers in ways not permitted in other jurisdictions, to operate openly and more actively in other jurisdictions. Of course, some such activity is not permitted. See *infra* Section V.B.

68. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 464 (2013).

69. See Fla. Bar Ass'n Comm. on Pro. Ethics, Op. 17-1 (2017); N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 1038 (2014); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 911 (2012); N.Y. State Bar Ass'n Comm. On Pro. Ethics, Op. 889 (2011); N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-1 (2020); N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2015-8 (2015); Phila. Bar Assn. Pro. Guidance Comm., Op. 2010-7 (2010).

70. Md. State Bar Ass'n., Comm. Ethics Op. 2013-07 (2013).

These questions of permissible activities across jurisdictional boundaries have suddenly taken on great importance to lawyers, law firms, and investors seeking to spread nationwide the economic benefit of the Arizona, Utah, and D.C. rules.⁷¹ Most of these issues are unresolved by anything remotely resembling clear legal authority.⁷²

For decades, some D.C. nonlawyer-owned firms have used these few fee-division opinions to support a practice in which a nonlawyer personal injury lead generator owns at least a portion of a law firm that accepts leads from the lead generator, converts them into clients, co-counsels with litigation law firms all over the country, and then the nonlawyer shares in the D.C. firm's share of the fees.⁷³

No one knows how widespread this practice is. D.C. has never had any requirement that nonlawyer-owned firms register with anyone or disclose their existence to the bar. Similarly, Arizona has no rule that would require a lawyer or firm sharing fees with nonlawyers (as opposed to an authorized ABS⁷⁴) to somehow report that to the bar.

This hub-and-spoke model is becoming common in Arizona.⁷⁵ The ethics questions raised by that model pale in complexity to others raised by efforts to "export" the business benefits of operating an Arizona ABS, a Utah sandbox participant, or an Arizona firm using permitted fee-sharing.⁷⁶

B. Knotty, Unsettled Questions

What about the lawyers practicing in Arizona ABSs, Arizona firms sharing fees with nonlawyers, Utah sandbox nonlawyer-owned firms, and D.C. nonlawyer-owned firms who want to practice outside Arizona, Utah, and D.C.—can they do so?

Assume the lawyer is licensed only in Arizona (or Utah or D.C.), practices in a nonlawyer-owned firm or an Arizona firm sharing fees with nonlawyers, and co-counsels with a firm in a Model Rules state to handle (and divide) fees in a case. Also assume the firm in the Model Rules state remains a different

71. See discussion *supra* Part II (examining the major changes in the business of law).

72. See, e.g., ABA Comm. on Ethics & Pro. Resp., Formal Op. 464 (2013). Very few decisions by courts exist on these issues. Almost all sources of authority on these issues are ethics opinions, which are a particularly weak form of legal precedent. They are usually non-binding, even on lawyers in the jurisdiction whose rules they interpret. They are most often issued by bar associations, not lawyer regulatory agencies. The authors are almost always volunteer lawyers. More often than not, no court or disciplinary agency blesses their reasoning or results.

73. See Phila. Bar Assn. Pro. Guidance Comm., Op. 2010-7 (2010).

74. There is also no rule applicable to an Arizona ABS that would currently require such detailed disclosure.

75. See *supra* note 53 and accompanying text.

76. See N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-1 (2020).

firm from the Arizona (or Utah or D.C.) firm, so that the Model Rules-jurisdiction lawyer is not practicing in a firm with a nonlawyer owner. Can the Arizona lawyer actually appear in court (on *pro hac vice* admission) in the Model Rules jurisdiction court to represent their mutual client? Or, if they do appear, would that mean that the Model Rules-jurisdiction ban on nonlawyer ownership suddenly applies to them? Can the client and the Arizona (or Utah or D.C.) lawyer use a well-informed, choice-of-law provision in their representation agreement to choose, say, Arizona law, and avoid licensure issues in the Model Rules jurisdiction for the lawyer?

Without much analysis, language in an old ABA opinion directly supports this practice as permissible under the ABA Model Rules.⁷⁷ Virtually no other authority exists on this question, and no one knows what real-life lawyers in these situations are actually doing.

