

PRACTICING LAW IN THE TWENTY-FIRST CENTURY IN A TWENTIETH (NINETEENTH) CENTURY STRAIGHTJACKET: SOMETHING HAS TO GIVE

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INTRODUCTION

As we move through the second decade of the twenty-first century, the legal profession in the United States confronts a confluence of pressures and realities that have the potential to greatly change how law is practiced at all levels of the profession.¹ Like multiple rivers coming together to create a larger more powerful river, these pressures and realities are coming together to exert inordinate pressure on the legal profession for change. While no one can predict the future with a high degree of accuracy, we can try to understand how the recent past and current realities influence how the future develops. One thing that is certain, one way or another, like a rushing river, the future is coming and with it significant changes to the practice of law and the legal profession.

During the twentieth century, there was unprecedented growth in the influence of law and legal systems across all levels of society. Over the past forty years, the lawyer population in the United States has increased profoundly.² The segment of the bar and law firms representing entities grew dramatically, while the sophistication of these entities in the purchase of legal services has likewise expanded and developed.³ At the opposite end of the spectrum, the legal needs of many Americans go largely unmet.⁴ A significant segment of society, including those in the socio-economic middle class, simply cannot afford to hire a lawyer and, as a result, they do without legal representation. Likewise, many solo and small-firm lawyers, predominantly representing individuals and small business, may be worse off than they were forty years ago.

These glaring realities are buttressed by significant pressures that are demanding and compelling changes in the practice of law. Clients, technology, competitive forces, globalization, the recent recession, and, to an extent, the government are exerting unprecedented pressures on the legal profession to change how law as a profession and as a business is practiced and regulated. These forces are often working in tandem, and, at times, at cross purposes, to mold the ever changing landscape of the legal practice.⁵

1. The recession has had a profound impact on the legal profession. From June of 2009 to June 2010 the legal sector shed more than 22,000 jobs. See Tom Huddleston, Jr., *Legal Sector Lost 3,900 Jobs in June*, AM. LAW. (July 2, 2010), www.law.com/jsp/article.jsp?id=1202463264613. This loss continued in to the first half of 2011. See *June Legal Jobs Economy Shows Biggest Decline this Year*, WALL ST. J., July 11, 2011, <http://blogs.wsj.com/law/2011/07/11/june-legal-jobs-economy-shows-biggest-decline-this-year/>.

2. See discussion *infra* Section I.A.

3. See discussion *infra* Subsection I.C.1.

4. See discussion *infra* Subsection I.C.2.

5. See Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 960-61 (2002).

To a significant extent, many of the rules governing how and in what form lawyers can practice law⁶ in the United States are premised on a by-gone era of lawyering that may have existed 50 or 100 years ago, but does not today.⁷ These rules and their underlying premises do not comport with many of the realities of the practice of law in the early part of the twenty-first century, and they tend to inhibit or prohibit the profession from addressing many of the pressures currently confronting lawyers and the practice of law. These rules reinforce a cartel mentality that impedes change, stifles competition, and does not promote innovation.

These rules disproportionately place American lawyers at a global disadvantage when competing for clients, attempting to innovate, and seeking to best serve clients at all levels, without proportionately protecting the interests of clients. Clients will gravitate to the most efficient, innovative, competitive, and skilled practitioners regardless of national origin or jurisdictional boundaries. While other legal systems are embracing changes that promote greater diversity of legal service providers, enable lawyers and their law firms to practice in multi-professional organizations, and permit legal service providers to raise capital to finance innovation, to promote competition, and to deliver legal services less expensively, the legal profession in the United States clings to outmoded business practices and rules that do not promote the best interests of the profession or clients.

Lawyers exist to serve the needs of clients and society. Society and the government have permitted a significant degree of self-regulation premised on this proposition.⁸ When the profession fails to protect these interests in favor of protecting its own interests, the right of self-regulation will and

Cartels in a wide variety of industries have long tried to enforce restrictions on terms of dealing with clients. Sometimes the restrictions succeed for a while. Ultimately, however, such restrictions tend to be overcome, and it is likely to be the clients and their other service providers—not the lawyers—who prevail.

Id.

6. See, e.g., MODEL RULES OF PROF'L CONDUCT RS. 5.4-5.7 (2010). By rules of the profession, I am referring to the three generations of professional regulations promulgated in model form by the American Bar Association and then adopted by the fifty states and several other jurisdictions that regulate the practice of law. See ABA CANONS OF PROF'L ETHICS (1908); MODEL CODE OF PROF'L RESPONSIBILITY (1969); MODEL RULES OF PROF'L CONDUCT (2010).

7. I use the words "may have existed" because there is a great tendency for lawyers to talk about a golden age of lawyering and by comparison to criticize the present for failing to adhere to this perceived golden era. See generally Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996).

8. See Morgan, *supra* note 5, at 949-50 (quoting several sociologists on the characteristics of a profession and a professional and noting that "the public 'must be persuaded that the body of knowledge and skill ascribed to the occupation is of such a special character to warrant privilege'" (quoting Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 220 (Robert L. Nelson et al. eds., 1992)).

should be removed and regulation will be imposed by outside forces.⁹ As seen in England and Australia, there is a growing trend toward imposed government regulation in the face of the legal profession's perceived inability to put the client and society ahead of its own interests.¹⁰

This Article will examine some of the contemporary realities and pressures facing the legal profession in the United States and the rules implicated by this discussion. I have set several goals for this discussion: (1) to show that the realities that gave birth to the rules governing the profession, whether truth or myth, no longer prevail in the current environment; (2) to discuss the different needs of large national and multinational corporate clients versus individual and small business clients in the current environment; (3) to examine the different concerns and competitive conditions of lawyers working with these different clients; and, (4) finally, to propose structural changes to the practice of law that will enhance competition, innovation, and reduce costs while protecting the interests of clients and society.¹¹

Recent history is replete with examples of once thriving industries and professions that have been replaced by more efficient, economically-viable enterprises or that have ceased to exist.¹² The legal profession is not immune from these forces. The regulation of lawyers must change to permit adapta-

9. See generally Daniel R. Coquillete & Judith A. McMorro, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123 (2011) (summarizing a variety of federal regulations governing the practice of law). See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. & 18 U.S.C.); Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. pt. 205 (2010); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 526 (2006).

10. See, e.g., Legal Services Act, 2007, c. 29, § 2 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2007/29/contents> (creating a new supervisory board to oversee the legal profession in England and Wales); *Legal Profession (Incorporated Legal Practices) Act 2000* (NSW) sch 1 (Austl.) & *Legal Profession Regulation 2002* (NSW) (Austl.) (sweeping reforms in the governance of the legal profession in New South Wales, Australia); see also Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW. 13; Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45.

11. In light of the ABA 20/20 Commission that is examining the Model Rules, I view this discussion as an attempt to refute those who claim that change is inconsistent with our professional values. See *infra* Part II.

12. Mark Chandler, Senior Vice President and General Counsel of Cisco, succinctly points to glaring examples of information based enterprises that have been or are being replaced by technology based organizations—Encyclopedia Britannica v. Wikipedia; Frommers and Fodors v. ePinions and TripAdvisor; Corner Bookstores v. Amazon; Newspaper Classifieds v. eBay and Craigslist. Mark Chandler, Senior Vice President & Gen. Counsel of Cisco, Address at Northwestern School of Law's 34th Annual Securities Regulation Institute: The State of Technology in the Law (Jan. 2007), available at http://blogs.cisco.com/news/cisco_general_counsel_on_state_of_technology_in_the_law/.

tion to a changing legal marketplace or the legal profession in the United States will become less competitive and lose market share to other more competitive, innovative, and efficient entities. This change will not be easy but it is critical for the profession to remain true to the primary core values of serving clients and society. No matter how much one would like to practice law in some bygone, simpler era, the glaring truth is that we cannot continue to practice law in the twenty-first century bound in a rules straight-jacket of the early twentieth century. One way or another something has to give.

I. THE TIMES, THEY HAVE CHANGED¹³

Over the past 100 years, the rules governing the legal profession in the United States have evolved yet, in many respects, remain true to the realities, or at least the perceived realities, and agendas of the profession when they were first written. The legal profession has sought a set of rules, with some state-to-state variation, that applies to all lawyers, to all law practices, and to the representation of all clients.¹⁴ These rules are written as if there is one legal profession, that all lawyers practice similarly, and that the practice of law is primarily local or regional. Likewise, many of the rules are written as if all clients are the same or similarly situated and that they all need protecting due to an information asymmetry.¹⁵ The rules are also written to stifle external and internal competition.¹⁶ These premises have been under attack for some time now, but Roger Cramton may have said it best seventeen years ago:

This myth of professional unity, competence, and equality builds on the 19th century tradition of the all-competent generalist lawyer whose clients were almost entirely private individuals. It is reinforced by rules of admissions, ethics, and bar discipline applicable to all lawyers. Yet, the structure of contemporary law practice resembles two large hemispheres with modest overlap. The legal profession is highly stratified and has a relatively clear status hierarchy.¹⁷

The next several sections will explore the nature of the rules of the legal profession as they have developed over the past 100 years, the realities and agendas of their creation, the growing engagement of the federal government in the regulation of the practice of law, the vast differences in cli-

13. See BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN'* (Warner Bros. Inc. 1963).

14. See Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 838 (2002).

15. *Id.* at 838, 840-41.

16. See RICHARD L. ABEL, *AMERICAN LAWYERS* 112-126 (1989).

17. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 538-39 (1994); see also JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319-32 (1982).

ents and the lawyers and law practices that serve them, and some of the influences affecting these groups.

A. Rules Are a Creation of Their Times

The lawyer population in the United States grew slowly for the first seventy years of the twentieth century, but has grown dramatically since 1970. In 1900, there were approximately 110,000 lawyers, with one lawyer for every 696 people.¹⁸ By 1940, the lawyer population had grown to approximately 179,000, but the lawyer ratio had actually decreased to 1 in 733.¹⁹ By 1971, the lawyer population had almost doubled to 355,242, and the ratio changed to one lawyer for every 572 people.²⁰ Over the next four decades, the lawyer population grew at a rate much faster than the general population, and by 2008, there were approximately 1.18 million lawyers at a ratio of 1 to 261.²¹

For much of the twentieth century, solo and small law firm practice remained the mainstay of much of the profession. Reportedly, in 1898, thirty-five firms had five lawyers and another thirty-two had more; by 1915, there were 240 firms with five or more lawyers.²² In 1930, almost 87% of lawyers were in private practice, at a time when law firms were very small.²³ By 1948, this number had increased to 89% in private practice, with 61% of these private practitioners engaged in solo practices.²⁴ By 1970, the largest firm had 164 lawyers.²⁵

Like the growth in lawyer population, the growth in the size of law firms began in earnest in the 1970s and accelerated over the next four dec-

18. See ABEL, *supra* note 16, at 280.

19. *Id.*

20. *Id.*; CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 1 (2004).

21. See ABA, LAWYER DEMOGRAPHICS (2009), available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf [hereinafter LAWYER DEMOGRAPHICS]. As of November, 2011, the ABA reports the lawyer population at 1,225,452. ABA, NATIONAL LAWYER POPULATION BY STATE (2011), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/2011_national_lawyer_by_state.authcheckdam.pdf [hereinafter LAWYER POPULATION].

22. See ABEL, *supra* note 16, at 182; see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 489, 539 (3d ed. 2005) (reporting that at the turn of the twentieth century, the largest law firm had ten lawyers and seventy firms had five or more lawyers). As Galanter and Palay report that information about large law firms in the first half of the twentieth century "was not abundant," systematic collection of information was discouraged and often impeded. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 20-21 (1991).

23. See ABEL, *supra* note 16, at 299.

24. *Id.* at 300.

25. *Id.* at 183.

ades, with the only decline in firm size coming with the recent recession beginning in 2007.²⁶ By 2008, 74% of lawyers worked in private practice, 70% of this group in firms of ten or fewer and 14% of private practitioners in firms of more than 100.²⁷ In 2010, there were four U.S.-based law firms with over 2,300 lawyers worldwide and the average size of the largest 100 firms was 860 lawyers.²⁸

Until fairly recently, there was the definite perception that lawyers in large law firms were likely to spend their entire careers with one firm.²⁹ As one large law firm partner notes, “[A] 1970s firm brochure for then-Piper & Marbury (now DLA Piper LLP) stated that no partner had ever left the firm to join another law firm.”³⁰ Just as there was a perception of lawyer stability within the law firm, there was the perception that “clients tended to be enduring.”³¹ At least on the surface, large law firm practice was not a very competitive environment for lawyers or clients.³²

For most of the twentieth century, law practice was predominately local or regional due to limited communication, transportation, and research modalities.³³ Most client engagement was face-to-face, by telephone, or through one form or another of hard copy print media. Transportation was predominantly by automobile or rail for the first half of the twentieth century. Legal research was completely book-based and somewhat limited.³⁴ As a result, New York firms represented the financial and investment institutions in New York, Detroit firms represented the auto industry, Los Angeles firms represented the west coast entertainment industry, and so on.³⁵ When out-of-town representation was needed, the client was referred to a local firm of

26. *Id.* at 182-83.

27. See LAWYER DEMOGRAPHICS, *supra* note 21 (showing that until 1990, the largest ABA law firm category was 50+; the 100+ category was created in 1991).

28. David Brown, Editor’s Note, *The NJL 250*, NAT’L L.J., Apr. 25, 2011, at S3.

29. See GALANTER & PALAY, *supra* note 22, at 23-24; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 277 (1993).

30. Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 348-49 (2011); see also Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105, 1113 (2005) (noting that attorneys in large corporate firms would expect to stay there for their entire professional life).

31. See GALANTER & PALAY, *supra* note 22, at 33; David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney–Client Relationship*, 78 FORDHAM L. REV. 2067, 2078 (2010).

32. See GALANTER & PALAY, *supra* note 22, at 36; Miller, *supra* note 30, at 1112-13.

33. See GALANTER & PALAY, *supra* note 22, at 23 (“Firms were located in and identified with a single city.”); FRIEDMAN, *supra* note 22, at 539; see also Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1882 (2008).

34. See Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 508 (2008).

35. See FRIEDMAN, *supra* note 22, at 539.

similar stature.³⁶ In 1970, very few firms had offices in more than one or two cities and even fewer had offices outside of the country.³⁷

Prior to the twentieth century, the practice of law was fairly unregulated.³⁸ Competition came from nonlawyers of all sorts. Lawyers engaged in fairly wide open advertising and client solicitation.³⁹ Many lawyers practiced multiple professions within the same office, often out of economic necessity.⁴⁰ The profession was not always held in high regard.⁴¹

Near the end of the nineteenth century, a small group within the profession sought to elevate the status and income of lawyers, which led to early efforts at an organized bar and the creation of a profession.⁴² The regulation of lawyers grew out of the local court admissions process.⁴³ The licensure of lawyers, the adoption of the rules governing lawyer conduct, the control over who can practice law, and the disciplining of lawyers remains largely within the province of the states with little involvement of the federal government.

The professionalization agenda of the American Bar Association (ABA) led to the promulgation of the Canons of Professional Ethics in 1908.⁴⁴ The Canons were replaced by the ABA Model Code of Professional Responsibility in 1969,⁴⁵ and then the ABA Model Rules of Professional Conduct in 1983,⁴⁶ which have been revised on several occasions over the

36. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 299 (2005); Galanter & Henderson, *supra* note 33, at 1882.

37. See ABEL, *supra* note 16, at 188 (reporting that in 1970, there were almost no branches offices in Washington, D.C., and that of the twelve largest Chicago firms in 1979 only four had branch offices in 1970). In 1979, Abel finds that of the 100 largest law firms, all but eleven had three or fewer branch offices. *Id.* at 188, 318.

38. See FRIEDMAN, *supra* note 22, at 498-99; Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1158, 1159 n.42 (2009).

39. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE* 1078-79 (2006).

40. See FRIEDMAN, *supra* note 22, at 484.

41. *Id.* at 496.

42. See ABEL, *supra* note 16, at 71; Zacharias, *supra* note 38, at 1158, 1162.

43. See FRIEDMAN, *supra* note 22, at 498-99; James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1165, 1166 (2000).

44. See ABEL, *supra* note 16, at 142-43.

45. MODEL CODE OF PROF'L RESPONSIBILITY (1969). The ABA Model Code was adopted by the jurisdictions regulating lawyers almost in lock step with very little state to state variation. See Zacharias, *supra* note 38, at 1162 & n.63.

46. MODEL RULES OF PROF'L CONDUCT (1983). The ABA Model Rules have not attained the same degree of uniform adoption as did the Model Code, because this time around there was much more state by state modification of many of the rules. See JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES* 109-15, 210-83 (2010-11 ed. 2010) (providing over seventy pages of nonexhaustive state modifications).

past twenty-five years.⁴⁷ While the structure of these various generations of professional regulations has changed with each new version, many of the rules in place today can trace their lineage back to the Canons without significant modification.⁴⁸ With each new version, the authors added more detail and specificity to the rules, but many of the rules remain reflective of society and practice of law in the United States in the first half of the twentieth century.⁴⁹

The rules, to a great extent, are a creature of the environment within which they were created.⁵⁰ They reflect a profession that was fairly homogeneous and relatively small.⁵¹ They reflect the practice of law that was predominantly local or regional.⁵² They reflect a profession that was comprised of generalists, with a heavy focus on litigation and individual client counseling, working in solo or very small private practices.⁵³ They reflect a profession that predominantly serviced a fairly unsophisticated client base even

47. See ABA MODEL RULES OF PROF'L CONDUCT (2011), App'x F, 203-209 (listing the amendments to the Rules by Rule and by Date). Further adding to the variation in lawyer rules was the publication of the Restatement, which provided another basis for state-by-state variation and, at times, impetus to modify the Model Rules. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000).

48. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 97 (2000) (noting that Canons 33, 34, and 35 were largely carried forward to the Model Code and the Model Rules—all prohibiting lawyers from forming partnerships and practicing law with nonlawyers); ROTUNDA & DZIENKOWSKI, *supra* note 39, at 968-69 (noting ABA Canon 7 as a precursor to ABA Model Code DR 2-108 and ABA Model Rule 5.6).

49. See Jones & Manning, *supra* note 43, at 1174 n.76 (“[T]he ABA’s 1908 Canons of Professional Ethics are framed primarily in terms of the rules of litigation. . . . This same tendency is apparent even in the 1969 Model Code and the 1983 Model Rules.”).

50. *Id.* at 1174 (“During the nineteenth century, almost all lawyers ‘went to court’ and, as a consequence, the profession was largely defined by the norms and practices of litigation.”); see also Miller, *supra* note 30, at 1111-12 (referring to this time in the history of the legal profession as a “club” because the profession displayed the following features: membership was exclusive, members engaged each other outside of their roles as professional service providers, competition was constrained by norms of politeness and courtesy, there was little lateral mobility, relations between providers and clients were stable and long lasting, based on institutional history and not personal connections).

51. See Galanter, *supra* note 7, at 555 & n.28; David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 464 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)); Miller, *supra* note 30, at 1112.

52. See *supra* notes 33-35 and accompanying text.

53. See Jones & Manning, *supra* note 43, at 1174 n.76 (“[T]he ABA’s 1908 Canons of Professional Ethics are framed primarily in terms of the rules of litigation. . . . This same tendency is apparent even in the 1969 Model Code and the 1983 Model Rules.”); see also Zacharias, *supra* note 14, at 854-55; Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1710 (2008).

when those clients were entities.⁵⁴ They reflect a profession that maintained fairly stable employment situations in which many lawyers spent their entire careers at one location similar to many employees of other business entities.⁵⁵ Finally, they reflect a profession, according to Professor Gillian Hadfield, that maintains a:

commitment . . . to a single definition of what it means to be a “lawyer” and the requirement that all lawyers undergo the same training and pass a bar exam that tests knowledge of rules across a wide spectrum of fields of practice [that] reflects the view that to be a “lawyer” means, still, to have basic competence to handle the mix of cases that the solo or small-firm general practitioner has always been likely to see.⁵⁶

Part and parcel of the professionalism agenda was the desire to limit external competition from outside the profession and to control internal competition. The rules prominently reflected this agenda. The desire to limit external competition led to rules that restricted forms of practice to only those controlled and owned by lawyers thereby eliminating outside producers such as banks, insurance companies, and others from engaging in activities that would be considered the practice of law even if those who provided these services were lawyers.⁵⁷ In the same vein, this desire led to the emergence of unauthorized practice laws and rules that controlled who could practice law within a given jurisdiction.⁵⁸ These laws have been liberally construed to paint a very broad definition of the practice of law, securing all within the ambit of the definitions or lack of definitions to the domain of only those admitted to the bar in a given jurisdiction.⁵⁹

The desire to control internal competition led to restrictions on out-of-jurisdiction (not licensed in the specific state) lawyers practicing within a given jurisdiction and to a move away from admission by motion for experienced lawyers.⁶⁰ Restraining internal competition also included severely restricting the flow of information to the public in the form of advertising

54. See Wilkins, *supra* note 31, at 2077-78 (noting that few businesses “had any significant internal expertise to help them decipher and navigate these new legal risks”). Corporate and government law departments were very small, if they existed at all. *Id.*

55. See Miller, *supra* note 30, at 1113.

56. Hadfield, *supra* note 53, at 1710-11.

57. See ABEL, *supra* note 16, at 112-15; see also Jones & Manning, *supra* note 43, at 1172 (noting that in addition to unauthorized practice laws and rules, bar associations negotiated agreements with competing occupations to divide up contested markets).

58. See Hadfield, *supra* note 53, at 1706-09; FRIEDMAN, *supra* note 22, at 540; ABEL, *supra* note 16, at 112-15.

59. See generally ABA, REPORT OF THE TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW (2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.authcheckdam.pdf; *id.* at app. A, available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

60. See ABEL, *supra* note 16, at 115-18.

and solicitation prohibitions,⁶¹ dictating the type and nature of everything from business cards to letterhead,⁶² and by creating mandatory fee schedules.⁶³

By the middle of the twentieth century, the professionalism project had obtained relative success in limiting who could practice law, where they could practice, in what forms they could practice, what they could say about their practices, how they could obtain clients, and what fees they could charge.⁶⁴ Just as this success had been obtained and was being solidified, the project started to come under attack from various constituencies, all the while the profession maintained a vigorous defense.⁶⁵ Shifting forces within the government and society aligned to undermine the monopolistic control of the legal profession over the last third of the twentieth century and has accelerated in the first decade of the new century.⁶⁶ Demographic, organizational, and structural changes have been working against the organized cartel agenda of the legal profession. These shifting tides will be examined in the next several sections.

B. The Federal Government Slowly Asserts Itself

The first unraveling in the professionalism agenda came in the form of constitutional attacks on several aspects of the rules that were developed to limit competition and information. The United States Supreme Court, over a twenty year period, removed or significantly limited restrictions on mandatory fee schedules,⁶⁷ advertising,⁶⁸ written and other solicitations,⁶⁹ citizen-

61. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 27 (1980); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1980); MODEL RULES OF PROF'L CONDUCT Rs. 7.2, 7.3 (1983).

62. See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-102 (1980); MODEL RULES OF PROF'L CONDUCT R. 7.5 (1983).

63. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 12 (1980); ABEL, *supra* note 16, at 118-19.

64. See ABEL, *supra* note 16, at 158.

65. See discussion *infra* Section I.B.

66. See discussion *infra* Section I.B.

67. Goldfarb v. Va. State Bar, 421 U.S. 773, 791-93 (1975) (finding state and local bar association minimum fee schedules violate the Sherman Antitrust Act).

68. Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977) (invalidating ban on certain forms of lawyer advertising).

69. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 471 (1988) (striking down ban on targeted-mail solicitation of prospective clients); NAACP v. Button, 371 U.S. 415, 428-29 (1963) (invalidating ban on in-person solicitation of group members); Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 8 (1964); *In re Primus*, 436 U.S. 412, 432, 438-39 (1978) (permitting solicitation by public interest and charitable organizations even if their primary purpose is to generate business leading to statutory attorneys' fee awards). *But see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449, 467-68 (1978) (upholding the ban on in-person solicitation in a personal injury case).

ship and residency requirements,⁷⁰ and group legal services plans.⁷¹ In each instance, the profession vigorously defended its restrictive rules only to be rebuffed by the Court's finding that certain constitutional rights counteracted the profession's restrictions.⁷²

In the past ten years, Congress has begun to regulate the conduct of lawyers appearing before certain federal agencies and in certain federal actions.⁷³ Initially, Congress and various federal agencies sought to enhance competition by protecting the rights of nonlawyers to represent clients before some federal agencies.⁷⁴ The United States Supreme Court has upheld the federal government's right to regulate and control the practice of law before federal agencies and departments.⁷⁵ Specifically, the Court has upheld the right of authorized patent agents, who are not lawyers, to engage in federal patent practice, despite this practice being labeled the practice of law.⁷⁶ This same analysis protects accountants and other professionals en-

70. *In re Griffiths*, 413 U.S. 717, 718, 729 (1973) (finding citizenship requirement violated the Equal Protection Clause); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 288 (1985) (striking down New Hampshire's refusal to admit a Vermont resident who had passed New Hampshire's bar exam); *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 61 (1988) (striking down Virginia rule that permitted Virginia residents licensed out of state to waive into the Virginia bar while requiring nonresidents to take the state bar exam); *Barnard v. Thorstenn*, 489 U.S. 546, 549, 559 (1989) (striking down the Virgin Islands' one year residency requirement).

71. *Button*, 371 U.S. at 428-29 (organization has a constitutionally-protected right of political association to make available attorneys willing to bring civil rights and desegregation cases on behalf of its members); *Bhd. of R.R. Trainmen*, 377 U.S. at 8 (upholding unions' right to refer injured workers and their families to certain lawyers to bring action against the railroads); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 218, 225 (1967) (striking down state ban on closed panel plan in which the union referred injured members' compensation claims to a private lawyer salaried by the union).

72. See, e.g., Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 *FORDHAM L. REV.* 915, 918, 922-26 (2001) (detailing the bar's vigorous opposition to group legal services plans and noting that the ABA and forty state bar associations filed an amicus brief requesting a rehearing of the *Brotherhood of Railroad Trainmen* case). At least eleven states and the ABA filed amicus briefs in *Bates v. State Bar of Arizona* in support of the Arizona ban on lawyer advertising. See *Bates*, 433 U.S. at 352-53 n.*.

73. See generally Coquillette & McMorrow, *supra* note 9 (reviewing a variety of federal agency regulations of lawyer conduct). Coquillette and McMorrow found that "the movement toward federalization has come not through federal articulation of core values. . . . [that remain with the state bars, the ABA, and the American Law Institute but] is shaped by a hundred pokes of legal regulation, . . . an increasing percentage of those pokes comes from federal law." *Id.* at 126.

74. See *id.* at 132.

75. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329, 1341 (2010) (upholding Congressional authority to regulate lawyer conduct in bankruptcy representation); *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963) (ruling specifically that a state may not prohibit "the right to perform the functions within the scope of the federal authority").

76. See *Sperry*, 373 U.S. at 385.

gaged in federal tax practice, enabling them to represent clients in federal tax matters despite them being nonlawyers.⁷⁷

Relying on this authority, the federal regulation of lawyers intensified in the last decade with the passage of the Sarbanes-Oxley Act and the promulgation of accompanying regulations.⁷⁸ In the wake of the Enron scandal, Sarbanes-Oxley sought to enhance disclosure and reporting requirements of lawyers practicing before the Securities and Exchange Commission, creating rules that potentially conflict with a number of the states' professional conduct rules, specifically those involving confidentiality and chain-of-command reporting.⁷⁹ Sarbanes-Oxley is the first Congressional attempt to directly regulate the professional conduct of lawyers.⁸⁰ The organized bar and various segments of the profession have objected to the Congressional mandates and the proposed regulations being promulgated under Sarbanes-Oxley.⁸¹ Several years after Sarbanes-Oxley, Congress continued in a similar vein with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that classifies lawyers in bankruptcy matters as debt relief agencies and imposes certain advertising and disclosure requirements on these lawyers.⁸²

At this point, it is too early to determine how far Congress is willing to go in regulating lawyers appearing before federal agencies or in federal matters, let alone the bar more generally.⁸³ Some commentators have suggested

77. See 31 U.S.C. § 330(a) (2006) (regulating the practice of representatives before the Department of the Treasury); see also C. John Muller IV, *Circular 230: New Rules Governing Practice Before the IRS*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 284, 292-94 (2011) (reviewing the history of nonlawyer practitioners appearing before the IRS and the bar's efforts to preclude them).

78. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. & 18 U.S.C.); Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. pt. 205 (2010).

79. See William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 950 (2005); David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 ST. MARY'S L.J. 873, 906-07 (2003).

80. Beck, *supra* note 79, at 875.

81. See *id.* at 900; Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 579 n.9 (2011); see also Michael S. Greco, Am. Bar Ass'n President-Elect, Address at the National Italian American Foundation Institute for International Law International Legal Conference 3-5 (May 10, 2005), available at <http://www.klgates.com/files/Publication/1748cc29-d738-45ab-ab60-d54eb32193dc/Presentation/PublicationAttachment/458dedbc-644a-4eb9-8c3e-d74c0898ca42/rome.pdf>.

82. 11 U.S.C. § 526(a)(4) (2006); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329, 1338-39 (2010) (upholding the constitutionality of the statute as it applies to and controls attorney conduct in bankruptcy matters).

83. Simon predicts that the trend away from state regulation of the bar will continue due to the growing national and international nature of the practice of law and the fact that

that unless the bar significantly reforms itself, it may not be too long before Congress engages in more far-ranging regulation of the legal profession.⁸⁴ Federal action would be consistent with the reforms being undertaken by the governments in England and Australia, which have asserted far greater governmental control over the legal profession in recent years.⁸⁵

C. Not All Clients Are the Same

Whatever can be said of clients during the first three-quarters of the twentieth century surely cannot be said today.⁸⁶ All clients are clearly not the same or similarly situated. There are glaring differences between the needs and desires of the sophisticated organizational client and the individual or small business consumers of legal services. There are also great differences in the knowledge, experience, and sophistication that each of these clients brings to the client-lawyer relationship. All of this creates striking differences in the abilities of these clients to exert influence and control in the client-lawyer relationship, and therefore, great differences in the power differential in that relationship.⁸⁷ Believing that the profound differences in clients drives the differences in lawyers and their practices, Roger Cramton, like many others, has concluded that “[v]ariation within the profession is best accounted for, not by the type of legal services rendered, but by the

the states do not have a particularly impressive track record regulating lawyer conduct. Simon, *supra* note 79, at 950-51; *see also* Jack P. Sahl, *Forward: The New Era—Quo Vadis?*, 43 AKRON L. REV. 641, 675 (2010) (“The Incorporation Transparency and Law Enforcement Assistance Act [pending in the Senate] would, among other things, enable the Treasury Department ‘to impose suspicious-activity report requirements upon lawyers.’” (quoting Marcia Coyle, *Cough Up the Info: Feds Want More Corporate Data*, NAT. L.J., Jan. 12, 2010, at 4)). But under strong lobbying from the organized bar, Congress amended the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, with the Red Flag Program Clarification Act of 2010, Pub. L. No. 111-319, 124 Stat. 3457, to override FTC regulations, 16 C.F.R. § 681.1 (2010), that would have brought lawyers under the red flag reporting requirements of the 2005 Act and the FTC regulations. In addition, the ABA sued the FTC to prevent enforcement of the regulations. *Am. Bar Ass’n v. Fed. Trade Comm’n*, 671 F. Supp. 2d 64, 66 (D.D.C. 2009). That suit was later dismissed as moot in light of the 2010 Act. *Am. Bar Ass’n v. Fed. Trade Comm’n*, 636 F.3d 641, 643 (D.C. Cir. 2011).

84. *See* Sahl, *supra* note 83, at 674-75 (predicting that unless the bar undertakes certain regulatory reforms, Congress and others outside of the profession will “take action that may affect lawyers negatively”); Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 PROF. LAW., no. 2, 2009 at 11.

85. *See* Davis, *supra* note 84, at 1.

86. The reality is that for most of the twentieth century, clients have not been the same or similarly situated. Instead, the rules were either premised on the myth that they were or that the vast majority of clients were similarly situated.

87. *See* Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 752-53 n.24 (2008); Cramton, *supra* note 17, at 539-40 & nn.18-21.

social and economic character of clients.”⁸⁸ This next section will explore some of these differences.

1. *The Organizational Client*

For a significant segment of the legal marketplace, the client is a sophisticated entity, most often a national, if not multinational, corporation.⁸⁹ The rise of the administrative state and the expanded national and international scope of commercial operations have substantially increased the corporate need for legal representation.⁹⁰ These clients employ lawyers to assist in every conceivable legal matter involving local, state, national, multinational, and international law.⁹¹ Lawyers, by necessity, are involved in all aspects of corporate life.

The days of information asymmetry at the corporate end of the legal market are largely gone forever.⁹² There has been much written about the knowledge asymmetries between client and lawyer,⁹³ and, whatever can be said of the personal or small business consumer of legal services, the same cannot be said of the twenty-first century national or international corporate client.⁹⁴ These corporate clients are represented by corporate counsel, sup-

88. Cramton, *supra* note 17, at 539; *see also* HEINZ & LAUMANN, *supra* note 17, at 321.

89. While this Article refers to the large, sophisticated client at one end of the spectrum and the individual and small business client at the other end, I realize these are to a degree artificial dichotomies, and that clients run the spectrum from one extreme to the other. For discussions sake this dichotomy is useful.

90. *See* Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 99 (2011).

91. Schwarcz, *supra* note 34, at 498-99. Steven Schwarcz provides the following example:

“[I]n its representation of J.P. Morgan and Société Générale [in connection with the joint acquisition of Seagrams Wine and Spirits from Vivendi by Group Pernod Ricard and Diageo PLC, the] Jones Day [law firm] counseled its clients on governing law in eight jurisdictions, including the United States, Australia, France, Japan, and Spain.”

Id. at 507 (alterations in original) (quoting LARRY SMITH, *INSIDE/OUTSIDE: HOW BUSINESSES BUY LEGAL SERVICES* 78 (2001)).

92. *See* Wilkins, *supra* note 31, at 2080-82; Simmons & Dinnage, *supra* note 90, at 95; Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 439 (2001).

93. *See* Joseph R. Julin, *The Legal Profession: Education and Entry*, in *REGULATING THE PROFESSIONS* 204 (Roger D. Blair & Stephen Rubin eds., 1980); Larry E. Ribstein, *Lawyers As Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 304-08 (2004); Barton, *supra* note 92, at 437-38 & n.26.

94. *See* Quintin Johnstone, *An Overview of the Legal Profession in the United States, How That Profession Recently Has Been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 766-68 (2008); Barton, *supra* note 92, at 439 (“[C]orporations[] are also becoming increasingly sophisticated and knowledgeable through the use of in-house

ported by a highly-qualified legal department.⁹⁵ For the most part, corporate counsel has exclusive or at least significant control over the purchase of outside legal assistance.⁹⁶ As purchasers, they are knowledgeable and have a level of sophistication in the legal marketplace that is unmatched at any time in history.⁹⁷ The corporate client, through corporate counsel, knows the nature of the legal matters for which they are engaging outside counsel, what they are willing to pay, and the services they expect of outside counsel in return.⁹⁸ When they are dissatisfied with the legal services they receive, they have ample means of protecting themselves.⁹⁹ This change has been so profound that Professors Galanter and Henderson have observed a significant transfer of power from the large law firm to corporate counsel.¹⁰⁰

Corporate counsel are under considerable pressure to enhance the efficiencies of their departments, to reduce costs, and by doing so, to increase corporate profitability, all the while managing an increasingly complex legal and regulatory environment on a global scale.¹⁰¹ Like all sectors of cor-

counsel and information clearinghouses.”); Wilkins, *supra* note 31, at 2081 (citing General Electric’s Ben Heineman as “the symbol of the modern general counsel” and the legal department he built as being responsible for altering the relationship between GE and its outside lawyers).

95. See NICK SMEDLEY, LAW CENTRES FED’N, REVIEW OF THE REGULATION OF CORPORATE LEGAL WORK 24 (2009), available at http://www.lawcentres.org.uk/uploads/Review_of_the_Regulation_of_Corporate_Legal_Work_03.09_.pdf; Schwarcz, *supra* note 34, at 508 (noting that until the advent of electronic research and the internet, large law firms with their extensive and expensive libraries were the sole purveyors of legal knowledge; this is not the case today, corporate law departments have access to the same information resources as most law firms).

96. See Simmons & Dinnage, *supra* note 90, at 114; Brad Blickstein, “Mr. Inside . . . Mr. Outside”: *Getting the Right Message to General Counsel*, N.J. LAW., Dec. 6, 2004, at A3; ABEL, *supra* note 16, at 170.

97. See Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1659 (2011); SMEDLEY, *supra* note 95, at 13; Simmons & Dinnage, *supra* note 90, at 106-07.

98. See HEINZ ET AL., *supra* note 36, at 297-99; Wilkins, *supra* note 31, at 2081; Ribstein, *supra* note 97, at 1659.

99. See SMEDLEY, *supra* note 95, at 13 (“If they are unhappy with the service they receive, they will negotiate a reduction in the price, they will take their custom to a rival firm, they will sue the firm—or all three.”).

100. Galanter & Henderson, *supra* note 33, at 1912; see also HEINZ ET AL., *supra* note 36, at 297 (“A key factor in weakening the ties between law firms and their clients was the changing role of corporate inside counsel.”); Wilkins, *supra* note 31, at 2084 (“[I]t is fair to say that the general counsel has become the client of the outside law firm.”); Simmons & Dinnage, *supra* note 90, at 98, 109; William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011, 3:40 AM), http://www.abajournal.com/magazine/article/paradigm_shift.

101. See EVERSLEDs, LAW FIRM OF THE 21ST CENTURY: THE CLIENTS’ REVOLUTION 4 (2010), available at http://www.abajournal.com/files/Clients_Revolution.pdf (“The vast majority (90%) of General Counsel said they were under internal pressure from their Finance

porate management, corporate counsel are called upon to decide whether to buy legal services from outside vendors, in most instances law firms, or to retain work in-house.¹⁰² In recent years, they are relying increasingly on their in-house legal departments to reduce costs, but also to bring a more diverse, problem-solving methodology to addressing legal and business issues.¹⁰³ This has led to a substantial expansion of many corporate law departments, the retention of much more legal work in-house, and to the growing complexity of that work.¹⁰⁴ Corporate counsel are also aware that they perform an ancillary, albeit important, function within their organization.¹⁰⁵ They know that they are not a source of revenue, but instead are a revenue drain. As a result, they know that they must derive greater value from their in-house legal departments and their outside counsel.

Corporate clients are seeking highly sophisticated, personalized, national and international, multidimensional expertise from outside counsel when needed, while on the other hand, they are demanding that routine or commoditized services be provided in the least costly, most efficient manner.¹⁰⁶ They are pushing for greater services in certain areas and reduced services in others. Unlike in the past, these consumers have an ability to

Directors or equivalent to provide better value, efficiency and cost reductions.”); Hadfield, *supra* note 53, at 1729 (“Corporate clients have in recent years mounted significant efforts to reduce the costs of legal services with powerful general counsel moving more and more legal work in-house or offshore, deploying more technology to manage legal information, document production and review, and experimenting with flat fees, task-based billing, auctions for legal work, billing audits, and more aggressive service contracts to reign in bills from outside counsel.”); Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2138-39 (2010); RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 175 (2010); Henderson & Zahorsky, *supra* note 100.

102. See Schwarcz, *supra* note 34, at 498-99. Interestingly, corporate clients, like individual clients, when faced with cost prohibitive or at least inhibiting legal services, tend to handle the matters themselves, although with very different levels of skills and consequences. See *infra* Subsection I.C.2 (discussing individual client responses to high costs of legal services).

103. See Schwarcz, *supra* note 34, at 498-99; Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 69 *TENN. L. REV.* 179, 199-204 (2001); Henderson & Zahorsky, *supra* note 100 (“No longer viewed as purveyors of the law, in-house lawyers are problem solvers and key business strategists.”).

104. See Schwarcz, *supra* note 34, at 519-20 (“[M]ost general counsel respondents viewed in-house lawyers as performing as high quality work as outside lawyers. Only half of outside lawyer respondents believed they are more qualified than in-house counsel.” (footnote omitted)); EVERSHEDS, *supra* note 101, at 4, 6.

105. See Regan & Heenan, *supra* note 101, at 2167 (“[L]egal departments are regarded as cost centers or support functions within the larger corporation, as opposed to activities that constitute the core of a company’s business.”); Simmons & Dinnage, *supra* note 90, at 96.

106. See Ribstein, *supra* note 97, at 1659-60.

shop in a very competitive legal marketplace and they are doing so.¹⁰⁷ They are increasingly coming to realize that it is a buyers-market.¹⁰⁸ The historical, long-standing connections between corporate clients and their lawyers are just that, history.¹⁰⁹ Corporate clients, like never before, feel the pressures to shop for legal services and to readily shift from one provider to another when they can obtain competitive and pricing advantages.¹¹⁰ As a result, they seek outside assistance from a more diverse group of legal services providers.¹¹¹ As buyers, they are in a greater position to dictate the terms of representation with outside law firms and other professional services providers.¹¹² These clients are emerging as agents of change, forcing suppliers of legal services to comport with their needs and demands or the clients will obtain services from others who are willing to do so.¹¹³

Corporate clients increasingly speak of the need for outside counsel to understand their business and to make decisions with the goals and strategies of that business in mind.¹¹⁴ They are looking for counsel to add value to the corporation, not just provide one-off legal solutions.¹¹⁵ They are also

107. See Harry Trueheart, *The Gravity of Market Forces: A Global Firms Leader's Take on the Trends That Will Reshape Law Firms*, LAW PRAC., Jan.-Feb. 2010, at 52, 52-53, available at http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is1_pg52.html; Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902-03 (1990).

108. See Miller, *supra* note 30, at 1114; SUSSKIND, *supra* note 101, at 175.

109. In an effort to promote diversity among its outside lawyers, Shell Oil, after very short interviews with all of its outside law firms, dropped dozens of firms with long standing relationships with the firm, including one that had its offices at One Shell Plaza. See Andrew Bruck & Andrew Canter, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2090 (2008).

110. See Miller, *supra* note 30, at 1114; Henderson & Zahorsky, *supra* note 100.

111. See Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 I/S J.L. & POL'Y INFO. SOC'Y 1, 33-34 (2012).

112. See, e.g., Bruck & Canter, *supra* note 109, at 2108 (recounting how Mark Chandler, general counsel for Cisco Systems and an advocate for alternative billing methodologies, consolidated Cisco's legal work to two law firms and within five years achieved a twenty-five percent drop in total revenue spent on legal matters).

113. See EVERSHEDES, *supra* note 101, at 4; Bruck & Canter, *supra* note 109, at 2090 (reporting on Catherine Lamboley's, general counsel for Shell Oil, mandate that outside counsel maintain a diverse work force and dropping dozens of firms with long standing relations with the company when it was determined that these firms did not have a diverse work force); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 381 (1985).

114. See Hadfield, *supra* note 111, at 2-5, 33-36 (providing numerous examples of general counsel and other corporate officers expressing their frustration with outside counsel); Blickstein, *supra* note 96, at A3.

115. See Simmons & Dinnage, *supra* note 90, at 147-48; Hadfield, *supra* note 111, at 33; Ed Poll, *Cost or Value: Which Is More Important to Corporate Counsel*, MICH. LAW. WKLY., Feb. 16, 2009, available at <http://milawyersweekly.com/news/2009/02/16/cost-or-value-which-is-more-important-to-corporate-counsel063/>.

looking for outside counsel to assume some of the risk inherent in certain types of representation, just as they expect many of their other outside providers of goods and services to assume certain risks.¹¹⁶ All the while, they are seeking greater certainty and stability in legal costs.¹¹⁷

Large corporations face a plethora of legal issues, both nationally and internationally, and they need lawyers who can provide representation on that scope.¹¹⁸ Client demand has fueled the growth of national and international law firms with offices scattered across the country and around the globe.¹¹⁹ These clients require legal assistance wherever the legal issues may arise, and they do not want a duplication of services or providers, which only increases the overall cost of those services.

Corporations have long employed a multifaceted approach to problem solving, bringing together a variety of professionals from within and outside of the corporation to address the needs of the corporation.¹²⁰ They are very comfortable working with a variety of professionals. They are demanding the same from their outside providers of legal services.¹²¹ They want one-

116. See Wilkins, *supra* note 31, at 2106 (noting that one of the reasons corporations are consolidating the number of outside law firms is to force the firms “to move toward fixed fees and other similar compensation systems in which both the costs and benefits of representation are shared by both parties”). The move to fixed annual or project budgets shifts some of the cost and efficiency risk from the client to the lawyers just as numerous other fixed bid mechanisms shift this same risk from the buyer to the seller to deliver the product within budget or risk losing on the project. Hadfield, *supra* note 111, at 34-35; see also Blane Prescott, *The Evolving Economy and Four Resulting Trends for the Legal Profession*, PRAC. INNOVATIONS, Mar. 2009, at 1, 7, available at <http://store.westlaw.com/signup/newsletters/practice-innovations/2009-mar/default.aspx> (predicting that more and more legal work will be done on a project pricing model similar to a growing body of legal work throughout Europe and Asia).

117. See Prescott, *supra* note 116, at 6-7 (“Clients tend to want more predictability and better alignment of incentives . . .”).

118. See, e.g., Schwarcz, *supra* note 34, at 498-99; Hadfield, *supra* note 111, at 20-21, 36.

119. See Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 The Answer, An Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 726-29 (1995); see also Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 881 n.22 (2010). But see GALANTER & PALAY, *supra* note 22, at 88 (attributing half of this growth to the need for these law firms to leverage associates to support a growing number of partners).

120. See Hadfield, *supra* note 111, at 35-36 (citing Cisco’s General Counsel, Mark Chandler, on the “difficulty finding a litigation team that can integrate expertise across multiple areas—litigation, finance, communications—instead of leaving it to him to integrate these cross-cutting considerations”).

121. See *id.* at 36.

stop services whenever they are available and to present the best and most efficient solution to the corporation's needs.¹²²

Corporate clients are one of the leading forces pushing for the outsourcing of legal work. Corporations are very comfortable with outsourcing in all facets of organizational operations and in the production and delivery of goods.¹²³ They are questioning why outsourcing cannot be used to reduce the cost of legal services. Like most other aspects of corporate industrial life, these clients are coming to realize that legal products can be decomposed and sent to the least costly and most efficient provider.¹²⁴ They are seeking the unbundling and outsourcing of legal work from their internal corporate legal departments and their outside law firms, all in the effort to drive down costs.¹²⁵

Corporate legal departments are also beginning to explore various forms of technology to relieve some of their dependence on outside counsel, create greater efficiencies, and reduce costs.¹²⁶ Corporate law departments are increasingly looking for ways to automate legal work.¹²⁷ Artificial intelligence has the potential to be very disruptive to the practice of law as we know it.¹²⁸ Not all legal work requires the personal engagement of a highly

122. See *id.* at 48 (“[T]he deepened complexity and novelty of multiple business decisions . . . calls for more collaborative participation in problem-solving from a wide spectrum of experts.”).

123. See Regan & Heenan, *supra* note 101, at 2140 (providing examples of outsourcing of “more complex and knowledge-intensive activities” in the aerospace industry to “significantly reduce[] costs”).

124. See *id.* at 2148-53 (providing examples of the decomposition of legal work and outsourcing); SUSSKIND, *supra* note 101, at 42-52.

125. See EVERSHEDES, *supra* note 101, at 6; Heather Timmons, *Cost-Conscious Companies Are Outsourcing Legal Work*, N.Y. TIMES, Aug. 5, 2010, at B1.

126. See EVERSHEDES, *supra* note 101, at 6; Schwarcz, *supra* note 34, at 516 & nn.139-40 (providing survey evidence supporting the increased reliance on technology by corporate legal departments to reduce reliance on outside counsel and cut cost); John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1.

127. For a presentation on how Cisco devised an automated nondisclosure agreement builder and how this automated contract builder is being marketed, see Gabrielle Walker, Graham Allan & Joe Collins, *NDA—Streamlining the Process Using Technology and Smart Negotiation*, CADENCE DESIGN SYS., INC. & CISCO SYS., INC. (2008), <http://www.acc.com/chapters/sfbay/upload/IP%20NDA%20Program%20Materials%205-21-08.pdf>; see also SUSSKIND, *supra* note 101, at 100-05.

128. Susskind predicts:

The systems that are increasingly causing a stir and attracting greatest attention among clients are not conventional sustaining uses of IT that bolster the business of law firms; instead, they are applications of technology that challenge the old ways and, in doing so, bring great cost savings and new imaginative ways of managing risk.