Or, make it simpler. An Arizona lawyer, licensed only in Arizona, gets called for advice by a Model Rules-jurisdiction client because the Arizona lawyer is a true expert on the subject on which the client needs help. Can the Arizona lawyer represent that client? If so, what ethics rules apply to the representation? Could the Model Rules-jurisdiction rules apply to some parts of the lawyer's representation (*e.g.*, the fee agreement), while the Arizona rules on nonlawyer ownership apply to the lawyer's practice with an ABS?

C. Multijurisdictional Practice

What about the MJP implications? Will the Model Rules-jurisdictions' version of the ABA Model Rule of Professional Conduct 5.5 authorize this type of practice?

We know from the D.C. experience⁷⁸—we think—that the Arizona ABS cannot have *offices* in a Model Rules jurisdiction. But can an Arizona lawyer working for the ABS live and work in a Model Rules jurisdiction? Maybe so, under authority allowing remote practice, as long as the lawyer does not serve clients from that jurisdiction or advise on that jurisdiction's law.⁷⁹

D. More Than One License

To quickly instigate a headache, consider an Arizona lawyer licensed also in a Model Rules-jurisdiction. After all, the number of American lawyers licensed in more than one jurisdiction is growing significantly.

There are a very few opinions that suggest that a lawyer licensed in a jurisdiction permitting nonlawyer ownership (or broad fee-sharing) *and* a

77. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 91-360 (1991).

78. See N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 1038 (2014).

79. ABA Comm. on Ethics & Pro. Resp., Formal Op. 495 (2020).

Model Rules-jurisdiction *might* be able to essentially use both licenses, in separate practices, and perhaps not run afoul of either licensing jurisdiction's rules.⁸⁰

VI. ONE MODEST PROPOSAL FOR A MIXED ENVIRONMENT

This analysis leads me to a question and a modest proposal.

My question: In a nation built as a laboratory of federalism, where lawyer regulation offers the perfect example of that decentralized governance, are there things lawyer regulators can do to better accommodate lawyer (and client) flexibility and choice, and the public policy decisions of lawyer regulators in other jurisdictions, without fundamentally compromising each jurisdiction's own policy decisions on lawyer regulation?

My modest proposal: We can and should do a few concrete and positive things to allow lawyer regulation in our current mixed environment to function more coherently and effectively by addressing a few issues about the interaction of different rules in our current mixed environment. Addressing these issues would provide lawyers with great certainty—or at least reduce uncertainty—concerning the propriety of their conduct.

A. *Choice of Law*

By far, the most important concern for lawyers in this mixed environment is what law applies to their conduct. This includes lawyers located or licensed in jurisdictions with new or different rules. But it also includes clients, whose expectations—and, to the extent consistent with good regulatory policy—consent should be honored. The rules on choice of law in this context can and should be clarified and made as uniform as possible.⁸¹

To be clear, the questions implicated by the choice of law conversation include not only nonlawyer ownership and fee-sharing but also more mundane (but important) issues like conflict of interest rules, rules governing fee agreements, and where trust accounts for client and third-party funds must be established.

While some potential choice of law issues concerning lawyer conduct implicate concerns beyond the interests of one consenting client, the regulatory interests concerning many choice of law issues primarily concern the interests of one client who is in a position to consent. In those situations, the consent of the client should be honored.

80. N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 1093 (2016).

81. One approach might be for ABA Model Rule of Professional Conduct 8.5(b) and its Comment to be amended to more clearly and expressly permit client consent to govern which ethics rules apply to the lawyer's conduct in connection with the representation.

Indeed, even this year, the ABA has taken a significant positive step with the issuance of a new Formal Ethics Opinion that takes a fresh look at the application of the ABA's widely-adopted Model Rule on choice of law.⁸² Among other things, the Opinion points the way to allowing lawyers practicing with nonlawyer-owned law firms or law firm that share attorney fees with nonlawyers to appear *pro hac vice* in cases in jurisdictions where their ethics rules prohibit such practices.⁸³ The Opinion also opens the way to greater client autonomy in agreeing to engagement terms by which the attorney-client relationship may be governed by ethics rules of the lawyer's home jurisdiction, potentially including jurisdictions where regulatory reforms have been adopted that might be at odds with rules in other jurisdictions.⁸⁴ These are rational, forward-looking applications of accepted choice of law principles.

B. Welcoming Strangers

We also need to discuss the extent to which a Model Rules jurisdiction might be able to allow some activity within its borders by nonlawyer-owned law firms or firms that share fees more broadly with nonlawyers.

Of course, some of this activity is clearly permitted today, given the interaction and application of fee-division and MJP rules already on the books.⁸⁵ For example, ABA Formal Opinion 464, entitled *Division of Legal Fees with Other Lawyers Who May Lawfully Share Fees with Nonlawyers*, permits a lawyer in a jurisdiction that has adopted ABA Model Rule 1.5(e) on division of fees between lawyers in different law firms to be co-counsel with, and share fees with, a lawyer who practices in a D.C. or Arizona nonlawyer-owned law firm.⁸⁶ Thus, those D.C. or Arizona lawyers should be able, in this way, to handle matters in Model Rules-jurisdictions, even without the D.C. or Arizona lawyers appearing as counsel of record in the Model Rules jurisdictions.⁸⁷ Surely, most of these jurisdictions, and many of their lawyer regulators, just do not know about current activity of this type.

However, there is no legitimate regulatory reason to exclude an Arizona-licensed lawyer from *pro hac vice* admission in a Model Rules-jurisdiction simply because the lawyer shares fees with nonlawyers (in the case in question or others) or practices with an ABS. I am not aware of any *pro hac vice* rule

82. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 504 (2023).

83. *Id.*

84. *Id.*

85. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 464 (2013).

86. *Id.*

87. *Id.*

or authority that makes this a legitimate basis for denying *pro hac vice* admission.

By similar reasoning, there is no authority that would somehow deny authority under ABA Model Rule of Professional Conduct 5.5 for temporary practice to a lawyer simply on the basis that he or she was lawfully practicing with a nonlawyer-owned law firm in his or her home jurisdiction.

In my opinion, this is the law now. Perhaps, it should be said out loud and confirmed in ethics opinions and other authority.

There is no good reason, consistent with good lawyer regulation in the public interest, that the logic of these situations should not be extended in a responsible manner to other legally indistinguishable circumstances. For example, a real estate lawyer working with a D.C. nonlawyer-owned law firm should be able to practice law temporarily in State A, even if State A bars nonlawyer ownership, so long as State A has adopted a version of ABA Model Rule of Professional Conduct 5.5 that permits out-of-state lawyers in good standing to do the work in State A temporarily. No version of ABA Model Rule 5.5 adopted by any U.S. jurisdiction, for example, limits its benefits to out-of-state lawyers who do not lawfully share fees with nonlawyers or lawfully work in firms owned by nonlawyers.

For a nation founded on federalism, this should be possible; indeed, this policy result should be federalism's policy goal. For a profession and its regulators who have fiercely protected the authority of individual jurisdictions to independently regulate the practice and business of law, respecting the dignity and public policy decisions of other jurisdictions should be a mandate.

VII. RECOGNIZING THE POWER OF ECONOMIC FORCES

One final thought about the business and economics of law.

At least equal to the importance of changes in the regulation governing the business of law are the changes driven by economic forces. As in most industries, these forces are far more powerful than regulations and regulators.⁸⁸

Conceivably, the forces driving changes in regulation may be thwarted by those resisting change. In my view, the economic forces driving change cannot be. Believing otherwise is, at best, naïve. Anyone interested in good regulation, and anyone interested in access to justice, must recognize, attempt to understand, and reckon with, these powerful economic forces. In my view, that is and will be exceptionally difficult.

88. See *supra* Section I.A.

I grew up as a lawyer working for the last generation of lawyers whose dominant view was that the law was a profession, and that it was definitely *not* a business. That ideology was dying as my legal career was being born.

I have no doubt whatsoever that the law is today both a profession and a business. I have never found that embarrassing or tawdry. I have little patience for those who do. It is not that I pity them, exactly; instead, I believe that they must be so detached from the reality of the world that they should not be allowed to make policy for the work of the law.

A. *The Implications of Power*

Believing in the raw power of the economic forces in play here has a number of implications.

First, I am skeptical of the power of regulatory reform to fundamentally change the access to justice debacle this nation faces. My strong sense is that, just as we will never solve the access to justice crisis with more *pro bono* services, the required set of answers—no single answer exists—must include some set of solutions driven by business models that allow legal services, or adequate substitutes for legal services, to be provided at reasonable cost by money-making enterprises, lawyers or otherwise. Will regulatory reforms like Arizona's and Utah's enable this to happen? I don't know, but I am skeptical, largely because they remain chained by our reigning paradigm of UPL.