SUSSKIND, *supra* note 101, at 98. *But see* Darryl Ross Mountain, *An Update and Reconsideration of Chrissy Burns’ ‘Online Legal Services—A Revolution that Failed?’*, 1 EUR. J.L. &

experienced specialist.¹²⁹ All lawyers recognize that there are many occasions where much can be done by answering a limited universe of questions. Checklists are common in many areas of the practice of law. Automating these checklists has already occurred in some practice areas. There are document assembly systems that take the user through a fairly complex decision tree and when they get to the end, the software produces a legal document, sidestepping the need for lawyer involvement.¹³⁰ There can be little doubt that as technology improves and as the demand for less expensive legal solutions grows, there will be enhanced ability and motivation toward the increased use of legal automation.

There are reports of social networking and other peer-to-peer networking practices creeping into corporate law departments.¹³¹ Peer-to-peer client collaboration through the use of one or another form of social networking, often referred to collectively as Web 2.0, could greatly enhance the client's ability to resolve legal issues without reliance on private practice lawyers.¹³² With enhanced client-to-client communication, corporate clients will identify common issues and share common solutions to these issues, whether this occurs within certain industries or across industries but with related issues. Many issues do not require the proverbial "reinventing of the wheel."

2. Individual and Small Business Clients

At the other end of the spectrum is the individual and small business client. For this client, cost is often a prohibitive or limiting impediment to obtaining legal services.¹³³ There is considerable research and literature

TECH. 1, 1-6 (2010), available at <http://ejlt.org/article/view/48/71> (citing a study conducted by Chrissy Burns, an Australian lawyer, indicating that the development of this technology might be more difficult than initially anticipated). This does not mean that it will not occur; it just means that it will take longer and probably be more expensive than originally predicted. See *id.*

129. See SUSSKIND, *supra* note 101, at 90 ("[M]any lawyers exaggerate the extent to which their performance depends on deep expertise. . . . Lawyers often overstate the extent to which the content of their work is creative, strategic, and novel.").

130. See Hadfield, *supra* note 53, at 1724-25 (giving the example of Cisco Systems development of software that enables engineers and executives to prepare their own nondisclosure agreements without consulting a lawyer unless the system flags an issue; then, and only then, is the matter referred to the legal department); SUSSKIND, *supra* note 101, at 100-05 (reviewing British law firms' use of automation).

131. See SUSSKIND, *supra* note 101, at 125-36 (exploring the growth of open-source software and closed legal communities).

132. See SUSSKIND, *supra* note 101, at 73-83; Hadfield, *supra* note 111, at 15.

133. See Johnstone, *supra* note 94, at 770-74, 790-91; Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *FORDHAM L. REV.* 719, 721 (2001) ("[T]he majority of Americans live on quite modest incomes and lack the discretionary spending power necessary to purchase expensive legal services in today's market."); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can*

demonstrating that the legal profession has not met the needs of middle- and lower-income clients.¹³⁴ After reviewing numerous studies on the legal needs of middle- and lower-income Americans, George Harris and Derek Foran concluded: “While difficult to compare because of their different methods and focus, the bar association legal needs studies confirm as a whole what has long been assumed. A significant number of Americans with legal needs are not getting professional assistance.”¹³⁵

The profession has repeatedly called for greater participation in pro bono activities in a vain attempt to provide greater representation to this underserved population.¹³⁶ Pro bono, while well meaning, cannot begin to address the lack of access to legal services.¹³⁷ These clients need highly competent and inexpensive, if not free, legal representation.¹³⁸ As Roger Cramton, not surprisingly, concluded over seventeen years ago, these clients “want legal services made available to them at reasonable cost by lawyers who are competent, diligent, trustworthy, and loyal.”¹³⁹

The individual and small business client contrasts sharply with the sophisticated entity client. The individual or small business client rarely has much experience with and no training in legal matters.¹⁴⁰ They tend not to

Learn from the Medical Profession's Shift to a Corporate Paradigm, 70 *FORDHAM L. REV.* 775, 796-98 (2001) (referring to several studies and the decline in the percentage of lawyer income derived from individuals to argue that the business sector has been increasingly drawing legal work away from middle- and low-income clients creating a further upward pull on the cost of legal services). *But see* Herbert M. Kritzer, *Examining the Real Demand for Legal Services*, 37 *FORDHAM URB. L.J.* 255 (2010) (questioning the validity of many of the legal needs assessment studies).

134. *See* ROY W. REESE & CAROLYN A. ELDRED, *LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY* (1994); *STANDING COMM. ON THE DELIVERY OF LEGAL SERVS.*, ABA, *RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT* (1994); Carle, *supra* note 133, at 720-26 (reviewing a number of studies that all lead to the conclusion that the legal profession is not adequately meeting the legal needs of middle- and low-income clients). *But see* Harris & Foran, *supra* note 133, at 790 (“[S]o-called ‘legal need’ studies are by no means above criticism and are at best imprecise. . . . Some of the numbers emerging from those studies are quite startling.”).

135. Harris & Foran, *supra* note 133, at 795. *But see* Kritzer, *supra* note 133 (questioning the validity of these studies).

136. *See* Cramton, *supra* note 17, at 581-87 (reviewing the history of the professions uneven and fractious debate of pro bono and whether it should be mandatory).

137. *See* Nathan M. Crystal, *Core Values: False and True*, 70 *FORDHAM L. REV.* 747, 762-63 (2001) (citing recent surveys and a New York Times article demonstrating that the bar does not provide much pro bono services).

138. *See* Cramton, *supra* note 17, at 585-86 (questioning the competence of a bond lawyer to represent poor people).

139. *Id.* at 547.

140. *See* Ribstein, *supra* note 93, at 305; Wald, *supra* note 87, at 751-55.

be repeat users of legal services, at least on a regular basis.¹⁴¹ In most instances they are not in a position to evaluate the quality of the legal services being provided, let alone what services are needed. Often they do not even realize that they need the assistance of a lawyer.¹⁴² Researchers have found that when they realized they had a legal problem, the most frequent response was “to deal with the matter on their own,” do nothing, or rely on a nonlawyer third party.¹⁴³ For the most part, low-income and middle-income Americans do not rely on lawyers to meet their legal assistance needs.¹⁴⁴ For this client, the knowledge and information asymmetry is a very real concern.¹⁴⁵

Given their propensity to handle legal matters on their own, it is not surprising that individual and small business clients are willing to embrace many of the self-help, technology-based products that have entered the legal marketplace in the past ten years.¹⁴⁶ They do so out of necessity. These products are less expensive, or at least perceived to be, than traditional representation. Commentators and practitioners have made a fairly convincing argument that not all legal practice requires unique solutions on each occasion.¹⁴⁷ At the same time, clients have made it clear that they are not willing to pay for or cannot afford unique one-off solutions in certain matters. For many routine legal matters, automation is probably inevitable. It is hard to see how some aspects of the practice of law are any different than other

141. See Wald, *supra* note 87, at 752-53 n.24 (noting that generally lawyers representing individuals in solo or small practices are in a position to exert more power in the client-lawyer relationship than their large firm counterparts).

142. See Harris & Foran, *supra* note 133, at 802 (“Unlike high-wealth individuals and corporations, middle-class consumers often simply do not recognize their legal needs or, if recognized, do not know how to go about meeting them.”).

143. See Carle, *supra* note 133, at 723-24; REESE & ELDRED, *supra* note 134, at 20-26 (noting that 24% of low-income and 23% of moderate-income households handled the matter on their own, 38% of low-income and 26% of moderate-income households took no action at all, and 8% and 12% relied on a third-party non-legal provider); see also Henderson & Zahorsky, *supra* note 100 (quoting Fred Ury, former president of the Connecticut Bar Association, “80 to 85 percent of divorces have a self-represented party because most families can’t afford to hire one lawyer, let alone two”).

144. See REESE & ELDRED, *supra* note 134, at 20 (finding that only 29% of low-income and 38% of middle-income households relied on lawyers and the judicial system to meet their legal needs).

145. See Barton, *supra* note 92, at 440 (“[T]here are still substantial numbers of . . . prospective clients who lack the knowledge to successfully select a lawyer, let alone oversee legal work.”). *But see* Cramton, *supra* note 17, at 554-59 (questioning the information and knowledge asymmetry argument); Ribstein, *supra* note 93, at 304-08 (questioning whether regulatory rules were the best means of addressing information asymmetry issues).

146. One provider, LegalZoom, claimed to have assisted over one million customers as of 2011. See LEGALZOOM, <http://www.legalzoom.com/index1h.html> (last visited May 15, 2012).

147. See SUSSKIND, *supra* note 101, at 89-91.

areas of manufacturing which have seen the demise of handcrafted, individually-made items.

There may be more than just cost involved in the failure of individual and small business clients to seek the assistance of lawyers in resolving their legal needs. These clients also may be intimidated by lawyers and the legal system. In one study, low-income and moderate-income households relied on non-legal third parties for assistance 13% and 22% of the time, as compared to relying on lawyers and the legal system 29% and 39% of the time respectively.¹⁴⁸ Whatever can be said of these findings, individual and small business clients need greater expert legal assistance than they are currently obtaining from the legal profession.

D. Not All Lawyers Are the Same

Just as all clients are not the same, not all lawyers and practice organizations are the same.¹⁴⁹ The small to medium size law office is very different from the international law firm with hundreds, if not thousands, of lawyers spread all over the globe. The practices of these lawyers and the business models employed portray few commonalities.¹⁵⁰ Heinz and Laumann, in their seminal study of Chicago lawyers in the mid-1970s, found profound differences in lawyers and their practices leading them to conclude that the profession existed in two very different “hemispheres.”¹⁵¹ They “advanced the thesis that much of the differentiation within the legal profession is secondary to one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals.”¹⁵² After their study, they concluded:

The two kinds of law practice are the two hemispheres of the profession. Most lawyers reside exclusively in one hemisphere or the other and seldom, if ever, cross the equator.¹⁵³

....

The two sectors of the legal profession thus include different lawyers, with different social origins, who were trained at different law schools, serve different sorts of clients, practice in different office environments, are differentially likely to engage in litigation, litigate (when and if they litigate) in different forums, have somewhat

148. See REESE & ELDRED, *supra* note 134, at 22.

149. See Jones & Manning, *supra* note 43, at 1174-76 (“By the end of the twentieth century, the former idealized image of the ‘general practitioner’ no longer reflected the reality of American law practice—particularly in the country’s major commercial centers.”).

150. See generally HEINZ & LAUMANN, *supra* note 17; HEINZ ET AL., *supra* note 36; GALANTER & PALAY, *supra* note 22; Galanter & Henderson, *supra* note 33.

151. HEINZ & LAUMANN, *supra* note 17, at 319.

152. *Id.*

153. *Id.*

different values, associate with different circles of acquaintances, and rest their claims to professionalism on different sorts of social power. . . . Only in the most formal of senses, then, do the two types of lawyers constitute one profession.¹⁵⁴

The evidence since 1975, both anecdotal and empirical, further reinforces Heinz and Laumann's conclusions.¹⁵⁵ In the mid 1990s, after a second study of Chicago lawyers, they concluded that "[w]ithin each of the broad parts, the fields [hemispheres] are now more distinct, more clearly separated than they were 20 years ago."¹⁵⁶

Lawyer incomes, practice areas, employers, and practice business models reveal a very complex and diverse profession with some similarities but also glaring differences. Most recent data on lawyer salaries reveals a bimodal distribution at the entry level and a skewed spread as one progresses through the profession.¹⁵⁷ Likewise, the variety of practice and business models reveals lawyering across the profession that has very little in common and, in fact, exhibits very significant differences. This section will discuss some of the more pronounced differences in the law practices of those lawyers in large, private-practice firms that predominantly represent large organizational clients and those in much smaller operations who represent individuals and small business entities. This discussion demonstrates that the state of law practice at both ends of the spectrum is somewhat precarious, is facing competition and challenges from outside the profession, and is being stifled by rules that hinder innovation and competition.

154. *Id.* at 384.

155. See generally Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345 (1994) (exploring the different roles that exist within the legal profession).

156. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 773 (1998).

157. See *Salary Distribution Curve for the Class of 2009 Shows Relatively Few Salaries Were Close to the Mean*, NAT'L ASS'N FOR L. PLACEMENT (July 2010), <http://www.nalp.org/startingsalarydistributionclassof2009> (revealing that of the class of 2009 who reported salaries, 42% were earning between \$40,000 and \$65,000, while 25% were earning approximately \$160,000); see also ABEL, *supra* note 16, at 206-07 (providing evidence that this stratification has been growing over the past fifty years); JEFFREY A. LOWE, MAJOR, LINDSEY & AFR., 2010 PARTNERS COMPENSATION SURVEY app. 4 (2010), available at <http://www.mlglobal.com/PartnerCompSurvey/2010/FullReport.pdf>; HEINZ ET AL., *supra* note 36, at 291 (reporting that between 1975 and 1995, the median real income of partners and associates in large firms grew substantially while the real median income of partners in small firms declined and that of solo practitioners declined from \$99,159 to \$55,000 leading to the conclusion that "the income gap between lawyers in large firms and those in small firms and solo practice widened considerably"); Nelson, *supra* note 155, at 373 ("The legal profession historically has had the highest levels of income inequality among the leading professions.").

1. *Big Law—the Large Corporate Law Firms*

Much has been written about those lawyers who work in large private-practice law firms and who represent national and international organizational clients.¹⁵⁸ In 2010, the largest 250 U.S. law firms employed almost 125,000 lawyers, with an average firm size of 497.¹⁵⁹ The ten largest firms employed over 22,000 lawyers, averaging approximately 2,200 lawyers.¹⁶⁰ The largest 100 firms averaged 859 lawyers with an average of almost eleven offices in the United States and six offices outside the country.¹⁶¹ These firms increasingly take a larger portion of the income pie as compared to lawyers representing individuals and small businesses.¹⁶² The lawyers working in these firms earned significantly more than their smaller firm counterparts.¹⁶³

In many instances, these large law firms have adopted management structures that are more similar to their corporate clients than the traditional law partnership.¹⁶⁴ There has been a move toward more centralized management and decision-making, a significant increase in lawyer employees

158. See generally HEINZ ET AL., *supra* note 36; HEINZ & LAUMANN, *supra* note 17; GALANTER & PALAY, *supra* note 22; Galanter & Henderson, *supra* note 33; Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1.

159. See Brown, *supra* note 28, at S3 (noting this is even after the economic downturn and loss of approximately 10,000 law jobs at these firms in the past three years).

160. See *id.*

161. Of the group of 100 largest firms, almost a quarter did not maintain a foreign office while twenty percent had ten or more foreign offices. See *The NJL 250: Branch Offices*, NAT'L L.J. (Apr. 2, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?germane=1202489565842&id=1202547389260>. On the spread of U.S. law firms into the global market, see Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1093 (2000). See also U.S. INT'L TRADE COMM'N, RECENT TRENDS IN U.S. SERVICES TRADE: 2011 ANNUAL REPORT 7-4 (2011), available at <http://www.usitc.gov/publications/332/pub4243.pdf> [hereinafter RECENT TRENDS 2011] (noting that 91 of the 100 highest grossing law firms were from the United States and England).

162. See HEINZ ET AL., *supra* note 36, at 46-47, 100 (concluding that the amount of lawyer time devoted to large organizations is more than twice that devoted to individual clients and, as a result, lawyers in firms of more than 100 increased their percent of total income from 9% in 1975 to 37% in 1995, and when combined with firms of more than thirty lawyers, their portion rose from 22% to 47%, while lawyers in firms of fewer than thirty declined from 43% to 31% and solo practitioners declined from 19% to 10%); Galanter & Henderson, *supra* note 33, at 1870-71.

163. See HEINZ ET AL., *supra* note 36, at 159-74, 291.

164. See *id.* at 109-14, 293; cf. Robert L. Nelson, *Of Tournaments and Transformations: Explaining the Growth of Large Law Firms*, 1992 WIS. L. REV. 733, 745-46 (reviewing GALANTER & PALAY, *supra* note 22) (noting that “corporate law firms began to mimic the aggressive entrepreneurialism of the corporate and financial actors they represented” and as a result took on new managerial identities).

who will never obtain an ownership stake in the enterprise, and a reduction in owner liability.¹⁶⁵ Most of these firms are highly compartmentalized, divided into practice groups, specialties, or other subgroup divisions.¹⁶⁶ Specialization is an entrenched fact of life in most, if not all, large law firms.¹⁶⁷ In most instances, assignments will depend on what specialties are required to best serve the client regardless of where the specialist may be located.

As little as thirty to forty years ago, it was unusual for law firms to have offices in more than one city, with a few occupying offices in a couple of cities, most often within a limited territory (for example, one state, or the east or west coast).¹⁶⁸ National and international expansion of commercial operations coupled with the dramatic rise of the industrial regulatory regimes at the state, national, and international level have greatly increased the corporate demand for legal representation.¹⁶⁹ The law firms that represent large corporate entities have grown to meet this demand with offices scattered all over the country and around the world.¹⁷⁰

Advances in communication and information technology have greatly facilitated the growth of national and global law practices and national and multinational law firms. These technologies permit a firm to exploit massive amounts of information and to access it anywhere within the organization.¹⁷¹ Location is no longer a hindrance to group efforts; documents can be built simultaneously from multiple global locations, and firm-wide expertise is instantly available regardless of where the client or the experts are located. Interestingly, technology has been both a significant leveler and a further stratifier of the legal profession. While technology has enabled small and regional firm lawyers to compete in certain areas with large firms,¹⁷² it has also lead to a pronounced expansion of the size, the geographical reach, and enhanced specialization of and within the multinational firms.¹⁷³

165. See HEINZ ET AL., *supra* note 36, at 294-95; Galanter & Henderson, *supra* note 33, at 1875-76.

166. See HEINZ ET AL., *supra* note 36, at 37-38.

167. See *id.* (finding that specialization had increased significantly between 1975 and 1995).

168. See Galanter & Henderson, *supra* note 33, at 1882.

169. See GALANTER & PALAY, *supra* note 22, at 38-45.

170. See CARSON, *supra* note 20, at 19 (finding that in 2000, 78% of firms with more than 100 lawyers had offices in multiple states).

171. The internet, cloud sharing, multi-user access to documents, and the ability to connect all to of the organization's computer infrastructure mean that all members of the firm have access to all of the intellectual property of the firm. See SUSSKIND, *supra* note 101, at 125-36.

172. See Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 *FORDHAM L. REV.* 847, 853 (2001).

173. See HEINZ ET AL., *supra* note 36, at 37-38.

As the large law firms have grown and expanded, so has the level of competition for clients and the best legal talent.¹⁷⁴ Clients understand that there is no shortage of highly qualified and very talented lawyers, and they are willing to shop in the legal market like never before. Likewise, firms understand the value of a lawyer with a defined client base to the overall profitability of all of the partners in the firm. These two components have created a fiercely competitive legal marketplace.

Reportedly there was a time in the not too distant past when competition for clients at the corporate end of practice, while it may have existed, was hardly discussed.¹⁷⁵ Instead much reference was made to client loyalty and large firm stability.¹⁷⁶ To a significant extent, the rules of the profession were predicated, in part, on these two beliefs.¹⁷⁷ Regardless of the historical reality of client loyalty and firm stability, the same cannot be said of the current environment.

The competition for and the movement of lawyers in large law firms has led several authors to refer to this as an “era of ‘free agency’” and for one court to note the “‘revolving door’” of partner departures is a “‘modern-day law firm fixture.’”¹⁷⁸ Neil Dilloff, a partner at DLA Piper, notes that:

In many firms, partners who have been with the firm for five years or less likely comprise forty to fifty percent of the entire partner population. It is no longer rare for partners to make multiple moves from one law firm to another, totaling as many as seven moves in their careers. The days of a partner joining a firm and staying forever are not gone, but they are dwindling rapidly.¹⁷⁹

From this rise in competition for and movement of lawyers, Dilloff and others have concluded that there has been a decline in large law firm

174. See Dilloff, *supra* note 30, at 348-49; Wilkins, *supra* note 31, at 2082-83.

175. See Wilkins, *supra* note 31, at 2077 (“As a result, companies and their principal law firms developed deep and enduring relationships that extended to every aspect of the company’s business. Until well into the 1960s, it was not uncommon, for example, for a single law firm to handle all of the legal business for its major clients Indeed, many law firms were located in the same buildings that housed the offices of their primary client, typically a bank, and it was not at all unusual for these long-standing business ties to be cemented through personal friendships and even marriages.”).

176. See *id.*; Dilloff, *supra* note 30, at 348-49; Miller, *supra* note 30, at 1113.

177. Prior to 2009, the Model Rules did not permit screening. Compare MODEL RULES OF PROF’L CONDUCT R. 1.10 (1983), with MODEL RULES OF PROF’L CONDUCT R. 1.10 (2009). Rule 5.6 prohibits non-compete agreements based on the client’s right to counsel of choice and to a lawyer’s professional autonomy, but also reflects a time when lawyers did not readily switch firms. MODEL RULES OF PROF’L CONDUCT R. 5.6 (2010).

178. Dilloff, *supra* note 30, at 349 (quoting Shannon Henson, *Lateral Market Popping Again Following Dip*, LAW360, June 1, 2010, <http://topnews.law360.com/articles/172051>; Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1180 (N.Y. 1995)); see Jack P. Sahl, *Thinking About Leaving? The Ethics of Departing One Firm for Another*, 19 PROF. LAW. 2, 2 (2008) (noting that lawyer movement is common and likely to continue for several reasons); Galanter & Henderson, *supra* note 33, at 1899-903.

179. Dilloff, *supra* note 30, at 349; see also Miller, *supra* note 30, at 1117.

collegiality, with these firms becoming less stable and partners becoming less trusting of each other.¹⁸⁰

Furthermore, this movement inhibits the development of intra-firm financial and personal capital. The professional rules prohibit binding of lawyers to their firms through noncompete agreements.¹⁸¹ Partners are reluctant to invest in the firm when they or other precious assets can leave at any time for a competing firm.¹⁸²

The advent of national law firms has meant that the competition for clients, which was once regional, is now national.¹⁸³ Today, every major market is serviced by most, if not all, of the numerous national law firms.¹⁸⁴ Local or regional loyalty plays no role in selection of representation. The national law firms have offices spread all over the country and can provide whatever service is needed in whichever market the client desires.

Just as there is stiff competition nationally, large national and multinational U.S. law firms are facing competition from non-U.S. law firms worldwide.¹⁸⁵ The growth of international global law firms has created significant competition among themselves for a defined set of global clients.¹⁸⁶ Moreover, these firms have very different national origins with different accompanying professional rules and regulations. With the growth in communications and information technology, there is not much to stop many of

180. See Dilloff, *supra* note 30, at 349; see also *A Less Gilded Future*, ECONOMIST, May 5, 2011, <http://www.economist.com/node/18651114> (“Since a firm’s only real assets are its partners, when a few departures turn into an exodus, the end can be shockingly quick.”).

181. MODEL RULES OF PROF’L CONDUCT R. 5.6 (2010).

182. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 772 (quoting a former partner at the now defunct firm of Arter & Hadden that “[t]he notion of making even a short-term or a medium-term financial sacrifice for some greater good of the firm is just not how a lot of folks are wired” (alteration in original) (citation omitted)).

183. See Galanter & Henderson, *supra* note 33, at 1889-90 (demonstrating an increase in the number of large law firms’ competitors in a given market from 27% in Washington, D.C. to 289% in San Diego from 1986 to 2006).

184. See *id.* NLJ 250’s 100 largest law firms by total lawyer population in 2010 averaged almost eleven offices domestically, with nineteen firms having offices in fifteen cities. See *The NJL 250: Branch Offices*, *supra* note 161.

185. See Galanter & Henderson, *supra* note 33, at 1890 (finding that London is the sixth-largest market for U.S.-based firms, placing them in “head-to-head competition” with the British Magic Circle firms); see also *A Less Gilded Future*, *supra* note 180; U.S. INT’L TRADE COMM’N, RECENT TRENDS IN U.S. SERVICES TRADE: 2009 ANNUAL REPORT 6-2 (2009), available at <http://www.usitc.gov/publications/332/pub4084.pdf> [hereinafter RECENT TRENDS 2009] (identifying British and Australian firms as the primary competitors for U.S. firms).

186. The American Lawyer reports that in 2010, seventy-nine of the top 100 firms ranked globally by revenues were United States based firms, twelve were English, five Australian, and one each from Canada, France, Spain, and the Netherlands. *The Global 100 2010: The World’s Highest Grossing Law Firms*, AMERICANLAWYER.COM, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202472338838&slreturn=1&hbxlogin=1> (last visited May 15, 2012).

the non-U.S. law firms from attempting to engage U.S.-based clients within certain areas of practice outside of the U.S. and within. In theory, the unauthorized practice of law restrictions should prevent some of this competition within the U.S. market, but these restrictions may prove to be rather ephemeral and difficult to enforce.¹⁸⁷

Recent changes in the lawyer regulatory schemes in England and Australia,¹⁸⁸ the two most significant competitors to U.S. multinational firms,¹⁸⁹ may alter the competitive landscape. These changes will permit the growth of large international multidisciplinary legal service firms with the ability to combine lawyers with nonlawyers in the provision of legal and other services, enabling them to offer a broader range of services than their U.S. counterparts. They will also be able to develop nonlawyer management expertise, which has the potential to enhance the level of innovation they bring to the provision of the services. Finally, these firms will have the ability to raise outside capital allowing for a greater investment in technology and expansion. In each instance, these firms may be able to obtain significant competitive advantages over their U.S. counterparts, both within the U.S. and the global markets. There is little to prevent U.S. corporations from seeking out the services of these multidisciplinary providers.

Clients are exerting significant pressure for their large law firm providers to move away from the traditional, hourly billing model.¹⁹⁰ The billable hour model has been attacked from all corners, most often for creating incentives to be inefficient—the longer it takes and the more lawyers involved, the more the firm earns—and for driving up costs.¹⁹¹ Clients are seeking and law firms are offering alternatives: fixed fees, contingent fees, value-added billing, mixed hourly and fixed fee models, to name a few.

187. Given today's global communications capabilities, multinational foreign law firms do not need to be present in the U.S. to service U.S. clients.

188. See *supra* note 10 and accompanying text.

189. In 2009, of the ten highest revenue generating firms, six were from the U.S. and four were from England. RECENT TRENDS 2009, *supra* note 185, at 6-3.

190. See Lisa Lerer, *The Scourge of the Billable Hour*, SLATE MAG., Jan. 2, 2008, <http://www.slate.com/id/2180420/> (quoting Mark Chandler, Cisco General Counsel, "Put most bluntly, the most fundamental misalignment of interests is between clients who are driven to manage expenses, and law firms which are compensated by the hour"; Chandler also referred to the billable hour as "the last vestige of the medieval guild system to survive into the 21st century"); *Curbing Those Long, Lucrative Hours*, ECONOMIST, July 22, 2010, <http://www.economist.com/node/16646318>; SUSSKIND, *supra* note 101, at 151 ("At worst, hourly billing can tempt lawyers to dishonesty. At best, it is an institutional disincentive to efficiency.").

191. See Regan & Heenan, *supra* note 101, at 2155; SUSSKIND, *supra* note 101, at 148-53 (referring to this as "a fundamental asymmetry between the commercial interests of law firms and those of their clients").

Alternative billing models demand and reward innovation, creativity, and efficiency over quantity of time and personnel.¹⁹²

Not only must large law firms compete amongst themselves for clients, they are facing increasing competitive pressures from other sources, including corporate law departments, nonlawyer professional service providers, outsourcing, and technology. As a cost saving measure, corporate law departments are steadily increasing the amount of work they retain in-house, work that in the past would have been sent to outside firms.¹⁹³ They realize that by relying on in-house talent and expertise, technology, and legal process outsourcing, they can substantially reduce the amount of work sent to outside firms, and thereby reduce expenses.

Large law firms are coming to find that the multinational accounting firms, the large consulting firms, and the various lobbying firms are encroaching on their turf for work that is legal or quasi-legal in nature.¹⁹⁴ They are often competing on uneven terrain. The nonlawyer professional service providers are not constrained by many of the rules that regulate and limit lawyer conduct even when lawyers are the ones providing the services within the nonlawyer firms.

Clients have come to realize that legal services can be decomposed into constituent parts, unbundled, and serviced by different providers. This permits those directing the provision of services, whether it is the client or the lawyer, to send various aspects of the work to the least costly, most efficient provider.¹⁹⁵ Large law firms traditionally unbundle work within the firm by delegating various parts of the work throughout the firm.¹⁹⁶

At least until very recently, what is changing is that clients are demanding and law firms are using providers that may not be lawyers or at least lawyers who are licensed to practice in the U.S. in order to save

192. See Regan & Heenan, *supra* note 101, at 2155 (noting that fixed fees or specific budget billing will “lead a firm to place more of a premium on building organizational capital—routines, procedures, and ways of doing things that enhance the ability of firm members to provide service efficiently”).

193. See Schwarcz, *supra* note 34, at 498; Johnstone, *supra* note 94, at 765-66; Jones & Manning, *supra* note 43, at 1174-76; RECENT TRENDS 2011, *supra* note 161, at 7-9 to 7-10.

194. See Johnstone, *supra* note 94, at 765-66; Morgan, *supra* note 5, at 959 (noting that current business realities are driving “many lawyers’ business clients to consulting firms for global advice”).

195. See *A Less Gilded Future*, *supra* note 180 (“Legal-process outsourcing firms, which do not advise clients but do routine work such as reviewing documents, put further downward pressure on the demand for their talents . . .”). There are increasing reports of clients either outsourcing certain work directly or requiring that their outside law firms outsource this work. See *id.* Likewise, in order to keep fees in line with what clients are willing to pay, firms are outsourcing work. See Anthony Lin, *Inside the Revolution*, 32 AM. LAW. 140, 144 (Oct. 2010) (quoting one Legal Process Outsourcing firm: “We’re starting to get a lot of work from firms”).

196. See Regan & Heenan, *supra* note 101, at 2148-49.

costs.¹⁹⁷ Legal process outsourcing (LPO) providers use trained paraprofessionals or foreign educated lawyers.¹⁹⁸ Currently, outsourcing has involved routine or repetitive tasks being unbundled and sent most often to India where the work is being performed by the Indian trained lawyers at a fraction of the cost of U.S. lawyers performing the same work.¹⁹⁹ In many instances, this work is being done virtually around the clock. It is not uncommon that work will be sent to India at the end of the western work day to be completed by the beginning of the next day, at a significant savings in time and expense.

While outsourcing currently remains a small piece of the legal services pie, it continues to grow each year with no end in sight.²⁰⁰ The unbundling of legal services, the client demand for less expensive legal services, and improvements in technology only increase the incentives for non-U.S. and U.S.-based LPO providers to enter the legal services market.²⁰¹ As the sophistication and competency of LPOs continues to grow and, concomitantly, the confidence and comfort level of clients relying on them, they have the potential to compete for business across a spectrum of legal matters.²⁰²

Just as outsourcing is creating competitive pressures on law firms, so too is technology.²⁰³ Lawyering has long been a very human intensive industry relying on human judgment and skill. Increasingly, clients and their law firms are relying on technology to perform a number of routine and repetitive tasks, many of which law firms relied on to generate significant reve-

197. *But see* Heather Timmons, *Legal Outsourcing Firms Creating Jobs for American Lawyers*, N.Y. TIMES, June 2, 2011, <http://www.nytimes.com/2011/06/03/business/03reverse.html> (noting that several LPOs have opened offices in the U.S. and are hiring American lawyers).

198. *See* Lin, *supra* note 195, at 140.

199. *Id.* This may be changing. In 2009, the global mining company Rio Tinto retained the LPO company CPA Global to handle a significant portion of its legal work, potentially saving the company tens of millions of dollars and at a cost savings of 3:1 for in-house work and 7:1 for outside work. *See* Regan & Heenan, *supra* note 101, at 2138-39 & n.1. There is also a growing use by law firms of outsourcing or at least offshoring of certain back office operations in an effort to reduce costs. *See* Lin, *supra* note 195, at 142, 144.

200. *See* Lin, *supra* note 195, at 143 (noting that in 2010, Indian LPOs had revenues of \$440 million in comparison to approximately \$230 billion for the U.S. legal profession in 2007).

201. *See* Regan & Heenan, *supra* note 101, at 2139-40; SUSSKIND, *supra* note 101, at 48.

202. *See* Henderson & Zahorsky, *supra* note 100 (“U.S. lawyers underestimate the threats of foreign competition to the provision of domestic legal services. The realm of ‘all other legal service providers’ . . . will continue to attract sophisticated business capitalists eager to obtain a greater portion of U.S. corporations’ legal budgets.”).

203. *See A Less Gilded Future*, *supra* note 180.

nues due to their inherent labor intensity and used to train young associates.²⁰⁴

Over the past forty years, large U.S. law firms have grown from regional operations into large national and multinational organizations with offices spread across the U.S. and the globe. The legal markets that these firms operate in are very competitive for clients and legal talent. They are competing amongst themselves, with nonlawyer providers, with their own clients in the form of expanding in-house legal departments, and with non-U.S. firms. Outsourcing and technology have heightened this competition. All of this is occurring at a time when clients are demanding a reduction in the cost of legal services. These trends are placing significant pressures on the legal profession to innovate and become more efficient.

2. *Lawyers Representing Individual and Small Business Clients*

At the other end of the spectrum from lawyers who represent national and multinational corporations are the lawyers who represent individuals and small businesses. These lawyers tend to work in much smaller private practice organizations. Many have fewer than thirty lawyers and most often they are smaller than ten, with a significant portion of this lawyer population being sole practitioners.²⁰⁵ These lawyers tend to earn substantially less

204. Hadfield offers the example of Cisco Systems's development of an online contract builder used by its engineers and executives to produce contracts without lawyer involvement unless certain questions produce the need for lawyer intervention. *See* Hadfield, *supra* note 53, at 1724-25; *see also* SUSSKIND, *supra* note 101, at 100-05 (providing several examples of English firms developing several different document assembly systems); Regan & Heenan, *supra* note 101, at 2148-53 (giving examples of British law firms' creative use of technology to build systems that provide ready client access to regulatory provisions, that help bankers produce term sheets, or that produce employment documents); Markoff, *supra* note 126, at A1 (citing significant advances in artificial intelligence enabling the creation of document analysis software that can review hundreds of thousands of documents in a matter of days when previously this same work would have taken hundreds of lawyers months to do).

205. In 2000, the most recent data, 48% of private practitioners worked as solos and another 22% worked in firms of ten or fewer lawyers. *LAWYER DEMOGRAPHICS*, *supra* note 21.

than their large law firm colleagues.²⁰⁶ They also tend towards being generalists or specialists across a broader spectrum of areas.²⁰⁷

Competition at this end of practice for those clients that can afford to retain a lawyer is very fierce. As previously discussed, a significant portion of individual and small business clients simply cannot afford legal representation and, as a result, the practitioners who represent these clients compete for a much smaller piece of the pie; those individual and small business clients who do not to represent themselves and who can afford to retain a lawyer.²⁰⁸ With approximately 70% of private practitioners working in firms of ten or fewer lawyers, by sheer numbers, this means that in 2008, approximately 600,000 lawyers were competing for these clients.²⁰⁹ Heinz and Laumann found that between 1975 and 1995, in Chicago, solo practitioner median income fell from \$99,000 to \$55,000, while the median income of those in firms of two to five lawyers fell from \$99,000 to \$75,000.²¹⁰

Other evidence of the intense level of competition is the expanding market boundaries of relatively small law firms. There appear to be a growing number of small firms that have expanded the territorial scope of their advertising campaigns.²¹¹ What were once local law firms, advertising in a specific geographic area, law firms have expanded their reach state-wide, if not regionally. It is not hard to notice that a number of these firms list lawyers with multiple bar admissions within a given region. This enables these firms to practice and to advertise anywhere any member is admitted.²¹²

Lawyers representing individuals and small businesses also have benefited from technology, but like those at the corporate end of practice, technology possesses some clear threats. Legal news and blogs are replete with

206. See HEINZ ET AL., *supra* note 36, at 160-75 (finding significant income disparity between lawyers in smaller practice settings and larger ones, to the point of finding that solo practitioners in their study actually saw a reduction in income between 1975 and 1995). The median starting salaries of lawyers working in firms of twenty-five or fewer lawyers, over a fourteen year period, studied by the NALP remained at about one-half of those who worked in firms of 251 or more. See *How Much Do Law Firms Pay New Associates? A 14-Year Retrospective as Reported by Firms*, NALP BULL., Sept. 2009, at tbl. 1, available at <http://www.nalp.org/2009septnewassocssalaries>.

207. Although, there are a number of practices focusing on individuals and small business that specialize in certain areas of the law.

208. See *supra* Subsection I.C.2.

209. See LAWYER DEMOGRAPHICS, *supra* note 21. The data show that 74% of 1,180,386 lawyers are in private practice and that 48% of these are in solo practice with another 22% in firms of ten or fewer. *Id.*

210. See HEINZ ET AL., *supra* note 36, at 163.

211. See Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801, 803 (2010) (noting the prevalence of lawyers' advertising on national cable channels that violate local advertising rules).

212. See MODEL RULES OF PROF'L CONDUCT R. 7.5(b) (2010) (permitting lawyers admitted in different jurisdictions to practice together as a single firm across those jurisdictions).

examples of solo or small firms that are relying on the internet to engage their clients and that use various forms of document assembly or information technology to systematize and automate aspects of their practice.²¹³ Whether we label these firms as virtual law firms or practices, their foci are similar: the use of technology to provide client services at reduced rates.²¹⁴ These lawyers can offer more service for lower fees and thereby attract middle class and small business clients. In addition, many of these practitioners have eschewed the traditional office, in place of home offices or various other less costly arrangements. This reduction in overhead is also related to a reduction in fees. These lawyers engage prospective clients and clients through the internet, they automate where possible, and they seek to provide a certain level of service in the least costly manner.

Artificial intelligence and sophisticated document assembly programs contain a double-edged sword for the solo and small law firm practitioner. On the one hand, they may enable them to more aggressively compete for clients by deriving greater efficiencies and to reduce the cost of their services.²¹⁵ At the same time, they pose the potential of putting them out of business altogether.²¹⁶

Client dependence on legal professionals to interpret the law and to create innovative solutions to legal matters has traditionally been a particularly human engagement. Whether the client needs a simple will, a divorce, a contract of sale, or a very complex merger or acquisition agreement, the client-lawyer interaction has been somewhat similar: client presents issues to lawyer, lawyer crafts solutions, and together lawyer and client implement solutions. Hadfield aptly describes lawyering as a “craft model” and rightly concludes that this type of representation is very slow and time and cost intensive.²¹⁷

Increasingly, solo and small firm lawyers are feeling the competitive pressures of technology. Much of this pressure is coming from computer/technology-based nonlawyer providers.²¹⁸ These organizations rely heavily on document assembly and artificial intelligence to assist consumers in crafting a variety of legal documents. Tax was one of the first areas where

213. See STEPHANIE L. KIMBRO, VIRTUAL LAW PRACTICE 3-6 (2011), available at http://www.mcgeorge.edu/Documents/centers/government/Ethics/VLP_Kimbrow_10.pdf.

214. For details on setting up and maintaining a virtual law practice, see *id.*

215. See Levin, *supra* note 172, at 853 (“Technology has also fundamentally changed the economics and efficiency of solo and small firm practices, enabling lawyers in these settings to compete with larger firms.”).

216. See SUSSKIND, *supra* note 101, at 28-33, 121-22 (noting the evolution of the practice of law from a highly customized personal service (bespoke) to a commoditized product).

217. See Hadfield, *supra* note 111, at 39-40.

218. For further discussion of the technology based legal services providers and the unauthorized practice of law, see *infra* Section II.C.

these providers were able to gain a significant foothold in the marketplace.²¹⁹ Recently they have ventured into the areas of contracts, domestic relations, entity formation, bankruptcy, probate, estates, and other succession planning²²⁰—areas that are conducive to various computer assisted document assembly methodologies. These providers enable consumers to sidestep the use of lawyers, prepare their own legal documents, and, in some instances, represent themselves in limited legal proceedings. Despite the profession's numerous rearguard actions,²²¹ Richard Susskind predicts that "[t]he disruption and threat here is that clients (whether citizens or multinationals) can obtain legal guidance online, [and] . . . [o]nline legal guidance systems can remove lawyers from the legal supply chain."²²²

Lawyers representing individuals and small businesses are also not immune from the pressures to unbundle legal services, only with a different focus. Unbundling at this end of practice means that lawyers do only part of the work and leave the client to handle the rest with or without a lawyer's guidance.²²³ This can take on every conceivable formation, including the lawyer drafting pleadings and the client representing himself or herself in court, the lawyer drafting contracts after the client has handled the negotiation, or the lawyer guiding the client through an administrative maze from the sidelines.²²⁴ This has even led some lawyers to ghostwrite legal documents on behalf of clients—a practice where the lawyer's identity does not appear on the document and may or may not be disclosed.²²⁵ In each of these

219. The best example and most successful product is probably Turbo Tax, produced and marketed by Intuit, Corp. See TURBOTAX, <http://www.turbotax.com> (last visited May 15, 2012).

220. See, e.g., LEGALZOOM, *supra* note 146; ROCKET LAWYER, <http://www.rocketlawyer.com> (last visited May 15, 2012).

221. See, e.g., *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011).

222. SUSSKIND, *supra* note 101, at 121-22.

223. Cf. Jack P. Sahl, *Entertainment Law—The Specter of Malpractice Claims and Disciplinary Actions*, 20 MARQ. SPORTS L. REV. 377, 393-94 (2010) (noting that "[c]lients who agree to limited representation tend to be happy with the results" reflected in the lower rate of malpractice claims).

224. For other examples, see Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 567-68 (2007).

225. For a discussion of the ethics of ghostwriting, see Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys*, 92 MARQ. L. REV. 103 (2008); Lindsay E. Hogan, *The Ethics of Ghostwriting: The American Bar Association's Formal Opinion 07-446 and Its Effect on Ghostwriting Practices in the American Legal Community*, 21 GEO. J. LEGAL ETHICS 765 (2008); and Peter Geraghty, *Ghostwriting*, YOUR ABA (Mar. 2011), <http://www.americanbar.org/publications/youraba/201103article11.html>. See also *In re*

instances, the lawyer is looking for business and the client is looking to save costs.

Rightly or wrongly, solo or small firm lawyers have been the target of most of the disciplinary enforcement against lawyers.²²⁶ They make up the overwhelming majority of lawyers who are punished through the disciplinary process each year, and they are also disproportionately the focus of malpractice litigation.²²⁷ It just might be that large law firms have the financial resources to keep their clients from seeking other redress when they have failed to represent them adequately, but it must also be acknowledged that they have the resources and the personnel to implement systems that significantly reduce the likelihood that matters will be neglected, that funds will be misused, or that glaring mistakes will occur. Much has been written about the reasons for this disproportionate focus, but regardless of the reasons, this group of lawyers has come under significant criticism for failing to protect the interests of their clients.

E. Not All Law and Not All Law Practice Is Local

Various factors came together at the beginning of the twenty-first century to shrink both the country and the world.²²⁸ If there was a time when law was predominantly a local or regional pursuit, with lawyers in local and regional markets servicing those markets, those days are gone forever.²²⁹ The advent of the national and multinational corporation, the internet with instantaneous global communication, and the ability to move about the country and globe easily and inexpensively have created a demand for lawyers who can practice nationally and internationally, who can provide services in multiple jurisdictions, or who can provide services inexpensively in

Fengling Liu, 664 F.3d 367, 369 (2d Cir. 2011) (reversing the district court sanctioning of a lawyer for ghostwriting pleadings).

226. See John Sahl, *Behind Closed Doors: Shedding Light on Lawyer Self-Regulation—What Lawyers Do When Nobody's Watching*, 48 SAN DIEGO L. REV. 447, 457-58 nn.58-59 (2011); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312-15 (2004); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1006-07 (2002).

227. See Levin, *supra* note 226, at 312-15; Sahl, *supra* note 226, at 457-58 nn.58-59.

228. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (3d ed. 2007).

229. Electronic filing permits a lawyer anywhere with access to the internet to file pleadings or other documents, removing the proverbial race to the courthouse and the need to have someone on the ground locally to file the documents. See Lynn A. Epstein, *The Technology Challenge: Lawyers Have Finally Entered the Race but Will Ethical Hurdles Slow the Pace?*, 28 NOVA L. REV. 721, 737-39 (2004).

a jurisdiction regardless of where the client or the lawyer is located.²³⁰ Professor Gillian Hadfield best sums it up:

[Google's] associate general counsel, Ramsey Homsany, told me about another problem. When Google acquired YouTube, it was faced with a massive problem of global regulatory compliance. YouTube shows up in over 100 countries around the globe, each with its own laws on privacy, intellectual property, defamation, and so forth. How do you manage a wicked compliance problem like that?²³¹

The growth in national and international law firms reflects the demand for national and international representation. In 2010, the National Law Journal's top 100 law firms by global lawyer population averaged almost eleven domestic and six international offices.²³² This represents a dramatic increase in the national and international growth of law firm practice in the past forty years.²³³

National or international corporate clients seek representation on a plethora of issues that transgress state and national boundaries or that involve multiple jurisdictions at the same time.²³⁴ They want lawyers who can represent them across jurisdictions without the added expense of having to retain separate counsel in each jurisdiction. At the corporate level, there are few practice areas that do not involve multijurisdictional, if not multinational, practice on a daily basis.

Even at the individual and small business end of legal practice, the world has shrunk considerably. The days of a person being born and living their life in a single location are fading fast.²³⁵ People are moving about the country with greater ease and frequency than ever before. This movement increases the number of cross-jurisdiction and multijurisdictional issues that arise for these clients. Likewise, very little commerce is local, and most small businesses engage in multijurisdictional, if not international, matters.

The internet has changed how lawyers engage prospective clients, that is, how they advertise. When lawyer advertising opened up thirty-five years

230. See Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 289-92 (2009); Hadfield, *supra* note 111, at 20-21 (noting that many of today's information technology companies, through the use of the internet, literally operate on a global scale, having to navigate a plethora of regulatory mazes).

231. Hadfield, *supra* note 111, at 3; see also Schwarcz, *supra* note 34, at 498-99; quote *supra* note 54.

232. See *supra* note 161 and accompanying text.

233. See *supra* text accompanying notes 33-37.

234. See Hadfield, *supra* note 111, at 7-8.

235. See PING REN, U.S. CENSUS BUREAU, LIFETIME MOBILITY IN THE UNITED STATES: 2010 1-4 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-07.pdf> (noting that "[t]he U.S. population is characterized by high mobility" with census data establishing that slightly less than 60% of U.S. residence currently reside in their state of birth and that, among the population twenty-five to fifty-four years of age, this dips to 50% of the population residing in their state of birth); see also Daly, *supra* note 119, at 723 & n.18 (noting significant lawyer and client state to state movement in 1992).

ago, almost all outreach was limited to the local yellow pages, local newspapers, and local radio and television advertising.²³⁶ National or global outreach was just too expensive for most lawyers and law firms. The internet has vastly expanded the territorial and the content reach of lawyer advertising, solicitation, and all other forms of prospective client engagement, while significantly reducing the cost and difficulty of this outreach.²³⁷ The internet enables law firms to engage clients, promote their services, and partake in a wide range of client solicitation activities nationally and worldwide.²³⁸

For many clients, the internet has increased the potential pool of lawyers to choose from. These clients are increasingly comfortable with computer-based interactions across a wide spectrum of social and business engagements. Legal assistance is no different.²³⁹ For a significant reduction in cost or just plain ease of access, clients will use the internet to engage a lawyer in the same manner as they bank, review medical records, or shop. For these clients, there is little connection to the location of the lawyer. Cost, competence, and convenience will trump location. Those lawyers who are venturing into the realm of virtual or internet practice seek clients wherever the clients may be and do not feel constrained, except for the unauthorized practice restraints, by jurisdictional limitations.

The internet also has radically expanded access to the varying aspects of the law. Computer-based information research has had a profound impact on the practice of law. In less than thirty-five years, the practice of law has gone from a book-based research endeavor to largely computer based.²⁴⁰ The expense of an up-to-date national book-based law library severely limited the practice of law across multiple jurisdictions.²⁴¹ For many practitioners, it was not economically feasible to maintain a library that contained the law of a variety of jurisdictions.²⁴² Today, anyone, anywhere in the world with access to the internet can engage in comprehensive legal research for any U.S. jurisdiction and many jurisdictions internationally, much of it free or at relatively low cost. As a result, lawyers and nonlawyers now have access to an unprecedented amount of information. The law library of today is

236. Much of this continues to be used today by many lawyers, but it is also being supplemented by use of the internet by almost all lawyers.