Second, I am unsure whether the current regulation of the business of law is in the best position it can be to reckon with these economic forces driving change. Note here that I specifically speak of the "regulation of the business of law." I could just as easily have referred to "regulation of the business of legal services," but I believe we need to think more broadly about services that are real or plausible substitutes for legal services provided by lawyers. In any event, I am not merely referring to the regulation of lawyers.

Of course, those who are *licensed* in some jurisdictions other than lawyers must be regulated—paralegals and ABSs, for example. Also, people and organizations other than lawyers who have a role in the business of law may need to be regulated in some way. Generally, my current view is that many of these players can best be regulated by regulating how lawyers may deal with them. But we must think of regulation—and reregulation—in the broadest possible way to make good policy.

Third, the economic forces at play here—the ones that caused and drive the access-to-justice problems we have, and the ones that are driving change in the business of law—will not be stopped by ABA resolutions decrying nonlawyer ownership (or calling for more access to justice) or by ethics rule changes. Conscientious policymakers need to be clear-eyed about the forces in play, their real power, the needs of consumers, and the differences between

the interests of lawyers and the interests of society. They must do their best, step by step, acting under uncertainty, understanding the shape and extent of that uncertainty, to shape regulation governing the business of law.

VIII. CONCLUSION

Any path forward—for the profession, for the business, for regulators, for good policymaking, and for the public and clients—requires that we fully appreciate the varied forces driving and responding to change. We need to recognize which forces can be opposed, and which are effectively too powerful to oppose. More importantly, we need to study and reach more of a consensus as a profession, as businesspeople, and as citizens interested in client and public protection, on the objectives, as well as the appropriate limits of regulation. We have only begun those conversations. It is time to more deeply engage.

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ETHICS

The Two-Company Model for New Law

By Lucian T. Pera

Three business people walk into a lawyer's office.

They say they have a great idea for a twist on a traditional business. They say they're innovative disrupters of that traditional business. They tell the lawyer something like, "It's Uber for [*fill in the blank*]"—get it?"

One is a forward-thinking operator in that traditional business. Another is a technology whiz who believes she can make the traditional business work better, faster and cheaper with an infusion of new technology, both for marketing and business operations. The third is an investor, committed to putting money in the venture. All three want the lawyer to help launch the business.

It's a good day for the lawyer. She gets to help new clients build something.

DISRUPTING TRADITIONAL LAW

This is the point where most ethics columns would walk the reader through all the classic issues concerning client identity and conflicts. Whom does the lawyer represent? Whom *should* the lawyer represent? Are there any conflicts of interest among these three possible clients? Well, not this column.

Instead, consider the possibility that the traditional business these three want to disrupt is not dry-cleaning or pet grooming, but law. The

traditional business operator is a lawyer. The investor and tech whiz are not. What can the lawyer tell them?

IS ALL HOPE LOST?

Suddenly, the lawyer's day seemed to get a little darker.

Those who aren't lawyers—we still call them by that patronizing term “nonlawyers”—cannot invest in a law practice or a law firm. They also cannot direct the delivery of legal services. So the tech whiz and investor can only have very limited roles. They cannot invest in the business—the disruptive new law firm—and they cannot be its officers or directors. They also can't run it.

That's what Rule or Professional Conduct 5.4 says, as adopted in every jurisdiction. (D.C. has a very limited exception to this rule, but set that aside for now.)

Is all hope lost for the new venture? Maybe not.

KEEP HOPE ALIVE

Over the last few years, an increasing number of entrepreneurial lawyers and others attempting to innovate in the delivery of legal services have begun to adopt what some call the “two-company” business model.

It's an acknowledged workaround designed to enable lawyers and law firms to access capital, as well as the expertise and assistance of those who are not lawyers. The model is aimed squarely at working around Rule 5.4 and related law that restrict investment and management of law practices and law firms by those who are not lawyers.

The model appears to have originated in the business of medicine where some states traditionally bar the “corporate practice” of medicine, dentistry or veterinary medicine.