237. See SUSSKIND, *supra* note 101, at 105-11.

238. For a discussion of the ethical minefields these lawyers face, see, for example, Raymond, *supra* note 211 (discussing the issues raised by cross-border television advertising). See also KIMBRO, *supra* note 213, at 32-35.

239. See *60% of People Would Buy Legal Advice from Brands like Barclays, AA, Co-op and Virgin*, LEGAL FUTURES, Mar. 8, 2011, <http://www.legalfutures.co.uk/latest-news/60-of-consumers-would-buy-legal-advice-from-brands-like-barclays-aa-co-op-and-virgin> (noting that in a British survey, 34% of respondents were more likely to choose a law firm that provided online services).

240. See Schwarcz, *supra* note 34, at 508.

241. *Id.*

242. *Id.*

a global library with immediate access to international, federal, state and local law, rules, and regulations. Legal research, like much of the practice of law, is not constrained by location.

II. SOMETHING HAS TO GIVE

There can be little doubt that the legal profession has changed significantly since the early and middle twentieth century. If the profession ever had a singular identity and make up, it does not today. If ever there was a prototypical client, he or she no longer exists and has been replaced by a spectrum of clients with very different needs. If the practice of law ever was local, it has increasingly become national and international. While the profession and the practice of law have changed significantly in the past 100 years, many of the rules regulating lawyers have not.²⁴³

The history of the legal profession in the twentieth century is one of first securing the professional ramparts by creating very restrictive practice regulations and then maintaining significant resistance to the opening of a very tightly organized monopoly.²⁴⁴ At several junctures, the profession promulgated rules that were anti-competitive, blocked the flow of information, restricted the provision of services to those who were inside profession, and seemed to favor lawyers' interests over others.²⁴⁵ At each turn, the profession fought those who tried to challenge these restrictions, in some instances successfully but in many others to no avail.²⁴⁶ Time and again, the courts, the legislatures, or the people have stepped in to overturn some rule, regulation, or practice that inhibited competition or the flow of information.²⁴⁷

243. See generally Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (arguing that the legal profession is undergoing a paradigm shift away from a Professionalism Paradigm to a Business Paradigm).

244. See Harris & Foran, *supra* note 133, at 798-99 (noting that supply of legal service providers is controlled by entry restrictions, law school and bar exam requirements, by unauthorized practice enforcement, and by limiting forms of practice). "[T]he market for legal services is noncompetitive and strictly regulated on the supply-side by the service providers themselves." *Id.* at 798.

245. See discussion *infra* Section II.C, E, & F.

246. See discussion *supra* Section I.B.

247. Compare *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *1, *4-7 (N.D. Tex. Jan. 22, 1999) (holding Parsons Technology's Quicken Family Lawyer software violated Texas unauthorized practice of law statute), with TEX. GOV'T CODE ANN. § 81.101 (West 2011) (overturning the prior statute and declaring that such software was not the practice of law); compare *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 2-3 (Cal. 1998) (finding that a New York based law firm had engaged in the unauthorized practice of law in California and therefore refusing to enforce a fee agreement with respect to fees earned in Califor-

Lawyers, by training, tend to be fairly conservative and notoriously risk adverse.²⁴⁸ The heavy reliance on precedence means that past practices often limit or dictate current practices.²⁴⁹ At the same time, many of the more significant political and social changes in the last century have been initiated or assisted by lawyers.²⁵⁰ There are even instances where the profession, after much heated discussion, has liberalized certain practice rules to provide for greater access to legal services, most notably with prepaid legal service plans.²⁵¹

The current and evolving state of affairs calls for profound changes in the governance and regulation of the legal profession at a time when competition, clients, technology, globalization, and the government are all exerting significant pressures on the profession to do things differently. Not change for change's sake, but change that will enhance competitiveness and efficiency, drive down costs, increase competence, provide greater access to legal assistance, and promote innovation in the delivery of legal services across the spectrum of clients.²⁵² The legal profession cannot continue to operate in a twentieth century rules straightjacket; something has to give.²⁵³

In deciding what areas of the rules need to change, I have focused on several principles. First and foremost, what is in the best interest of the client, that is, what changes are necessary to ensure that the client can obtain the best legal representation at a cost that they can afford? What this means across the spectrum of clients can be very different. As noted earlier, the needs and interests of individuals and small businesses are very different from those of the multinational corporation.²⁵⁴

In addition, changes in the rules should facilitate innovation, efficiency, and competition. Generally, innovation, efficiency, and competition tend

nia), with CAL. CIV. PROC. CODE § 1282.4(b) (West 2011) (permitting lawyers admitted to the bar of another state to represent parties in arbitration proceedings in California).

248. See SUSSKIND, *supra* note 101, at 254; Hadfield, *supra* note 111, at 45.

249. See Morgan, *supra* note 5, at 975 ("Lawyers tend to look backward, and bar leaders who have been financially successful under the current system have little incentive to face squarely the world as it is likely to become.").

250. Lawyers played a significant role in the civil rights movement of the middle of the twentieth century culminating in the now famous decision of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. Likewise, they were instrumental in the labor movement and the women's rights movement, just to name a few.

251. See Maute, *supra* note 72, at 933 ("The organized bar's earlier intransigence towards group legal services is now gone. Since 1983, the ABA has officially encouraged the development of prepaid legal service plans, providing increased levels of support and endorsement. . . . What was once scorned in horror has now become commonplace.").

252. See Hadfield, *supra* note 53, at 1694 ("The impact of supply control exercised by the bar has, of course, long been recognized as a potential cause of high prices for legal services, prices that we have seen spiral in the past decade.").

253. See Morgan, *supra* note 5, at 960-61.

254. See *supra* Subsection I.C.2.

to drive down the cost of services, promote the enhancement of the provision of those services, and let the marketplace give feedback on what services are most desirable.²⁵⁵ Lack of innovation, efficiency, and competition create an environment where the profession appears to serve its own interests while, in significant ways, neglecting the needs and wants of clients.

Finally, changes in the rules cannot ignore many of the realities of life in the early part of the twenty-first century, including: the growing nationalization and globalization of the practice of the law; the dramatic impact that technology is playing and will continue to play in the practice of law; the increasingly competitive nature of the practice of law, coming from within the profession and from external forces; and, the ever increasing external regulation of the law practice by other branches of the government beyond the judiciary.²⁵⁶ These forces appear to be gaining greater traction as we move through the second decade of the twenty-first century, and they will exert even greater influence on the legal profession in the coming years.

This leads to the recommendation that the regulation of the legal profession should be changed to promote the enhancement and greater provision of legal services across the spectrum of clients. Clients should have a greater choice in the type of legal service providers and, regardless of whether they choose lawyers or others to provide these services, they should have a significant degree of confidence that those providers are competent and will protect their interests. Just the same, certain clients are clearly in a position to protect their own interests and these clients should be free to structure the client-lawyer relationship in a way that promotes their interests and not predominately those of the lawyer.²⁵⁷ Finally, the profession must come to grips with the fact that much of law practice is national, and lawyers need to compete and provide service on a national level.

Change derived from within the profession should be more palpable to the profession than change forced externally. Many of these changes have

255. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 963 (2000) (“The perfectly competitive market is one in which goods are distributed by sellers with no ability to influence market price to buyers with no ability to influence market price under conditions of full information. . . . [S]uch markets result in the maximization of consumer welfare: in a sense, prices are as low as they can be, and output is as high as it can be.”).

256. See *supra* notes 78-84 and accompanying text.

257. See, e.g., ABA COMM’N ON ETHICS 20/20, PROPOSALS OF LAW FIRM GENERAL COUNSEL FOR FUTURE REGULATION OF RELATIONSHIPS BETWEEN LAW FIRMS AND SOPHISTICATED CLIENTS 3-4 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/lawfirmgeneralcounsel_issues_paperconcerningmultijurisdictionalpractice_authcheckdam.pdf (proposing that “sophisticated clients” have the right to waive or alter certain restrictions on the lawyers that represent them).

been discussed by others in varying degrees and in varying combinations.²⁵⁸ The time has come and the vehicles are present for a wide-ranging examination of these proposals.²⁵⁹

A. Core Values: Profession Versus Business Dichotomy—Some Preliminary Issues

The last time a significant change was proposed to the rules governing the practice of law—the proposals at the turn of the twenty-first century permitting multidisciplinary practice—it was defeated by the rhetoric of “core values.”²⁶⁰ This change was opposed, in part, in the name of preserving independent self-regulation, ensuring a lawyer’s undivided loyalty to the client, guarding client-lawyer confidences, protecting against conflicts of interests, and maintaining a single profession of law.²⁶¹ At each turn, these values, while laudable, have been called into question.²⁶²

The problem is that this debate is usually framed in absolutes when the reality of practice and the rules that govern practice are never that easy or clear.²⁶³ There can be little doubt that, at best, the practice of law today is a

258. See, e.g., articles in *Symposium: The Economic Downturn and the Legal Profession*, 78 *FORDHAM L. REV.* 2051-2443 (2010); *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 *MINN. L. REV.* 1083-1625 (2000).

259. Although it appears that Ethics 20/20 has chosen to promote incremental changes and not significant changes, this could be a political decision to get some of the loaf versus none of it. Ethics 2000 also chose the incremental route. See *ABA Commission on Ethics 20/20, Introduction and Overview*, ABA (AUG. 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

260. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2193-94 (2010); Crystal, *supra* note 137, at 773-74 (noting that the core values discussion has been “more a rhetorical tool than a useful basis for analysis of proposed changes . . . [and] has been used in an effort to maintain professional independence from other regulatory forces and to help sustain a professional monopoly over the delivery of legal services”). The ABA House of Delegates, in rejecting a recommendation in favor of liberalizing the ban on multidisciplinary practice, adopted Resolution 10F containing a list of core values. *Recommendation*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html (last visited May 15, 2012).

261. See *Recommendation*, *supra* note 260.

262. See Barton, *supra* note 92, at 467 (“[T]he rules governing confidentiality and conflicts of interest actually hew somewhat more closely to the interests of lawyers than clients or the public at large.”); Morgan, *supra* note 5, at 962-69 (noting that many of these core values are not unique to lawyers but apply to all agents); see also Crystal, *supra* note 137.

263. The original 1908 Canons of Professional Ethics did not contain prohibitions against lawyer and nonlawyer partnerships nor fee sharing. These prohibitions were a product of amendments some twenty years later. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 *GEO. J. LEGAL ETHICS* 217, 240-42 (2000).

co-regulated profession with considerable outside influence from a variety of groups not the least of which is the federal government.²⁶⁴ While a lawyer owes considerable loyalty to the client, the profession, society, and the government demand more than just client loyalty; they require loyalty to the courts, to other clients, and to nonclients.²⁶⁵ The duties of confidentiality and avoidance of conflicts of interests contain contradictions within the rules that create them and by necessity are not absolutes. The profession permits both permissive and mandatory disclosure in a number of instances to protect others, most notably the lawyer herself.²⁶⁶ The profession has also limited the conflicts imputation rules through screening of disqualified members of the firm.²⁶⁷ The realities of multiple and sometimes conflicting duties dictate that the values implicated by the rules are not absolute and, at times, need to be modified and restricted to serve other conflicting concerns.

Finally, there is little or no evidence that significant regulatory reform cannot be instituted without sacrificing many of these core values.²⁶⁸ Reforms are currently underway in England and Australia that do not appear to be inflicting traumatic damage to very similar values.²⁶⁹ As one regulator from Australia, which has implemented multidisciplinary practices and outside investment in law firms, has indicated, the proverbial “legal ethics sky has not fallen in Australia.”²⁷⁰

This is not to say that core values should not be part of the discussion and, where feasible, should be given considerable consideration. It just means that a limited set of core values should not control and overwhelm the discussion, especially when some of those values appear to be rather

264. See Zacharias, *supra* note 14, at 858-61.

265. Morgan points out that the duties to avoid conflicts of interests and to protect confidentiality are duties owed by all agents and not just lawyers. Morgan, *supra* note 5, at 963.

266. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(3) (2010).

267. Model Rule 1.10 was only amended in 2009 to permit screening. See DZIENKOWSKI, *supra* note 46, at 38-39.

268. The ABA Commission on Multidisciplinary Practice at the end of its report concluded, “After careful study, deliberation and analysis, the Commission has concluded that with appropriate safeguards a lawyer can deliver legal services to the clients of an MDP without endangering the core values of the legal profession or the interests they are designed to protect.” Sherwin P. Simmons et al., ABA Comm'n on Multidisciplinary Practice, *Report*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpreport.html (last visited May 15, 2012).

269. See Legal Services Act, 2007, c. 29, §§ 71-111 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2007/29/contents>; *The Model Legal Profession Bill: Status of Implementation*, LAW COUNCIL OF AUSTL., http://www.lawcouncil.asn.au/programs/national_profession/model-bill.cfm (last visited May 15, 2012). See generally SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT (2004); Schneyer, *supra* note 10.

270. Mark, *supra* note 10, at 46 (noting a significant decrease in the number of complaints against incorporated legal practices).

self-serving and anticompetitive.²⁷¹ At the same time, there are other core values that have been given much less attention and have had far less influence on the debates surrounding the regulation of the profession; most notably, the value of ensuring access to justice.²⁷² What good are the rest of the core values to clients who cannot benefit from them due to their inability to hire a lawyer in the first place?²⁷³ It rings hollow for an individual or small business to be told that the profession highly values loyalty and confidentiality but at a price you cannot afford, and, as a result, you do not have access to.²⁷⁴

Creative lawyers and sincere regulatory regimes can protect the vital interests of clients while permitting greater flexibility in the legal marketplace. Australia and England are demonstrating that methodologies for regulation can be devised that protect core values, enhance competition, and permit the creation of innovative law practices.²⁷⁵ Shutting down the discus-

271. Rhode found no evidence that lay providers of legal services betrayed client confidences or engaged in inappropriate conflicts of interests. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 33-34, 43, 91-92 (1981).

272. See Morgan, *supra* note 5, at 965-67; Crystal, *supra* note 137, at 762-65 (noting “the bar [has] refused to impose a professional obligation to assist in the delivery of legal services, [and] the bar has actively resisted efforts to provide those services from other sources”).

273. In a wonderful analogy, Professor David A. Hyman notes:

Generalization from anecdotal evidence of bad outcomes is an occupational weakness of lawyers, legislators, and judges, but that path is strewn with expensive and misguided policies. One should not reason from the non-zero incidence of shipwrecks to the conclusion that only certain kinds of “extra-safe” boats will in the future be allowed to leave the harbor. . . . A single-minded focus on the shipwreck numerator, without regard to the total fleet denominator and the marginal cost/marginal benefit trade-off inevitably results in “reforms” which price transportation beyond the pocketbook of many on the shore—leaving them to swim at greatly increased risk, or stay on the beach and entirely forego the gains from (admittedly risky) trade. Those who sell and operate “extra-safe” boats do quite well under such a system, but the rest of the population must pay higher prices for a different mix of services than they would have purchased voluntarily.

David A. Hyman, *Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353, 400-01 (1997) (footnote omitted).

274. See Barton, *supra* note 92, at 440 n.36 (“Ironically, the clients most likely to be affected by problems of information asymmetry, clients who cannot afford to hire lawyers from large, well-established firms or with other clear trappings of success, are precisely the clients that have arguably been priced out of the legal market altogether by entry-control and regulation.”).

275. See generally Mark, *supra* note 10 (outlining the regulatory scheme established in Australia to permit outside ownership of law firms, multidisciplinary practice, and other innovative forms of practice); John Flood, *The Consequences of Clementi: The Global Repercussions for the Legal Profession After the Legal Services Act of 2007*, 2012 MICH. ST. L.

sion, and, therefore, the struggle to protect certain values while moving forward, is not the answer.

Likewise, the profession should abandon the debate over whether the practice of law is a business or a profession.²⁷⁶ This discussion does not advance the interests of clients and has been used as a ruse for clinging to antiquated, paternalistic rules that do more to protect certain classes of lawyers than to advance the interests of clients and society.²⁷⁷ As one recent article put it, “[L]awyer[ing] is becoming more of a business than a profession. Some lawyers decry this. Others welcome it. Few deny it.”²⁷⁸ The reality is that law has always been a profession and a business and the part that needs the most regulating and should be the focus of the rules is the business.²⁷⁹ The professional aspects should take care of themselves if we take care of the business. The business of law will flourish if we take care to craft rules that protect certain vital interests of clients, recognize the realities of the practice of law in the twenty-first century, and do not get bogged down in self-protectionism that impedes competition, innovation, and enhanced efficiency.

B. Different Rules for Different Lawyers

The time has come to give up the ghost that all lawyers and all law practices are the same, and, concomitantly, that all clients are the same.²⁸⁰

REV. 537, 545-49 (outlining the developing regulatory scheme in England that will permit outside ownership of law firms and multidisciplinary practices).

276. As two authors have noted, “some bar leaders would prefer to bury their heads in the sand and return to the imagined golden years, when the practice of law was viewed as a profession, rather than a business, even if this vision of the legal profession probably never reflected economic reality.” Dzienkowski & Peroni, *supra* note 48, at 88.

277. See Barton, *supra* note 92, at 453-54 (“[M]ost of the lawyers that are regularly claimed as the ideal of the professional lawyer-statesman come from the nineteenth century, and practiced when there was little or no regulation of lawyers, and few barriers to entering practice.” (footnote omitted)); see also Morgan, *supra* note 5, at 949-50 (noting that the definition of a profession is also the classic definition of a cartel).

278. *A Less Gilded Future*, *supra* note 180; see also Hadfield, *supra* note 53, at 1717 (“[I]t is also clear that a great deal of legal work is, and should be appreciated as, economic activity that contributes to the effective functioning of a market economy.”); Pearce, *supra* note 243, at 1266 (reviewing the literature that rejects the notion of “businesspersons as morally inferior to lawyers”).

279. See Mark, *supra* note 10, at 46; see also Pearce, *supra* note 243 (calling for a rejection of the professionalism paradigm in favor of a new “Middle Range” approach to a Business Paradigm that will better serve clients and the public).

280. See Zacharias, *supra* note 14, at 841 (“The assumptions that all lawyers and all clients are the same have led to perhaps the most dramatic delusion inherent in the modern professional codes; namely, that a single set of rules should apply equally to, and can adequately govern, all legal representation.”); Daly, *supra* note 263, at 281 (referencing that the MDP debate is a “dispute . . . between two sets of lawyers with very different visions of the legal profession’s future”); SMEDLEY, *supra* note 95, at 24.

Equating the multinational corporate client with the individual seeking a divorce or wanting to form a small business, and, therefore, devising rules that apply equally to lawyers representing those very different clients, does a grave disservice to both clients and lawyers alike.²⁸¹ Nick Smedley, when reviewing the regulation of English solicitors, concluded:

During the research for this report, I found a unanimous view that “one size fits all” will not meet the regulatory needs of this market. A system designed to regulate the danger of solicitors taking improper advantage of vulnerable clients, cannot simply be scaled up to regulate the provision of legal services to sophisticated clients. The large corporate law firms are not simply a very big version of a high-street practice. Their work, and their organisational structures, are entirely different and, therefore, something equally different is needed from the regulator.²⁸²

In contrasting the different regulatory foci based on the nature of the client, Smedley found:

A regulatory regime designed to monitor small firms with an unsophisticated client base may understandably focus on the risks of poor work, financial impropriety and under-capacity. The primary purpose of regulation in this sector of the legal market is consumer protection, because there is an inherent imbalance in legal knowledge between the solicitor and the client. . . .

The risks in the corporate sector are rather different. Corporate clients do not usually need a third party to protect them from poor work, financial irregularities and under-capacity. There is no imbalance of bargaining power when the client is a corporate client. . . . The clients use their considerable commercial muscle to negotiate on prices and to rectify any problems encountered with the quality of the work. Relationships are very often built up over years, and operate at a personal level. Trust is high, and issues resolved between two parties of equal power. On occasion, it is the solicitor who needs protection—sometimes through rules—from a relationship with an overbearing client which might give rise to a risk of unsound advice or even unethical conduct.²⁸³

Time and again, commentators and practitioners have demonstrated that a one-size-fits-all set of regulatory rules both under regulates and over regulates different aspects of the profession.²⁸⁴ Likewise, one-size-fits-all

281. See Hadfield, *supra* note 53, at 1716-17 (finding that the rules create an “extraordinary level of ex ante consumer-protection regulation for corporations and other business entities”).

282. SMEDLEY, *supra* note 95, at 20.

283. *Id.* at 34; see also Hadfield, *supra* note 53, at 1716-17.

284. See Zacharias, *supra* note 14, at 842 (demonstrating that the adherence to one set of rules governing all lawyers was largely responsible for dooming the MDP proposals ten years ago); Hadfield, *supra* note 53, at 1718; Wald, *supra* note 87, at 752-53 (noting that the client-lawyer agency analysis better fits the sophisticated corporate lawyer relationship than the individual client-lawyer relationship); SMEDLEY, *supra* note 95, at 33 (“The wide scope of the conflict Rule, it is said by some, causes firms to lose business. Some argue that they have to turn away work which they could sensibly undertake, subject to appropriate safeguards and client consent. It is a matter of concern not only to the firms—many clients told me how frustrating they find it when their solicitor of choice is unable to act. In some cases,

rules prohibit clients, who can protect themselves, from providing market feedback on what they value and how much they value it.²⁸⁵ These clients are prohibited from selecting alternative models or providers of legal services due to the singular model of legal service delivery proscribed by the current rules. While the concept of one profession governed by one set of rules is enticing, it is glaringly out of touch with current realities and precludes the profession from creating an innovative regulatory regime that advances the best interests of all clients.²⁸⁶

This issue can be handled in at least two different ways. Either very specific rules can be formulated that apply to certain types of clients or law practices or opt-out provisions can be built into the rules that permit certain clients and their lawyers to create a client-lawyer relationship that waives certain restrictions or protections.²⁸⁷ The profession can no longer maintain the fiction that all clients need the same protection from all lawyers. Whatever avenue is chosen, the profession must come to the realization that it can no longer craft one set of rules that applies to all lawyers and to all clients. Otherwise, as Fred Zacharias concludes, we are strapped with “bad rules or . . . situations in which lawyers feel tempted to disobey the rules.”²⁸⁸

C. Unauthorized Practice of Law

The rules prohibiting the unauthorized practice of law (UPL) need to be relaxed sufficiently to encourage other providers of legal services to

there will be good reason for the prohibition, and the resulting protection of a potentially over-enthusiastic client (and their would-be solicitor) will in the long run be worth the frustration. . . . There are occasions when a law firm would be able to obtain informed consent from a client to waive the conflict Rule, and when it would be efficient and desirable to do so *in the interests of the client*. Clients told me that they require transparency from the solicitor, so that they can assess whether a waiver would be desirable.”)

285. See Hadfield, *supra* note 53, at 1718 (pointing out that corporate clients might be very willing to trade off the benefits of confidentiality and/or conflicts protections for a reduction in costs); Pearce, *supra* note 243, at 1267 (noting that many clients, especially repeat players and “businesses that employ in-house counsel[] are quite sophisticated in their ability to evaluate legal services and do not need special protections”).

286. See Hadfield, *supra* note 53, at 1717-18 (“The far more significant effect of regulation on the market for corporate legal services, I argue, is the effect on innovation in legal products and services, the primary source in most markets of cost reductions and improvements in quality. Professional regulation of legal markets dampens, even extinguishes, at every turn the energy of market creativity that, as we increasingly recognize in most other markets, drives the modern economy forward.”).

287. See generally ABA COMM’N ON ETHICS 20/20, *supra* note 257 (arguing that sophisticated corporate clients and the lawyers that represent them should be governed by different rules and proposing such modifications).

288. Zacharias, *supra* note 14, at 841.

compete for clients.²⁸⁹ Limiting the provision of legal services to lawyers drives up the cost of those services by restricting competition to one type of supplier. Opening up the market in legal services should increase the supply of providers and thereby reduce costs.²⁹⁰

If the past century has taught us anything, it is that lawyers cannot meet the legal needs of many middle- and lower-income Americans. Despite the great increase in the lawyer population in the last half of the twentieth century, the needs of individual and small business clients continue to go unmet.²⁹¹ In many respects the price of a lawyer is still too steep for many of these clients.²⁹² They need a lower-cost solution that will provide them with competent service.²⁹³

Limiting the practice of law to only bar-certified lawyers has another negative effect: it limits innovation in the provision of legal services. Professor Gillian Hadfield demonstrates that homogeneity of the idea pool—by

289. The current UPL restrictions are the product of a movement that began at the end of the nineteenth century and gained steam in the first quarter of the twentieth century. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 180 & nn.113-14 & 117; Daly, *supra* note 263, at 248-50 (noting that early UPL enforcement actions targeted banks preparing wills and other estate planning documents, insurance companies, organizations offering incorporation assistance, and accounting firms in the areas of tax and estate planning); Cramton, *supra* note 17, at 566-67.

290. Dzienkowski & Peroni, *supra* note 48, at 111 (“The Congress and the Treasury have made a policy decision that lawyers, accountants, and enrolled agents possess the necessary competence to offer tax services to the general public. This decision is based upon the training of these professionals and on the need for the general public to obtain affordable tax services in planning their affairs and complying with the law. Society is better off because competition exists in the tax practice area, and the public can access professional services from a variety of sources.” (footnote omitted)); Daly, *supra* note 263, at 251-61 (attributing the rise of the Big Five accounting firms to their ability to practice in the area of tax); Bruce Kobayashi & Larry E. Ribstein, *Law’s Information Revolution*, 53 ARIZ. L. REV. 1169, 1185-89 (2011) (using economic modeling to demonstrate that lawyer regulation increases the cost of services without appreciable benefits); see also FED. TRADE COMM’N, DEP’T OF JUSTICE, COMMENTS ON THE AMERICAN BAR ASSOCIATION’S PROPOSED MODEL DEFINITION OF THE PRACTICE OF LAW 4 (2002), available at <http://www.justice.gov/atr/public/comments/200604.pdf> (noting “the DOJ and the FTC believe that consumers generally benefit from lawyer-nonlawyer competition in the provision of certain services”).

291. See Pearce, *supra* note 243, at 1272-73; Renee Newman Knake, *Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals*, 73 OHIO ST. L.J. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800258; see also discussion and notes *supra* Subsections I.C.2., I.D.2.

292. See Knake, *supra* note 291.

293. See Barton, *supra* note 92, at 480 (“A deregulated legal market would likely provide legal services to the poor, because in a deregulated market there would be a much fuller range of professional services available, at all price ranges.”); see also Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1044-57 (2009) (calling for a “Mixed-Model” delivery system that employs various modes of delivery, not all of which will involve lawyers).

requiring those who practice law to have the same or very similar education, trained by those with the same or similar education, restricting most working environments to those with the same or similar education, and by limiting the exchange of information within the legal community due to confidentiality and conflicts regulations—limits “out of the box” thinking.²⁹⁴ For her, “Legal regulation is a poster child for the failure to harness the benefits of diversity.”²⁹⁵

The current unauthorized practice rules are premised on the idea that clients need protecting from unscrupulous and incompetent providers who lack the training and skills to adequately meet their needs.²⁹⁶ These claims may be highly overblown.²⁹⁷ There is evidence to demonstrate that the great harms prophesized have not materialized.²⁹⁸ To the contrary, there are several studies demonstrating the successful use of lay legal advisors in England.²⁹⁹ What is clear is that the rhetoric of harm from the unauthorized practice of law remains largely without much, if any, accompanying evidence.

While professing that nonlawyers will prey on an unsuspecting and unsophisticated public and that only lawyers can best serve their legal needs, we tolerate pro se representation, which often places the individual or small business in a far worse position.³⁰⁰ Instead of having assistance from someone or something that has some knowledge and expertise in the law, we demand that the person or business represent themselves despite the fact

294. See Hadfield, *supra* note 53, at 1720-22.

295. *Id.* at 1722.

296. See Dzienkowski & Peroni, *supra* note 48, at 92; Cynthia L. Fountaine, *When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 169-72 (2002).

297. See Kritzer, *supra* note 133, at 729; Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 772-75 (2003); see also FED. TRADE COMM'N, *supra* note 290, at 13 (articulating that the DOJ and FTC are not aware of significant harm that would justify a broad definition of the practice of law and that many state unauthorized practice decisions “set forth no factual evidence and little evaluation of how the ability of lay services had actually hurt consumers”). *But see* Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp., 123 Ohio St. 3d 353, 2009-Ohio-5336, 916 N.E.2d 784, at ¶¶ 25-53 (listing hundreds of high pressure sales tactics by a provider of living trusts that in many instances were not appropriate for the purchasers).

298. See Rhode, *supra* note 271, at 33-34, 43, 86-89 (finding a very low incidence of consumer harm reported in UPL cases, reported by UPL enforcement agencies, and in several areas that permit lay assistance).

299. See Moorhead et al., *supra* note 297, at 795-96 (demonstrating that Moorhead's conclusions are supported by his and other studies that he cites); see also Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629, 1636 (2010) (giving examples of legal services being provided “by unregulated or semi-regulated legal advice providers” in Scandinavia).

300. See Barton, *supra* note 92, at 447-48.

that they have no experience, expertise, or understanding of the law or what they are doing. We tolerate pro se representation because society does not have the means or the desire to provide legal representation to all.

Beyond pro se representation, there are many other examples of the use of nonlawyers in the legal services world.³⁰¹ History is replete with various professions encroaching on territory previously reserved for lawyers.³⁰² In each instance there has been general public or legislative support for this encroachment despite the opposition from lawyers.³⁰³ Likewise, there are numerous instances where nonlawyers are permitted to represent others before administrative agencies, again without a significant demonstration of harm to the person being represented.³⁰⁴

Not all legal matters require the assistance of a highly-trained and fairly-expensive expert.³⁰⁵ There are many matters that can be handled by trained, but less educated or credentialed, paraprofessionals.³⁰⁶ One study of the use of nonlawyer legal advisors in England found that “it is specialization, not professional status, which appears to be the best predictor of quality.”³⁰⁷

301. See Dzienkowski & Peroni, *supra* note 48, at 95.

302. The most pronounced example is federal tax law that authorizes nonlawyers to represent clients in federal tax proceedings. The U.S. Supreme Court in *Sperry v. Florida* held the Supremacy Clause preempted state enforcement of UPL against nonlawyers from representing clients in the U.S. Patent Office. 373 U.S. 379, 403-04 (1963); see Dzienkowski & Peroni, *supra* note 48, at 106-12 (discussing the extent to which nonlawyers may practice federal tax law).

303. See *supra* note 247. But see Greg Casey & Carol A. Needham, *Consensus Across Multiple Divides: An Empirical Study of Outlooks Underlying Lawyers' Attitudes on Multidisciplinary Practice*, 32 LOY. U. CHI. L.J. 617, 670-71 (2001) (reporting acceptance of UPL by other professionals, notably accountants and attorneys employed by banks, in their study of Missouri lawyers on focusing on MDP).

304. Rhode, *supra* note 271, at 77-80.

305. See Moorhead et al., *supra* note 297 (reviewing the fairly satisfactory use of nonlawyers in England by low-income clients with law related matters); Rhode, *supra* note 271, at 3 (citing a 1974 ABA survey finding 82% of respondents believed that many things that lawyers do could be done well and less expensively by nonlawyers).

306. See Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 729 (1999) (“As tasks become specialized and it becomes possible for persons to acquire the limited set of knowledge necessary to deliver highly specific services traditionally the domain of a member of a formal profession, it becomes increasingly difficult for the profession to maintain any exclusivity over those tasks.”); Cramton, *supra* note 17, at 574 (quoting from a 1986 ABA Commission on Professionalism finding that “it can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law.” (quoting ABA Comm’n on Professionalism, “. . . In the Spirit of Public Service”: A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 301 (1986))).

307. Moorhead et al., *supra* note 297, at 795-96 (citing other studies that reached the same conclusion).

The dramatic growth of the use of paralegals and other paraprofessionals by lawyers, corporate legal departments, and others further belies the claim that only lawyers, with their high level of training and expertise, can serve the interests of clients.³⁰⁸ Paraprofessionals now perform work that was previously the exclusive domain of lawyers.³⁰⁹ These paraprofessionals have been trained to do a variety of tasks that do not require a three-year post-graduate education.

Over-credentialing only raises the cost of services while not appreciably increasing protection. With the ever skyrocketing cost of legal education, it is unlikely that the cost of legal services is going to decline in the near future.³¹⁰ Instead of providing a mechanism for clients to choose regulated, less expensive providers, the current unauthorized practice rules leave clients just two choices: seek the assistance of a fairly expensive, highly-credentialed lawyer or represent themselves.³¹¹

The expansion of technology into all aspects of daily life forecasts greater intrusion into the territory of the unauthorized practice of law while holding out greater promise of meeting the needs of many who cannot afford a lawyer or for those who are seeking to reduce the cost of legal services.³¹² Technology-based legal services providers rely on document as-

308. See Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653, 653-54 (2010). Recent scholarship has demonstrated that nonlawyers employed by a lawyer can engage in a wide range of tasks, albeit under the peripheral supervision of a lawyer. See *id.* at 659-60. One author suggests that lawyers can delegate significant aspects of the practice of law to paraprofessionals or nonlawyers so long as those delegation decisions “remain subject to the competence and malpractice standards generally applicable to lawyering, as well as to the informed buy-in of the lawyer’s client.” *Id.* This same author demonstrates that paraprofessionals can offer legal advice to clients as long as that advice is not independent legal advice but given in collaboration with the lawyer responsible for the matter. *Id.*; see also Cramton, *supra* note 17, at 573-74.

309. See RICHARD A. POSNER, *OVERCOMING LAW* 66 (1995).

310. See Barton, *supra* note 92, at 443. See generally David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249.

311. See Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 141 (2005) (“As proponents of such initiatives [relaxing unauthorized practice rules] recognize, a primary challenge here is the bar’s vigorous opposition to even modest exceptions to its professional monopoly on legal services, even in areas where lawyers dare not tread because there is no money to be made.”).

312. See generally Fountaine, *supra* note 296; Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 FORDHAM L. REV. 985 (2001) (reviewing a variety of online dispute resolution services involving lawyer and nonlawyer providers); Hadfield, *supra* note 53, at 1724-25. These products are not only tailored for the individual consumer, large corporations are working to exploit the advantages of technology to reduce legal expenses. Hadfield gives the example of Cisco Systems developing an online contract builder that allows engineers and executives to produce their own nondisclosure agreements with the interaction with a lawyer. See Hadfield, *supra* note 53, at 1724-25. She rightfully points out that it cannot offer this product to the worldwide market without running afoul of the UPL rules, thereby limit-

sembly and artificial intelligence to assist consumers in crafting a variety of legal documents. As previously indicated, these providers started in the area of tax and have expanded their scope to contracts, domestic relations, entity formation, bankruptcy, probate, estates and other succession planning, and much more.³¹³ Each of these areas is conducive to various computer-assisted document-assembly methodologies. These providers are enabling consumers to sidestep the use of lawyers altogether and prepare their own legal documents and, in some instances, to represent themselves in limited legal proceedings. Some of these providers are coupling their services with the ability to engage a lawyer on a limited basis to handle those matters or provide advice in those areas that are either not conducive to mere document formulation or where there is significant ambiguity in how to proceed.³¹⁴

These technology legal service entities all provide disclaimers that they are not providing legal advice, are not practicing law, that the services they are providing are in the nature of consumer self-help, and that communications between the consumer and the provider are not covered by the attorney-client privilege or confidentiality rules.³¹⁵ It is difficult to know

ing Cisco's incentives to invest in this and further innovations. *Id.*; see also *Unauthorized Practice of Law*, ELAWYERING BLOG, <http://www.elawyeringredux.com/articles/unauthorized-practice-of-law/> (last visited May 15, 2012) (discussing free legal advice services aimed at specific legal issues).

313. LEGALZOOM, *supra* note 146; *Popular Legal Documents and Forms*, ROCKET LAWYER, <http://www.rocketlawyer.com/popular-legal-forms.rl> (last visited May 15, 2012) (listing services divided into four areas: business document, personal documents, legal letters and government forms).

314. J.D. Harrison, *LegalZoom Takes New Twist to Old Profession*, PORTFOLIO.COM (Sept. 16, 2011), <http://www.portfolio.com/companies-executives/2011/09/16/legalzoom-introduces-subscription-based-access-to-attorneys/> (reporting on LegalZoom's creation of a subscription plan to provide one-on-one access to lawyers for its subscribers); see also Richard Granat, *Will LegalZoom Become the Largest Law Firm in the US?*, ELAWYERING BLOG (Jan. 5, 2011) <http://www.elawyeringredux.com/2011/01/articles/legalzoom/will-legalzoom-become-the-largest-law-firm-in-the-us/> (discussing LegalZoom's attempts to link with a network of law firms); Richard Granat, *LegalZoom Is Launching an Attorney Directory*, ELAWYERING BLOG (Mar. 3, 2009) <http://www.elawyeringredux.com/2009/03/articles/legalzoom/legalzoom-is-launching-an-attorney-directory/> (discussing internet legal document providers starting lawyer directories to help their customers obtain legal advice while preparing their online documents); Kobayashi & Ribstein, *supra* note 290, at 1195; Mountain, *supra* note 128, at 3-4 (citing a study that concludes the pairing of technology with people may offer the client the best solution to meeting their needs).

315. For example, LegalZoom's website contains the following:

Disclaimer: The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom is not a law firm and is not a substitute for an attorney or law firm. Communications between you and LegalZoom are protected by our Privacy Policy, but are not protected by the attorney-client privilege or work product doctrine. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction.

LEGALZOOM, *supra* note 146.

whether most consumers who use these products understand the nature of the disclaimers, their importance, their legal implications, or, to a greater or lesser extent, even care.

As the sophistication of software continues to develop at a seemingly exponential rate and becomes increasingly capable of making ever more complex decisions, it is hard to see how this is radically, or even minimally, different from what lawyers do when they assist clients in drafting a will, a contract, or preparing a bankruptcy pleading.³¹⁶ Both are practicing law under most definitions of what it means to practice law. For most consumers, the difference between the end product obtained from a lawyer and from one of the online nonlawyer providers may be negligible, while the cost differential may be substantial.

The consumer has no way of evaluating the professional quality of the work being done by the internet provider or by an actual lawyer for that matter.³¹⁷ Information about individual attorneys is hard to come by and most consumers rely on word-of-mouth, referrals, and recommendations of family and friends, who are often in no better position to judge the quality of the representation being provided. Information about technology-based legal products may be easier to obtain. As Kobayashi and Ribstein explain, consumers of technology-based products can rely on other expert opinions, seller's reputation based on public information, and numerous transactions when seeking to evaluate whether the product is best for them.³¹⁸

The press is replete with examples of the states and the bar prosecuting technology-based providers of legal services for the unauthorized practice of law.³¹⁹ Most of these prosecutions end with the provider agreeing to enhance its disclaimers, to restrict certain statements in its advertising, and to make it clear that it is not a substitute for a lawyer.³²⁰ The one thing that

316. See Kobayashi & Ribstein, *supra* note 290, at 1192-93 (“[S]ophisticated artificial-intelligence programs that purport to render individualized advice based on the user’s personal information could constitute legal advice that may be given only by a licensed attorney.”).

317. See Fountaine, *supra* note 296, at 170.

318. Kobayashi & Ribstein, *supra* note 290, at 1185.

319. See Fountaine, *supra* note 296, at 157-58 (recounting the Texas Unauthorized Practice Commission’s prosecution of Parsons Technology, the producer of Quicken Family Lawyer, for the unauthorized practice of law); *LegalZoom Sued for Unauthorized Practice of Law in Missouri*, LAW VIBE (Feb. 21, 2010), <http://lawvibe.com/legalzoom-sued-for-unlawful-practice-of-law-in-missouri/>; *Unauthorized Practice of Law*, *supra* note 312.

320. See, e.g., *Settlement Reached in Missouri Lawsuit Against LegalZoom*, THE ELDER FIRM, LLC (Sept. 6, 2011), <http://columbiaelderlaw.blogspot.com/2011/09/settlement-reached-in-missouri-lawsuit.html> (reporting on the settlement of a Missouri class action against LegalZoom); Assurance of Discontinuance, *In re LegalZoom.com, Inc.*, No. 72557-0001 (Wash. Super. Ct. Thurston Cnty., 2010), available at <http://www.keytlaw.com/blog/wp-content/uploads/2010/09/Assurance-of-Discontinuance.pdf> (providing an Assurance of Discontinuance filed by the Washington

has not happened is the outright restriction of these entities from providing their services. Their gross revenues continue to grow each year with no reduction in sight.³²¹ If technology-based providers can build a good reputation for providing quality documents, they pose a significant competitive threat to those lawyers competing for the same clients, unless the profession can prevent their further innovation and improvement of services through the threat of unauthorized practice prosecutions.³²²

Relaxing the authorized practice rules does not discount any regulation of the people or entities that will provide legal assistance.³²³ Instead of spending considerable effort to preclude nonlawyer providers of legal services from the marketplace, the federal and state governments should be devising schemes to open these markets and to regulate them.³²⁴ If the concern is truly to protect the consumer and not to restrain competition for the benefit of the lawyers, heightened regulation should serve this purpose while increasing access to legal assistance at a reduced cost.

There are many regulatory challenges to be faced in this new frontier of expanded provision of legal services but that does not mean that it should not occur. Everything from requiring a standard of care, perhaps equivalent

Attorney General in their action against LegalZoom); *see also* Fountaine, *supra* note 296, at 158 (noting that upon the U.S. district court's ruling that Parson's was engaged in UPL, the Texas legislature amended the statutory definition of UPL to exclude from the practice of law "the design, creation, publication, distribution, display, or sale by means of an Internet web site, or written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney").

321. LegalZoom has raised over \$100 million in financing as of July 2011, and forecasts over \$100 million in revenue. Leena Rao, *Eyeing an IPO in the Next Year, LegalZoom Raises \$66M from Kleiner Perkins and IVP*, TECHCRUNCH.COM (July 24, 2011), <http://techcrunch.com/2011/07/24/eying-an-ipo-in-the-next-year-legalzoom-raises-66m-from-kleiner-perkins-and-ivp/>.

322. *See* FED. TRADE COMM'N, *supra* note 290, at 11 (noting that UPL restrictions are "likely to impede substantially the growth of e-commerce and software-based solutions"). Hadfield notes that Cisco Systems would face significant UPL challenges if it decided to market its contract builder software worldwide and as a result it is "not cost-efficient [for] Cisco to invest in further innovations in the procedure." Hadfield, *supra* note 53, at 1724-25. *But see* Walker, Allan & Collins, *supra* note 127 (covering the marketing of Cisco's program and processes).

323. *See* Daly, *supra* note 263, at 227 (noting that in the civil law system, many of the tasks performed by lawyers in the United States are performed by a variety of professions).

324. *See* Rhode, *supra* note 271, at 94-96 (suggesting that lay providers of legal services be held to the same standard of care as lawyers, be required to obtain informed consent from clients, and/or are subject to regulatory oversight); FED. TRADE COMM'N, *supra* note 290, at 10-11 (providing examples of states regulating real estate agents who provide legal advice in real estate closings). *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.

to those who are currently licensed to practice, and very specific and targeted disclaimers that explain what is being sacrificed when a client uses a nonlawyer provider to malpractice or equivalent insurance should be considered.³²⁵ Regulation is better than the current rear-guard action of fighting these providers to protect the domain of the lawyers.

By expanding the number of legal services providers, the state will expand the competition for clients, which should drive down cost, enhance efficiencies, and promote innovation.³²⁶ Each of these results is beneficial to clients.³²⁷ Clients would be able to decide for themselves the level and the nature of the services they desire.³²⁸ They could determine how much expertise and protection they are willing or able to pay for.³²⁹ Susskind predicts “that the market is increasingly unlikely to tolerate expensive lawyers for tasks (guiding, advising, drafting, researching, problem-solving, and more) that can equally or better be discharged by less expert people, supported by sophisticated systems and processes.”³³⁰

D. Enhancing the Competence of Those Who Do Practice Law

The lawyer competence rule is rather straightforward and to the point: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”³³¹ This basic laudatory rule belies the fact that very little attention is paid to insuring lawyer competence after the initial licensure decision.³³² All lawyers take essentially the

325. See Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY’S L.J. 891, 903 (2009). Morgan discusses various duty of care standards for nonlawyer providers of legal services and concludes that adopting “a contract-based standard that asks what the nonlawyer purported to be competent to do and whether she met a client’s reasonable expectations about the services to be provided” would best protect consumers. *Id.*

326. See Pearce, *supra* note 243, at 1273-76; Hadfield, *supra* note 53, at 1717-27; Fountaine, *supra* note 296, at 170-71 (suggesting a range of possibilities from various nonlawyer specialties creating professional conduct standards to creating liability standards for software publishers and other technology providers).

327. See Kobayshi & Ribstein, *supra* note 290, at 1190 (finding that “professional regulation and restrictions on the unauthorized practice of law can decrease social welfare relative to the unregulated market”).

328. See Morgan, *supra* note 5, at 969.

329. Using the example of tax providers, there does not seem to be a great calamity from letting tax payers choose between preparing their taxes on their own, using commercial software products, or using a neighbor, a sole proprietor accountant, a small accounting firm, or a regional, national, or international accounting firm. No one is claiming that the level of service or expertise are the same or even similar, but likewise no one is claiming that the costs are the same or similar.

330. SUSSKIND, *supra* note 101, at 2.

331. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2010).

332. See Barton, *supra* note 92, at 448-49; Pearce, *supra* note 243, at 1272 & n.255.

same entrance exam, and after admission, there is little or no professional training for newly admitted lawyers.³³³ The profession has largely abdicated responsibility for professional training to law schools and expects that this can be accomplished within three years. In most instances, newly admitted lawyers are under no practice restrictions and are free to take on all areas of practice with little or no supervision.³³⁴

Once licensed, there are no licensure renewal requirements at any time throughout one's career regardless of how long one practices. A license derived from the education at the beginning of a lawyer's career remains in effect throughout regardless of changes that may have occurred over that time period.³³⁵ The continuing education requirements, which in most instances only document attendance, do not require any proof that attendees have learned anything, that the programs attended are relevant to the areas they practice in, that they obtained any benefit by attending, and, in many instances, do little to ensure competence.³³⁶

In fact, the rules seem to deny incompetence by permitting a lawyer who is not competent in an area to take on the representation if the lawyer believes that she can become competent despite the fact that she has never handled the same or similar matter and may have no understanding of what it will take to become competent.³³⁷ This provision appears to place the lawyer's economic interests above those of the client. The rules should place much greater emphasis on client protection and less on protecting the economic interests of the lawyer.

A sincere regime of client protection should require much more at each turn—at initial licensure, in the early years of practice, and throughout ones career. The rules should be far more rigorous, and they should contain significant consequences for incompetence. The profession does little to punish incompetence and very few lawyers are disciplined for incompetence.³³⁸

333. See, e.g., *Mentoring Associates: It's Simply Good for Business*, LAWPRO, Apr. 2002, at 12, available at <http://www.lawpro.ca/LawPRO/LawPROmagazine1.pdf>; Steven J. Harper, *Where Have All the Mentors Gone*, THE BELLY OF THE BEAST (July 19, 2010), <http://thebellyofthebeast.wordpress.com/2010/07/19/where-have-all-the-mentors-gone/> (decrying the loss of mentoring in the legal profession).

334. See *contra* SUPREME COURT OF OHIO & OHIO JUDICIAL SYS., RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO 20-20.05 (2012), available at <http://www.sconet.state.oh.us/LegalResources/Rules/superintendence/Superintendence.pdf> (limiting the lawyers who can be appointed to represent indigent defendants in death penalty cases).

335. See Barton, *supra* note 92, at 445.

336. See *id.* at 449.

337. See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. 2, 4 (2010).

338. One authority has noted, "Curiously, few attorneys have been disciplined for incompetent representation per se." SUSAN J. BECKER, JACK A. GUTTENBERG & LLOYD B.

Further belying the desire to protect clients is the fact that only one jurisdiction requires malpractice insurance.³³⁹ This requirement alone would help encourage lawyer competence and significantly further client protection.³⁴⁰ Insurance companies, although not without their own motives, would do much to foster greater lawyer competence, if for no other reason than to protect themselves.³⁴¹ They often require that their insureds institute processes and procedures that have the result of putting in place standards that protect clients and prevent lawyer malpractice.³⁴²

When the issue of mandatory malpractice comes up, those who oppose such a regime argue that it will increase the cost of legal services and will drive those lawyers who cannot afford such insurance out of practice.³⁴³ As to the latter argument, this may not be such a bad thing. Lawyers whose practices are so unstable and whose revenues are so low that they cannot afford malpractice insurance are the very lawyers who may be the most tempted to misuse client funds or to take work that they are not competent to handle out of economic necessity.