Sightings in the law business date back to the mid-2000s and have been quietly, but dramatically, increasing in the last several years. Law

firm Atrium LLP and its companion service company Atrium LTS (a legal tech start-up), founded and backed by Twitch co-founder and serial entrepreneur Justin Kan, are a recent example that has received many favorable mentions in the legal press—and attracted lots of capital. Atrium LLP, enabled by Atrium LTS (the acronym stands for Legal Technology Services), aims to provide better, faster, cheaper legal services to start-ups, especially in support of much faster, more effective fundraising.

THE MECHANICS

It works like this: Law Firm practices law. It contracts with a company that is not a law firm—let’s call it “ServiceCo”—to provide Law Firm various services it needs.

Those services can include technology development, ongoing technology services, marketing services (perhaps including lead generation), financial and accounting services, leased real estate, tech and equipment leasing, insurance services, human resources, and employee staffing. Often ServiceCo holds intellectual property associated with the law firm’s practice and licenses it to Law Firm. And the service agreement is typically long term—maybe 10 or 25 years. Think of ServiceCo as Law Firm’s back office—everything but the lawyers and the practice of law.

Of course, BigLaw firms have begun to aggressively outsource such services. But often the two-company model consists of just one law firm and one service company. Why?

Because separating the activities needed to deliver legal services in this way and allowing ServiceCo to charge Law Firm for these services enable investment by nonlawyers in ServiceCo. That approach can help attract investment capital to support the capital-intensive activities many lawyers believe are now needed to innovate in delivering legal services.

THE NEED FOR CAPITAL

I confess that, maybe 10 years ago, I was one of the doubters. I believed that law was not a capital-intensive business. I was wrong. If that

was true, it's not anymore, certainly not for those lawyers and nonlawyer entrepreneurs trying to bring technology to bear on legal services to deliver them better, faster and cheaper.

Developing technology that can manage cases, draft documents or interact intelligently with clients on a lawyer's behalf is expensive. Most lawyers have little ready capital. Investors want a return on their money. A two-company approach, with nonlawyer investment in ServiceCo, enables all that.

Ah, you say, then aren't those investors in ServiceCo "investing in" Law Firm? And isn't that forbidden? No, not if the two-company structure is carefully planned and executed.

BUILDING WITH CARE

Careful experimenters with this business model often have trusted ethics lawyers vet the structure—and especially scrutinize the fees paid by Law Firm to ServiceCo—to assure that Law Firm will not be treated as sharing fees with a nonlawyer. They assure that these are not based on or tied to Law Firm's fees, revenues or profits. Instead, to the greatest extent possible, they encourage that these fees be "reasonable" in the marketplace. After all, each of these services is one that could, in theory, be bought from one or another third-party provider.

The services agreement between the two companies will also establish—and prudent operators will zealously maintain—real corporate form and formality between the two entities. ServiceCo will neither have nor exercise any control over the law firm or its delivery of legal services. The services agreement will ban it.

Details and traps abound for the unwary. For example, violations of the ethics rules barring restrictions on Law Firm's right to practice must be avoided.

But the concept is simple: ServiceCo doesn't own or control Law Firm or its lawyers. ServiceCo is simply a service provider tuned up very

specifically to enable Law Firm to expand or innovate, often in very specific, customized ways.

IS THIS ETHICAL?

So far, there's not much formal authority—like ethics opinions or court decisions—that expressly blesses the two-company model. But a number of working ethics lawyers and others have gotten quite comfortable with the analysis set out here as compliant with ethics rules. In my view, and the view of many others, done right, the model is ethical.

Remember, of course, that some ServiceCos out there can and do offer these same services to multiple law firms—both to BigLaw and to consumer firms. Nobody suggests that *they* are secretly owning or controlling law firms.

And again, this model has thrived for years in the medical professional sector, without endangering the independent medical judgment of family docs, specialists and vets. Even in our own law-business backyard, liability insurers have been permitted for years in most jurisdictions to have “captive” law firms with their own employee-lawyers defend their insureds in court. Most jurisdictions have long since gotten over the conflicts and independence-of-professional-judgment concerns inherent in this model.

THE UNDISCOVERED COUNTRY

So there you have it: a new business model for lawyers trying to reach the cutting edge and needing capital to get there.

While the rest of the legal services market may be waiting for regulatory reform in the states—maybe even authority to allow private capital into law firms—others are out there working around these hurdles.

It's hard to know whether the hurdle jumpers will settle the frontier before regulatory reform takes hold—if it does. But there may well be more than one path to real NewLaw.

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