As for driving up the cost of legal services, to some degree this is correct. A lawyer who currently does not have malpractice insurance and would be forced to obtain that insurance will need to recoup the cost from clients. This is a cost-benefit trade off: the increased cost of such insurance

SNYDER, ANDERSON'S THE LAW OF PROFESSIONAL CONDUCT IN OHIO § 8.05 (2009-10 ed. 2009).

339. Oregon is the only American jurisdiction to require malpractice insurance of all lawyers who are admitted to practice in the state. OR. REV. STAT. § 9.080(2) (2011). As of August 9, 2011, seven jurisdictions require disclosure directly to the client of the lawyer's failure to maintain malpractice insurance. Another seventeen jurisdictions require lawyers to report their lack of malpractice insurance on their annual registration statements. ABA STANDING COMM. ON CLIENT PROT., STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE I (2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/malprac_disc_chart.authcheckdam.pdf. One solicitor and academic from England, during a conversation with the author, was shocked to learn that lawyers in the U.S. could practice law without having malpractice insurance. He had assumed that this was required as it is in England.

340. See Schneyer, *supra* note 10, at 20.

341. See generally Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996). But see Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233, 234-35 (1996); Hyman, *supra* note 273, at 402-03.

342. See Davis, *supra* note 341, at 211-20 (reviewing a variety of insurance based restrictions imposed on lawyers and law firms via malpractice insurance). Davis also reviews various risk management systems that are imposed by malpractice providers. See *id.* at 220-22.

343. See Manuel R. Ramos, *Legal Malpractice: The Professions Dirty Little Secret*, 47 VAND. L. REV. 1657, 1727 (1994); Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion*, 8 GEO. J. LEGAL ETHICS 637, 645-50 (1995).

versus the benefit of greater client protection. Given the potential damage to clients from lawyer incompetence, a slight increase in the cost of legal services may be a price well worth paying.

While opening up the provision of legal services to nonlawyer providers and, at the same time, calling for stiffer rules to insure the competence of those who do practice law as lawyers may seem contradictory—both are in the interest of better serving clients and society. Enhancing the competence of lawyers should give them a competitive advantage over many nonlawyer providers because when someone chooses to go to the lawyer, they will have greater confidence that the services they are obtaining will meet a certain standard of care.³⁴⁴

E. Form of Practice Restrictions

The rules governing the practice of law restrict how lawyers can practice, the nature of the entities they can practice within, how these entities are financed, and who can manage and control a lawyer's work.³⁴⁵ Each of these restrictions has been discussed extensively in the academic scholarship and in the popular legal and nonlegal press.³⁴⁶ Each restriction is based on the premise that lawyers need unfettered discretion to control their work and make completely independent decisions on behalf of their clients, and that expanding the forms of practice and who can own those practices would interfere with client-lawyer confidentiality, create insurmountable conflicts of interest, undermine the client-lawyer relationship, and facilitate the unauthorized practice of law.³⁴⁷ The validity of each of these claims has repeatedly been called into question.³⁴⁸ At the same time, these restrictions are tainted by a strong streak of lawyer protectionism.³⁴⁹

There are numerous instances where the profession either endorses or tolerates nonlawyer involvement in the client-lawyer relationship. Insurance defense, group legal services plans, prepaid legal services plans, lawyers working for the government, in-house corporate legal departments, and le-

344. See Pearce, *supra* note 243, at 1269-70.

345. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2010) (prohibiting the sharing of legal fees with nonlawyers, prohibiting lawyers from forming a partnership with a nonlawyer for the practice of law, and prohibiting nonlawyers from having an ownership interest or the right to direct or control the professional judgment of a lawyer).

346. See discussion *infra* Subsection II.E.1, 2.

347. See discussion of "Core Values" *supra* Section II.A.

348. See discussion *supra* Section II.A.

349. See Daly, *supra* note 263, at 242; Maute, *supra* note 72, at 920-25 (describing the heated debate within the ABA over the adoption of rules that would permit pre-paid group legal service plans, including many comments that reflected fears of nonlawyer interference by employers and unions, demonstrating a significant strain of lawyer protectionism).

gal aid societies are just a few examples where nonlawyers are involved in the management, selection, and, to some degree, the decision-making of lawyers who are practicing law.³⁵⁰ Each of these situations raises significant professional responsibility issues for the lawyers involved, and each is fraught with the potential for detrimental interference with the client-lawyer relationship. However, in each situation, the profession has determined or acquiesced in outside involvement without catastrophic results.³⁵¹ The time has come for the profession to open up the practice of law to different practice models that will enhance the provision of services, create greater competition, promote and support innovation, and reduce the cost of legal services.

1. *Multidisciplinary Partnerships*

In this section, I am referring to multidisciplinary partnerships (MDPs) as a means for lawyers and nonlawyers to form joint ownership and control over an enterprise that delivers legal and other services.³⁵² Much has been written and said about MDPs in the past twenty years, and I will not rehash much of that debate.³⁵³ Core values of the profession were invoked to defeat liberalizing the restrictions on MDPs a decade ago.³⁵⁴ MDPs raise a number

350. See Dzienkowski & Peroni, *supra* note 48, at 102-04 (discussing instances where lawyers work for nonlawyer employers).

351. See *id.* at 106-12 (discussing the extensive history of tax lawyers and accountants working together in large accounting firms and practicing federal tax law).

352. The ABA Commission on Multidisciplinary Practice defined an MDP entity as: [A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.

ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES app. A (1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpappendixa.html; see also Daly, *supra* note 263, at 223-24 (distinguishing between ownership and control—partnership—and various multidisciplinary means of delivering legal and other services—practices—which do not necessarily have to include ownership and control).

353. For a wide-ranging discussion of MDPs, see generally Daly, *supra* note 263; Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000); Dzienkowski & Peroni, *supra* note 48; Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Rumination on the Issue of MDPs*, 84 MINN. L. REV. 1097 (2000); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999).

354. Paton, *supra* note 260, at 2202 (concluding that the "core values"—maintaining independence, protecting privilege, and avoiding conflicts of interest—became the vocabu-

of issues that need addressing, but there can be little doubt that some of the impetus for opposing these partnerships is the desire to inhibit competition from outside of the profession.³⁵⁵

By prohibiting lawyers in private practice from forming partnerships with nonlawyers for the provision of legal and other services, the profession stifles innovation and competition, while increasing the cost of those services.³⁵⁶ The profession has interposed its rather paternalistic beliefs as to what is in the best interest of all clients instead of permitting clients to choose how they wish to obtain legal services, without a significant demonstration of the harm that will ensue and out of the desire for uniform regulation.³⁵⁷ One author has noted:

While large corporate clients are certainly aware of cost reduction, the care and facility of one-stop shopping will have a more immediate benefit to an elderly man who has difficulty driving or an apprehensive employee who has just lost her job and must still provide for her family. While one-stop shopping helps large corporate clients satisfy their desires, they at least have access to such services, even if that means working with multiple firms. Individuals, on the other hand, especially poorer ones, do not always have easy access to needs such as safe, affordable housing, personal financial planning, and psychological counseling, to name a few.³⁵⁸

Competition is reduced by limiting the practice of law to those entities made up entirely of lawyers and by excluding other professions that may be able to deliver certain services more efficiently and at a reduced cost.³⁵⁹ In addition, this restriction may preclude using the best professional with the

lary that defined and hijacked the debate”); *see also* Casey & Needham, *supra* note 303, at 679 (reporting on a study of Missouri lawyers that concluded “the legal profession is not yet fully prepared to face MDP”).

355. The biggest competitive threat comes from the big accounting firms and large commercial retailers that seek to expand into the outright delivery of legal services. *See* Daly, *supra* note 263, at 234-40, 242 (citing the 1981 ABA Commission on Evaluation of Professional Standards Reporter that MDP would permit Sears, Montgomery Ward, H & R Block, or the Big Eight accounting firms to compete with traditional law firms).

356. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2010) (prohibiting the sharing of legal fees with nonlawyers, prohibiting lawyers from forming a partnership with a nonlawyer for the practice of law, and prohibiting nonlawyers from having an ownership interest or the right to direct or control the professional judgment of a lawyer).

357. Testimony before the MDP Commission in support of MDPs came from consumer groups, business clients, corporate counsel, and small and solo practitioners. ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES app. (2000), available at http://www.americanbar.org/groups/professional_responsibility/commision_multidisciplinary_practice/mdpfinalrep2000.html. The Commission “heard the testimony of 95 witnesses and received 120 comments from interested parties and groups. Not once did a client urge the Commission to maintain the status quo.” *Id.*; *see also* Daly, *supra* note 263, at 274-76.

358. Rees M. Hawkins, Comment, *Not “If,” but “When” and “How”: A Look at Existing De Facto Multidisciplinary Practices and What They Can Teach Us About the Ongoing Debate*, 83 N.C. L. REV. 481, 509 (2005).

359. *See* Dzienkowski & Peroni, *supra* note 48, at 121.

most expertise from assisting the client.³⁶⁰ Instead, clients seeking legal services must employ a firm that is made up exclusively of lawyers, even if some of those lawyers perform services that could be provided by other less expensive professionals.³⁶¹ Reducing competition has the effect of driving up costs.³⁶²

Restrictions on MDPs also stifle innovation by limiting the talent pool that has a stake in creating diverse solutions that advance the interests of the client and the firm.³⁶³ Under the current structure, most of the input on client service and law firm management comes from a very insular group, those with very similar training and skills—lawyers.³⁶⁴ MDPs will create incentives for other professionals with very different training and skill sets to create solutions for enhanced client representation and firm management.³⁶⁵ Larger and more diverse talent pools are usually more creative and innovative. Increasingly, this is being recognized in numerous professions and businesses that put together multidisciplinary teams to work toward creative solutions.³⁶⁶

Finally, prohibiting MDPs, beyond inhibiting competition and innovation, increases costs. Transaction costs are increased because a client with legal and nonlegal problems must currently retain several service providers who may or may not have worked together in the past.³⁶⁷ This might necessitate multiple appointments and some duplication of effort while potentially preventing the least costly professional from providing part of the services. Prohibiting MDPs also prevents certain firms from taking advantage of economies of scale and scope and, thus, depriving clients of the savings from such economies.³⁶⁸

360. *See id.*

361. *See id.*

362. *See id.*

363. Harris and Foran argue that the prohibition of MDPs has prevented lawyers and technology providers from coming together to fashion mixed solutions to middle-income individual and small business client needs. *See Harris & Foran, supra* note 133, at 805. Excluding nonpartner capital and know-how limits the potential in this market. *Id.*; Hadfield, *supra* note 111, at 40-41.

364. Hadfield, *supra* note 111, at 40-41.

365. *See Dzienkowski & Peroni, supra* note 48, at 121 (“Working together in a team approach, lawyers and non-lawyers will be more sensitive to their respective issues and are likely to formulate and promote a more comprehensive definition of client problems.”).

366. *See id.* at 117-18 (“When individuals work together on a regular basis, they provide a synergy that is simply not present when an individual works alone. The synergy is more likely to produce higher quality service for a client requiring both legal and non-legal representation.”); Hadfield, *supra* note 111, at 17-18.

367. *See Jones & Manning, supra* note 43, at 1183; Hawkins, *supra* note 358, at 505.

368. *See Dzienkowski & Peroni, supra* note 48, at 118-23.

Much has been said about the wants and needs of clients. Mary Daly gives two good examples of when MDPs might provide an advantage to a client:

[T]o plan an orderly testamentary disposition of her assets, the owner of a small business may require coordinated advice from a lawyer, a financial planner, and a business consultant. To comply with environmental regulations, a company with manufacturing plants on both sides of the U.S.-Canadian border may require coordinated advice from U.S. and Canadian lawyers, environmental engineers, and architects.³⁶⁹

Corporate clients, in recent years, have repeatedly stated that they want lawyers who understand business and, more often, understand their business.³⁷⁰ What they are looking for is a broad perspective beyond just legal problem solving.³⁷¹

The current practice restrictions deprive clients of the right to determine the practice model they prefer by dictating that only one model is acceptable. If clients truly desire the services of a multidisciplinary provider, they will gravitate to those providers, and by their market preferences, they will express what they value.³⁷² If they prefer to interact with lawyers engaged in lawyer-only firms, they will likewise express their desires through market choices.³⁷³ In either instance, more than anecdote will prevail. The one thing that is certain: the current restrictive regime precludes clients from expressing a choice and letting the market regulate client preferences.

Although MDPs are formally precluded, there is growing evidence that lawyers and nonlawyers are forming relationships to service their clients.³⁷⁴ Beyond the glaring example of the multinational consulting and accounting firms regularly combining lawyers and nonlawyers to service their

369. Daly, *supra* note 263, at 222; *see also* Hadfield, *supra* note 111, at 43-50 (discussing multiple anecdotal accounts of corporate counsel complaining that their lawyers do not understand their needs).

370. Hadfield, *supra* note 111, at 42-50.

371. *Id.*

372. *See* Paton, *supra* note 260, at 2205 (referencing an empirical study by Professor Michael Trebilcock that demonstrates client demand for MDPs and that key objections raised against MDPs were overstated); *see also* ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 357.

373. *See* Paton, *supra* note 260, at 2205. It has been argued that when confidentiality and conflicts of interests are of paramount concern to the client, they may prefer lawyer-only firms to the extent that multidisciplinary partnerships cannot adequately protect those interests.

374. *See* Daly, *supra* note 263, at 252-63 (noting that accountants and lawyers have been working together in big, medium, and small firms to provide their clients with federal, state, and local tax advice since the 1930s, and more recently, lawyers in the accounting firms have been "rendering services to the firms' clients in ways that are virtually indistinguishable from those rendered by their colleagues in law firms, and they are sharing fees with their nonlawyer partners"). *See generally* Hawkins, *supra* note 358.

clients' legal and nonlegal needs,³⁷⁵ one author provides several examples of practices she refers to as "de facto MDPs."³⁷⁶ Noting that these practices are not "technically MDPs[,] . . . they involve lawyers working alongside accountants, mental health professionals, physicians, financial consultants, workplace managers, and/or other professionals."³⁷⁷ These entities service clients across the spectrum from large corporations to individual clients. Their existence, along with the profound success of the multinational accounting firms, demonstrates a significant degree of client demand and acceptance of such working arrangements.³⁷⁸ They also demonstrate that most of the evils attributable to MDPs can be overcome with some effort and creativity.

Further animating the debate over MDPs is that fact that international, and some domestic, clients will soon have the ability to make their preferences known. England and Australia have opened the doors to the creation of MDPs.³⁷⁹ In both instances, these countries have done so out of a desire to enhance competition and consumer services.³⁸⁰ Regulators in both countries are working to implement this transition while remaining true to the core values of protecting clients and maintaining the integrity of the legal profession.³⁸¹ English and Australian law firms are the most significant competitors for the multinational U.S. law firms.³⁸²

When MDP reform was terminated ten years ago, the profession took the easy way out. Instead of grappling with various competing methodologies for regulating MDP practices to meet the needs of clients and, to an extent, the legal profession, the profession repressed all innovation in this

375. See Morgan, *supra* note 5, at 959-60 ("As part of their internal staffing, such [multinational consulting and accounting] firms have hired lawyers to participate in their work of formulating business plans, drafting possible contract documents, and making regulatory filings.").

376. Hawkins, *supra* note 358, at 506-15.

377. *Id.* at 507.

378. See *supra* note 357 and accompanying text.

379. Legal Services Act, 2007, c. 29, §§ 71-111 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2007/29/contents>; *The Model Legal Profession Bill: Status of Implementation*, *supra* note 269.

380. CLEMENTI, *supra* note 269, at 3-4, 34-35; Schneyer, *supra* note 10, at 24; ABA COMM'N ON ETHICS 20/20, ISSUES PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES 16-17 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

381. For a review of the development and regulation of multidisciplinary partnerships in Australia, England, and Canada, see ABA COMM'N ON ETHICS 20/20, *supra* note 380, at 7-17.

382. See Morgan, *supra* note 5, at 961-62 ("[I]f U.S. lawyers bar consulting firms from delivering legal services in the United States, clients can get the services from firms operating out of Canada or Europe. The ABA seems to think that it is still operating in a world in which communication and travel are difficult. Clients know better, and so do the multidisciplinary practice firms." (footnote omitted)).

area.³⁸³ At this juncture, the profession should take its collective head out of the sand and struggle to create a form of multidisciplinary partnership that sustains certain core values while placing the best interest of the client at the pinnacle of those values.³⁸⁴ This time, it should not be a matter of if, but just when and in what format.

2. *Outside Investment and Ownership of Law Practices*

More controversial, and somewhat more difficult, is the question of outside investment and ownership of law practices.³⁸⁵ Again, these raise thorny issues of outside control over the client-lawyer relationship and outside control of the lawyers work. While MDPs can be crafted to give lawyers significant control over their work, their relationships with their clients, and their independent decision-making, outside investment and ownership makes this more difficult. The difficult nature of such innovation does not mean that it should not be done, it just means that greater skill and care must be employed in crafting the rules that govern these entities.

Outside investment and ownership of law practices is occurring already in other parts of the common law world. Australia has permitted outside investment and ownership of law practices for several years.³⁸⁶ England has passed legislation and is implementing procedures for the creation of “Licensed Bodies,” which will permit nonlawyer ownership and management in an entity that primarily practices law.³⁸⁷ In both countries, these new entities will have the ability to raise significant capital in the financial markets, engage nonlawyer management teams, and fund risky and costly innovations.³⁸⁸ At the same time, under both regimes, there are rules in place to

383. On July 13, 2000, the ABA House of Delegates adopted revised Recommendation 10F, ending the discussion on multidisciplinary partnerships and disbanding the Commission on Multidisciplinary Practice. See *Recommendation*, *supra* note 260.

384. See Dzienkowski & Peroni, *supra* note 48, at 153-204 (discussing several MDP models and how core values can be protected within an MDP structure).

385. The ABA Commission on Ethics 20/20, in February 2011, “decided that two options for alternative business structures—passive equity investment in law firms and the public trading of shares in law firms—would not be appropriate to recommend for implementation in the United States at this time.” ABA COMM’N ON ETHICS 20/20, *supra* note 380, at 2. Although the Commission did not give any reasons for this decision, one can only speculate that a rash of negative comments and perceived hostile reception from the organized bar precluded further consideration of these alternatives.

386. See Mark, *supra* note 10, at 53-63.

387. See generally Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT’L J. LEGAL PROF. 195 (2010); Schneyer, *supra* note 10. For a detailed listing of all of the rules, regulations, and considerations that have gone into the implementation of the Legal Services Act of 2007, see *Closed Consultations*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm (last visited May 15, 2012).

388. One commentator predicts:

protect lawyer independent decision-making, to ensure client confidentiality, and to avoid undue conflicts of interest.³⁸⁹ The Australian and English experiences demonstrate that other common law legal regimes are willing to experiment with innovative ways of enhancing the delivery of legal services.³⁹⁰

Initially, one should ask whether there is a need for outside capital.³⁹¹ Technology, competition for clients, the need and desire to innovate, the need to train and nurture young associates, and the expansion of firms place significant resource demands on law firms.³⁹² Exploiting communication and information technology requires an ever increasing need for resources. There can be little doubt that we are only at the beginning of the use of information technology in the practice of law.³⁹³ Artificial intelligence and document assembly promise heightened efficiencies in the years to come, but they may prove to be far more expensive and time consuming than previously believed.³⁹⁴ In any event, those firms with access to greater capital

“[P]rivate equity enters the legal marketplace in England & Wales, but it pays just glancing attention to traditional law firms, deciding that it doesn’t need the headaches that come with trying to manage lawyers and reinvent law firms built around the billable hour. Instead, most of the money heads for efficient, accessible, predictable, process-driven operations that are aligned more closely with how modern businesses operate, including LPOs, online and virtual service providers, and streamlined, fixed-fee lawyer boutiques.”

Mountain, *supra* note 128, at 6 (quoting Jordan Furlong, *The Blind Side*, SLAW, Apr. 3, 2010, <http://www.slw.ca/2010/04/03/the-blind-side/>).

389. See *supra* note 381.

390. See Schneyer, *supra* note 10, at 24-44; Mark, *supra* note 10, at 47-63.

391. Harris and Foran have made a convincing argument that individual clients are harmed by the prohibition of outside investment in law practices. See Harris & Foran, *supra* note 133, at 801. They claim that any market that produced a 261% increase in expenditures during a fifteen year period would attract sufficient interest from outside investors. See *id.*

392. See Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT’L L. REV. 407, 422 (2008); Hadfield, *supra* note 111, at 55-57; Hadfield, *supra* note 53, at 1726-27; Harris & Foran, *supra* note 133, at 805 (arguing that “consumer-friendly collaboration” between lawyers representing middle-income individuals and technology providers has not occurred because of the limitations on nonlawyer investment in the legal services industry).

393. Susskind reports that U.S. law firms invest less in knowledge management than their European counterparts. See SUSSKIND, *supra* note 101, at 160; see also Kobayashi & Ribstein, *supra* note 290, at 1207-08 (suggesting that the traditional client advice model results in underproduction of legal products because fees from individual clients cannot adequately finance the discovery of complete solutions to complex problems like developing new takeover defenses or sovereign bond terms); Hadfield, *supra* note 111, at 59 (noting the need for a massive overhaul of the legal infrastructure to meet the needs of twenty-first century global clients).

394. See Mountain, *supra* note 128, at 1 (quoting a Ph.D. thesis by Chrissy Burns, an Australian lawyer that concludes that current legal knowledge products have largely “not lived up to their promise” for a variety of reasons including that they are much harder to build).

may have the funds necessary to pursue these technologies. Those with limited funding will have to maintain business as usual with the resulting reduction in efficiency and competitiveness.

Very large law firms sit on a huge storehouse of unexploited data, and when combined with other firms, this storehouse only grows significantly.³⁹⁵ This data should be mined to determine, for example, which types of legal arrangements are best suited for differing situations, which arrangements reduce or enhance risk, and what are the predicted outcomes from various types of legal action or conflict-resolution methodologies.³⁹⁶ The mining and application of this data will take significant capital resources, while posing certain risks. Without the infusion of nonpartner capital it seems highly unlikely that American law firms will have the resources to pursue the potential of this largely untapped resource.

The need to service clients nationally and globally has created further impetus for greater capital resources. Law firms have expanded nationally and internationally by opening offices in new cities or acquiring existing firms and practices.³⁹⁷ Again, in each instance, these events require capital resources.³⁹⁸

The traditional law firm practice model requires that firms are either self-funded—the partners contribute to the capital needs of the firm by devoting a portion of each partner's share to the capital needs of the firm—or the firm must borrow from outside sources, usually banks. Both of these sources have distinct limitations, costs, and detriments to the on-going vitality of the firm.³⁹⁹ As Professor Regan has explained, “A partnership’s capital base is limited to the wealth of its partners, and its assets are mobile.”⁴⁰⁰

The mobility of lawyers hinders the capital resources of a firm in several ways.⁴⁰¹ Partners are less likely to invest in the long-term growth of the

395. See SUSSKIND, *supra* note 101, at 171-74. Confidentiality and conflicts rules will, to a degree, inhibit the cross firm sharing of some of this data but this should not impose an insurmountable hurdle.

396. See Hadfield, *supra* note 111, at 37-39, 42; Hadfield, *supra* note 53, at 1725.

397. See Regan, *supra* note 392, at 422.

398. One author has noted that many firms lose money on their foreign operations. See D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 *IND. J. GLOBAL LEGAL STUD.* 5, 14 (2007).

399. See HEINZ ET AL., *supra* note 36, at 300-01 (finding that law firms are vulnerable to better finance competitors and that law firms are undercapitalized); Erin J. Cox, Comment, *An Economic Crisis Is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 *UCLA L. REV.* 511, 518 (2009); Heather A. Miller, Note, *Don't Just Check "Yes" or "No": The Need for Broader Consideration of Outside Investment in the Law*, 2010 *U. ILL. L. REV.* 311, 319-20 (citing several examples of debt overload contributing to law firm dissolutions).

400. See Regan, *supra* note 392, at 422.

401. See MODEL RULES OF PROF'L CONDUCT R. 5.6 (2010) (prohibiting “a partnership . . . or other similar type of agreement that restricts the right of a lawyer to practice after

firm if there is a considerable risk that a significant portion of the firm's most valuable assets, the lawyers, are likely to depart at any time in the near future.⁴⁰² Borrowing may be just as risky, rendering the remaining partners liable for firm debt without the ability to maintain the revenue stream necessary to fund such debt. These two concerns may just as likely inhibit investors. In all three instances, there are clear incentives to promote greater firm stability and to start a discussion of the viability of the current policies promoting lawyer mobility.⁴⁰³

The ban on nonlawyer ownership of law practices hinders the provision of legal services to middle- and low-income individuals and small businesses. Despite the great influx of lawyers in the past forty years most solo and small firm lawyers remain too expensive for most middle- and lower-income Americans.⁴⁰⁴ They need lawyering at Wal-Mart prices.⁴⁰⁵ Currently, Wal-Mart and other mass retailers offer a variety of professional

termination of the relationship"); *see also* Ribstein, *supra* note 182, at 804-06 (discussing the effects on law firms of the prohibition of lawyer noncompete agreements).

402. *See* Ribstein, *supra* note 182, at 771-73 (providing case histories of the dissolution and breakup of a number of big law firms due to expansion, debt, and lawyer mobility). Ribstein quotes one partner, "The notion of making even a short-term or a medium-term financial sacrifice for some greater good of the firm is just not how a lot of folks are wired." *Id.* at 772 (alteration in original) (quoting Adelle Waldman, *Colleague Lawyers Regroup on Firm Ground: Former Arter & Hadden Attorneys Scale Back Their Vision*, PLAIN DEALER (Cleveland), July 21, 2003, at E1); *see also* HILDEBRANDT, *THE ANATOMY OF LAW FIRM FAILURES* 4 (2008) (concluding that "a key triggering event in the downward slide of many failed firms has been the departure of a group of key partners").

403. *See* Ribstein, *supra* note 182, at 804-06. *See generally* Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915 (2000).

404. *See* discussion *supra* Subsection I.C.2.

405. In a recent survey in the United Kingdom, sixty percent of respondents indicated that they would buy legal services from a mass retailer. *See 60% of People Would Buy Legal Advice from Brands Like Barclays, AA, Co-op and Virgin*, *supra* note 239; *cf.* Cramton, *supra* note 17, at 576 ("The specter of national retailers, insurance companies and major banks, among others, offering legal services generally, or to their customers through multiple offices, continues to alarm the profession."). England is moving ahead with a variety of retail law offerings including those by the Co-operative, which has started Co-operative Legal Services, and WHSmith. *See* THE CO-OPERATIVE LEGAL SERVICES, <http://www.co-operative.coop/legalservices/> (last visited May 15, 2012); WHSMITH, <http://www.whsmith.co.uk/> (last visited May 15, 2012). In addition, numerous solicitors have banded together to form franchise operations under the names of QualitySolicitors and Lawyers2you. *See* QUALITYSOLICITORS, <http://www.qualitysolicitors.com> (last visited May 15, 2012); LAWYERS2YOU, <http://www.lawyers2you.co.uk/> (last visited May 15, 2012). QualitySolicitors has formed a relationship with WHSmith to set up outlets in its retail stores. *See* Flood, *supra* note 275, at 555. Now there is news that another firm is establishing video conferencing kiosks at shopping centers to offer a limited consultation with a solicitor for a fixed price. *See Exclusive: Video-Conferencing Kiosks Hit Shopping Centres in New Legal Advice Push*, LEGAL FUTURES, Dec. 5, 2011, <http://www.legalfutures.co.uk/latest-news/exclusive-video-conferencing-kiosks-hit-shopping-centres-in-new-legal-advice-push>.

services, including banking, medical, dental, and eye care.⁴⁰⁶ The leap into the high need but overpriced, at least from the perspective of certain consumers, legal services market is a logical next step.⁴⁰⁷ Furthermore, nonlawyer-corporate ownership will bring needed capital and incentives to develop alternative and creative business models for delivering legal services at prices much more in line with the financial realities of middle- and lower-income clients.⁴⁰⁸ The ones hurt by this competition will be those solo and small firm practitioners who cannot adapt to this changing environment, not the clients.

The current model deprives law firms of the resources needed to grow, to innovate, to create efficiencies of scale, and to invest in technology, all with the result that these firms are less competitive.⁴⁰⁹ Hadfield equates law firm inability to raise capital to the “plowed-back profits and owner-manager mechanisms that financed companies in the late-nineteenth century.”⁴¹⁰ The real disadvantages in this model fall to the clients who are strapped with rising legal costs. If there are other competitors in the market who have the resources to become more efficient, clients will gravitate over time to these providers, especially if they deliver a highly-competitive product.⁴¹¹ The innovations in Australia, England and, to a lesser degree, the European Union are fostering an environment where such competitors

406. Wal-Mart is already into financial services through the marketing of debit cards that provide an alternative to those who do not use conventional banks. See Blake Farmer, *Wal-Mart Lures Bank Customers Frustrated by Fees*, NAT'L PUB. RADIO, Nov. 22, 2011, <http://www.npr.org/2011/11/22/142599130/wal-mart-lures-bank-customers-frustrated-by-fees>. Medical may be next. See Julie Appleby & Sarah Varney, *Wal-Mart Plans Ambitious Expansion into Medical Care*, NAT'L PUB. RADIO HEALTH BLOG (Nov. 9, 2011, 2:52 PM), <http://www.npr.org/blogs/health/2011/11/10/142156478/wal-mart-plans-ambitious-expansion-into-medical-care>.

407. See Cramton, *supra* note 17, at 577. When outside ownership was proposed in the early 1980s, Professor Geoffrey Hazard, the reporter for the Kutak Commission, reported: “During the debate someone asked if [the Kutak] proposal would allow Sears Roebuck to open a law office. When they found out it would, that was the end of the debate.” *Id.* (alteration in original).

408. See SUSSKIND, *supra* note 101, at 253-54 (noting the great untapped need, the interest of outside investors, and creative potential of mass retailers to transform the provision of legal services).

409. See Hadfield, *supra* note 53, at 1726-27 (“Innovation in legal markets is also severely hampered by limitations on the capacity for innovators to finance their entrepreneurial efforts.”).

410. *Id.* at 1726.

411. One blog reported that venture capital is flowing into companies that operate “at the intersection of the delivery of legal services and the Internet.” Richard Granat, *Venture Capital Flowing into Legal Enterprises: Total Attorneys Receives Infusion of Capital*, ELAWYERING BLOG (Jan. 22, 2011, 10:19 AM), <http://www.elawyeringredux.com/2011/01/articles/venture-capital/venture-capital-flowing-into-legal-enterprises-total-attorneys-receives-infusion-of-capital/>.

might thrive.⁴¹² These environments and the competitors they will spawn do not bode well for U.S. law firms seeking to compete in a world market for legal services.

F. Lawyer Mobility—Multijurisdictional Practice

The country and the world are increasingly shrinking. People, goods, and information move across jurisdictions effortlessly and constantly. Yet, the legal profession maintains a regulatory regime that is very reflective of the nineteenth and early twentieth century.⁴¹³

Lawyers admitted in one state cannot freely or easily practice in another state without special permission, often requiring the retaking of a minimal competency exam.⁴¹⁴ These restrictions hinder the free flow of labor and talent, they increase the cost of legal services, and they stifle competition, all without any appreciable evidence that they enhance the protection of clients, the public, or any other valid state interest.⁴¹⁵ They do, however, protect local lawyers from out-of-jurisdiction competition.⁴¹⁶

412. See Flood, *supra* note 275, at 552-54; Mountain, *supra* note 128, at 6.

413. See Marcus, *supra* note 230, at 288-92; Daly, *supra* note 263, at 286 (noting “a remarkable consensus among academics, in-house counsel, and most law firm practitioners that the current system [state-based regulation] makes little or no sense given the national structure of the economy and is an unjustifiable obstacle to the efficient delivery of legal services”).

414. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983). ABA Commission on Ethics 20/20 has proposed modifying Rule 5.5, but only to the extent of permitting a lawyer who is in good standing in another jurisdiction to practice in a non-admitted state on a continuous basis if that lawyer is seeking admission in that state and under certain restrictions. See ABA COMM'N ON ETHICS 20/20, INITIAL RESOLUTION MODEL RULE 5.5(D)(3)/CONTINUOUS AND SYSTEMATIC PRESENCE 2 (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authcheckdam.pdf). Thirteen states do not permit lawyers who have previously been admitted to practice in another jurisdiction to move for admission after some period of prior practice (usually for five or more years); in addition, twenty-five states will not grant reciprocity, admission by motion, to lawyers from states that limit admission to only those taking a bar exam. See NAT'L CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2011 35 chart 10, 38 chart 11 (2011), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/20110201_Comp_Guide.authcheckdam.pdf.

415. See Hadfield, *supra* note 53, at 1723 (articulating professional regulation limits innovation by restricting market size by limiting practice geographically). *But see* Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 702-07 (2002) (articulating the need to protect and maintain a healthy local bar in the face of multijurisdictional practice).

416. See Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729, 757 (2010).

There is probably no other rule that is more ignored by disciplinary authorities⁴¹⁷ and more violated by lawyers than the rules prohibiting multi-jurisdictional practice.⁴¹⁸ It is virtually impossible for many lawyers to adequately represent their clients without readily practicing across multiple jurisdictions on a regular basis.⁴¹⁹ We have come to a time when the practice of law in the U.S. should be permitted on a national scope.⁴²⁰

The only valid reason for maintaining the current regime of limited state licensing of lawyers is to ensure the competence of those who practice within a given jurisdiction. While state limitations may have been necessary at one time to insure competence, they are not today.⁴²¹ The education of lawyers is highly regulated and is glaringly similar in content and delivery nationally.⁴²² A significant portion of all but two jurisdictions' bar examina-

417. See Sara J. Lewis, Note, *Charting the "Middle" Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients*, 22 GEO. J. LEGAL ETHICS 631, 634 & nn.11-17 (2009) ("Luckily for lawyers, historic enforcement of MJP rules has been weak and challenges have been infrequent."); Daly, *supra* note 263, at 287 & n.285; Daly, *supra* note 119, at 729-30 (noting that for corporate in-house lawyers, the "marketplace solution has superseded the state-based admissions system" by permitting in-house lawyers to practice nationally as long as they do not go to court).

418. See Lewis, *supra* note 417, at 634 & nn.11-16 ("Practicing attorneys violate MJP rules 'habitually' and on a 'daily basis.'" (footnotes omitted) (quoting Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 685-86 (1995); Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 535 (1999)); Schneyer, *supra* note 10, at 20 n.23 ("Despite the recent liberalization, it appears that more than a few lawyers continue to practice across state lines without authority but with impunity."). See generally Wolfram, *supra*.

419. See generally Carol A. Needham, *The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments*, 43 AKRON L. REV. 985 (2010) (reviewing the pitfalls that can befall corporate in-house counsel under the current multijurisdictional practice terrain).

420. Mark Pruner, President of Web Counsel, LLC, which provides marketing services and creates internet based programs for the legal community, noted that the *Birbrower* case denying attorneys' fees to New York lawyers for the work they did in California "epitomizes the inherent contradictions in trying to apply geographical restrictions from the 19th century when the primary form of transportation was horse and buggy, to an age of telephones, faxes, email, extranets, FedEx and 777s." Mark Pruner, *The Clash of 20th Century Regulation with 21st Century Technology*, 16 ST. JOHN'S J. LEGAL COMMENT. 587, 593-94 (2002).

421. See Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 NEB. L. REV. 1379, 1394 (2003) ("It is important to keep in mind that there is no concrete evidence that restricting multijurisdictional practice is a way to protect the public.").

422. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3* (2007) (finding that the "curriculum at most [law] schools follows a fairly standard pattern"); Hadfield, *supra* note 53, at 1711-13; Daly, *supra* note 119, at 731-32.

tions are the same.⁴²³ They require that at least a third to a half of the exam be the Multistate Bar Examination.⁴²⁴ Forty-eight jurisdictions use the Multistate Professional Responsibility Examination and thirty-four jurisdictions employ the Multistate Performance Test as part of their testing regimen.⁴²⁵ These exams are based on national law and norms and the law common to all jurisdictions. They are devoid of state-based distinctions.⁴²⁶ While the passing scores vary from jurisdiction to jurisdiction, there is no evidence that the variation in passing scores creates a statistically significant difference in competence.

With the advent of the uniform state laws movement, uniform codes, and various other drives for state law uniformity, the law in many areas is fairly similar across jurisdictions.⁴²⁷ Where the law is different, the internet has made it very simple and relatively inexpensive to discover and learn the differences in any jurisdiction, including unpublished opinions and local rules.⁴²⁸ It is hard to fathom that a lawyer in good standing, who has attended an ABA accredited law school, who has passed a bar examination containing a significant component used in almost all jurisdictions, and who has ready access to the laws of any jurisdiction, is any less competent to prac-

423. Forty-nine jurisdictions employ the Multistate Bar Exam, with Washington joining this group in 2013, leaving Louisiana as the only jurisdiction that does not use it. See *MBE Jurisdictions*, NAT'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mbe/mbe-jurisdictions/> (last visited May 15, 2012). The ABA Commission on Ethics 20/20 Report accompanying a proposal to amend the ABA Model Rule on Admission by Motion concluded that "bar examinations in nearly half of all jurisdictions do not test any knowledge of local law. . . . [and of those that do,] the portion of the test dedicated to that material is typically so small that bar passage is unlikely to turn on it." See ABA COMM'N ON ETHICS 20/20, INITIAL DRAFT PROPOSAL—ADMISSION BY MOTION 4 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_admission_by_motion_initial_resolution_and_report_for_comment.authcheckdam.pdf.

424. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012, NAT'L CONFERENCE OF BAR EXAMINERS, Chart 9, 32-32, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (last visited June 6, 2012).

425. *MPRE Jurisdictions*, NAT'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpre/which-jurisdictions-administer-the-mpre/> (last visited May 15, 2012); *MPT Jurisdictions*, NAT'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpt/mpt-jurisdictions/> (last visited May 15, 2012). Washington is adding both examinations in 2013. *MPRE Jurisdictions*, *supra*; *MPT Jurisdictions*, *supra*.

426. With reference to the MBE, "The questions on the examination are designed to be answered by applying fundamental legal principles rather than local case or statutory law." *The New York State Bar Examination*, N.Y. ST. BOARD OF L. EXAMINERS, <http://www.nybarexam.org/TheBar/TheBar.htm> (last visited May 15, 2012).

427. See Daly, *supra* note 119, at 723-24.

428. See *id.* at 733-34.

tice in that jurisdiction than a similarly-situated lawyer who is admitted in that jurisdiction.⁴²⁹

All lawyers who engage in the practice of law in any jurisdiction, whether they are authorized or not, are subject to the disciplinary authority of that jurisdiction.⁴³⁰ The reciprocal discipline rules mean that a lawyer disciplined in any jurisdiction should receive the same or similar punishment in her state of licensure.⁴³¹ A suspension in one jurisdiction should operate to prevent a lawyer from practicing in any other jurisdiction.⁴³²

Finally, it is inconceivable that the European Union could set up a system that permits the free movement of lawyers between member countries, with their varying legal regimes, languages, and customs, and we in the United States with a common language, a unifying legal heritage, considerable uniformity in laws, and an overriding federal legal system, cannot create a system that permits the easy movement of lawyers across state lines.⁴³³ The underlying motivation in the European Union, Australia, and Canada is

429. The ABA Commission on Ethics 20/20 in its report accompanying revisions to the Model Rule on Admission by Motion found that “three years of practice in another jurisdiction may enable a lawyer to identify and understand variations in the law more easily than a recent law school graduate who has never practiced at all but has passed the jurisdiction’s bar examination.” ABA COMM’N ON ETHICS 20/20, *supra* note 423, at 4.

430. See MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (2010) (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”).

431. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22(D) (2007) (noting that with the exception of certain procedural irregularities, an “infirmity of proof,” or the “discipline imposed would result in grave injustice,” the “court shall impose the identical discipline”).

432. See, e.g., *Disciplinary Counsel v. Koehler*, 128 Ohio St. 3d 1222, 2011-Ohio-2385, 947 N.E.2d 172, at ¶ 10 (suspending indefinitely a lawyer in Ohio based on disbarment in California and stipulating that suspension will not be lifted until lawyer is reinstated in California); *Disciplinary Counsel v. Wood*, 126 Ohio St. 3d 1212, 2010-Ohio-3496, 931 N.E.2d 120, at ¶ 10 (suspending indefinitely lawyer in Ohio who had been indefinitely suspended under disability in Texas and stipulating that suspension will not be lifted until lawyer is reinstated in Texas).

433. See Lonbay, *supra* note 299, at 1629, 1632 (noting that the European Union has permitted temporary out-of-country practice under a lawyer’s home state title since 1970 and now “allows those with relatively minimal knowledge of local rules to gain access to the host state legal market and the host state legal profession, even with little pre-controlled assessment of their local legal knowledge”). Lonbay also notes:

The multitude of legal professions across the European Union has varying structures, customs, cultures, and legal traditions. The variation among entry requirements reflects this colorful diversity. Yet, despite these relatively deep differences in entry requirements, the EU has created some of the “particularly remarkable” and most dramatic rules for allowing free movement of lawyers and cross-jurisdictional practice rights in the world.

Id. at 1640 (footnotes omitted) (quoting Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 PENN ST. INT’L L. REV. 563, 598 (2004)).

to open up the practice of law to greater competition and thereby reduce the cost of those services.⁴³⁴ In all three, there is no evidence that clients have been harmed or that society has not benefited from these reforms.

The current multijurisdictional rules, while a step in the right direction, do not go far enough.⁴³⁵ They still place considerable limitations on the free movement of lawyers. The rules require that a lawyer not licensed in a particular jurisdiction may only practice in that jurisdiction on a temporary basis and only under limited circumstances: notably in association with a lawyer who is admitted to practice in that jurisdiction; in a matter related to a pending or potential proceeding that will enable *pro hac vice* admission; in a matter related to an alternative dispute proceeding or potential proceeding arising out of or related to the lawyer's practice in a jurisdiction where the lawyer is admitted; or, if none of the above, in a matter arising out of or reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted.⁴³⁶ The rules still prohibit a lawyer from establishing an office or other "systematic and continuous presence" in a jurisdiction in which the lawyer is not admitted to the practice of law even if that lawyer is in good standing in another jurisdiction.⁴³⁷

Numerous commentators have pointed out various problems arising from the "temporary basis" restrictions.⁴³⁸ The comments to the rule even lay out some of the difficulty with this terminology. Comment 6 states:

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.⁴³⁹

434. See *id.* at 1634-36.

435. See MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2010). For a discussion of the adoption and implementation of Rule 5.5, see Greenbaum, *supra* note 416, at 737-42. The ABA Center for Professional Responsibility maintains a webpage on the state-by-state implementation of Rule 5.5. See ABA, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (MULTIJURISDICTIONAL PRACTICE OF LAW) 1-4 (2011), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf. It was last updated in September 27, 2011, and reveals that thirteen states have adopted an identical version of Model Rule 5.5, while thirty-one states have adopted some version thereof. See *id.* The ABA Commission on Ethics 20/20 in a report dated September 7, 2011, has concluded that "[t]he current framework has served lawyers and clients well." ABA COMM'N ON ETHICS 20/20, *supra* note 414, at 2.

436. See MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2010).

437. *Id.* at R. 5.5(b)(1).

438. See Greenbaum, *supra* note 416, at 737-42 (quoting MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 6 (2009)); Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 502-08 (2011); Needham, *supra* note 419, at 1002.

439. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 6 (2010).

The “temporary basis” language must be read in conjunction with other language that indicates that “[p]resence may be systematic and continuous even if the lawyer is not physically present here.”⁴⁴⁰ Together, the two statements create a rather confusing and bewildering regime of regulation that permits, according to Professor Wald, “only temporary national practice, incidental national practice, or limited national practice that has a strong factual or legal nexus to the state where a lawyer is licensed.”⁴⁴¹ How this helps a lawyer licensed in California and practicing in Los Angeles, who represents a corporation with its national office in Detroit and incorporated in Delaware, to resolve numerous federal and state employment issues at plants located in Michigan, Ohio, Alabama, and Tennessee is beyond me. An argument can be made that if the lawyer were licensed in Michigan or if the client had a significant presence in California, she may fall within the exceptions to the rule.⁴⁴² Otherwise, she may be precluded from representing her Michigan client, something I doubt few lawyers would accede to. The realities of corporate, individual, and small business representation call for a very different solution.

Just as problematic is the language in the rule that requires association with and the active participation of local counsel.⁴⁴³ Without setting out any requirements for heightened competence beyond the general competence rules, Comment 8 articulates the belief that “interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction” and that the lawyer locally licensed “must actively participate in and share responsibility for the representation of the client.”⁴⁴⁴ This rule does not guarantee the competence of either the supervising lawyer or the lawyer licensed in another jurisdiction, nor does it preclude the neophyte from “actively participat[ing] in and shar[ing] responsibility” with the expert, to no advantage to the client.⁴⁴⁵ All it does is straddle the client with the cost of two lawyers and create employment for the supervising lawyer when one lawyer would have been sufficient to handle the matter and would have been cheaper.

440. See *id.* at R. 5.5 cmt. 4.

441. Wald, *supra* note 438, at 506; see also Greenbaum, *supra* note 416, at 737-52. But see Poser, *supra* note 421, at 1390 (finding that “the language of [C]omment 6 seems to allow everything short of permanence”).

442. Comment 14 adds further confusion to the matter by stating that “[i]n addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.” MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 14 (2010). The question becomes, so what—does this permit multidisciplinary practice without the other requirements? I don’t think so, but it does not help to clarify the matter.

443. See Greenbaum, *supra* note 416, at 742-44, 758-61.

444. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 8 (2010).

445. *Id.*

Finally, the rules prohibition against establishing an office or other systematic and continuous presence can only be to limit competition. The rules deem a lawyer competent to practice in a jurisdiction on a temporary basis even when it involves providing “services in this jurisdiction on a recurring basis, or for an extended period of time.”⁴⁴⁶ If the lawyer is competent to practice temporarily regardless of the length of that temporary practice, setting up an office or other systematic and continuous presence is not going to reduce the lawyer’s level of competence. It will increase the level of competition by permitting more lawyers to enter the legal market.

Again, if protecting the client were the profession’s true concern, it would open up competition for clients and put teeth in the rules that require written disclosures and make malpractice insurance mandatory. There is no question that any lawyer not licensed by a given jurisdiction should have to disclose that fact to prospective clients in writing, especially if they are going to establish a continuous presence.⁴⁴⁷ They should also be required to register in that jurisdiction and would be subject to all of the rules and regulations pertaining to attorneys practicing in that jurisdiction, including the rules on the reporting and handling of client funds.

The current jurisdictional limitation rules harken back to the days of the horse and buggy and a time before electronic communication was even conceivable. They simply do not reflect the reality in the twenty-first century. Their main by-products are a limitation on competition and an increase in the cost of legal services. The time for their demise is long overdue.

CONCLUSION

There can be little doubt that we live in exciting and interesting times. For lawyers, these times bring clear challenges and opportunities. Significant pressures are pulling the profession in numerous directions. With these pressures come opportunities. Whether one wishes to characterize the winds blowing against the legal profession as a paradigm shift, a move from a profession to a business, or simply a profession in decline,⁴⁴⁸ the facts remain the same: change is coming. Perhaps within the legal profession, change is always coming. Because lawyers exist to serve the interest of clients, the public, and society, their fate is directly attached to the current needs and pressures of the time.

446. *Id.* at R. 5.5 cmt. 6.

447. Rule 5.5(b)(2) prohibits a lawyer from holding out to the public or otherwise representing that they are admitted to practice in a jurisdiction when they are not. *Id.* at R. 5.5(b)(2).

448. As Professor Deborah Rhode has aptly noted, “Lawyers belong to a profession permanently in decline.” DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 1 (2000).

One constituency or another will push change. Whether it's sophisticated and powerful clients, national and international competition, technology, the federal government, international treaties, the profession itself, or a combination of some or all, change is inevitable. Clinging to the past is not an option. Change from within would seem to be preferable to change imposed from without. There is much to be commended in the current regulatory regime, but there is also much that should be changed. The profession needs to craft new rules that will enhance competition, promote innovation, embrace technology, promote efficiency, and demand competence, while preserving core-client protections. This will not be an easy task, not every interest will get what it wants, and numerous compromises will be made along the way. The legal profession can no longer operate as if it was 1925, let alone 1950. We must recognize the realities of the twenty-first century and incorporate rules that acknowledge those realities. If we don't, others will. The choice is ours.

