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

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## Articles

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

GILLIAN K. HADFIELD\* AND DEBORAH L. RHODE\*\*

*Scholars and critics have for decades advocated change in the professional regulation of legal services markets in order to solve the ever-widening gap in access to justice. One of the central obstacles to change has been concern about the impact of opening legal markets to new practitioners and business models on central professional values such as competence, loyalty, and independence. This Article argues that good regulatory solutions are available to ensure that more open and flexible professional models—ones that allow the practice of law by alternative providers and business structures—deliver high quality, lower cost, greater innovation, and more access to those currently excluded from our justice systems. Part I explores the rationale for regulating the legal services market, and argues that oversight structures should be more responsive to differences in the risks that consumers face in various legal contexts. Part II surveys regulatory options: prescriptive, performance based, management based, and competitive or meta-regulation. Part III reviews the promising strategies that the United Kingdom has recently pioneered to promote access, innovation, and quality. Part IV analyzes regulatory options for the United States and the applicability of U.K. approaches in this country. Attention also focuses on the contributions and limitations of Washington’s recent program to recognize limited license legal technicians. We conclude with proposals for more effective national regulatory models.*

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## INTRODUCTION

The case has been made for decades: our existing approaches to regulating the American legal profession increase costs, decrease access, stifle innovation, and do little to protect the interests of those who need or use legal services.<sup>1</sup> Ordinary Americans routinely manage complicated legal circumstances with little or no professional help;<sup>2</sup> the great majority of lawyers' work is done for large corporate clients, and the trend has only worsened in the last decades.<sup>3</sup> The number of people showing up in court without legal assistance to manage problems with housing, family, domestic violence, consumer credit, and other challenges continues to mount—in a recent New York study, the percentage of unrepresented

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1. BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* (2015); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004); DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* (2015) [hereinafter RHODE, *THE TROUBLE WITH LAWYERS*]; Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 *TEX. L. REV.* 639 (1981); Barlow F. Chistensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 5 *AM. B. FOUND. RES. J.* 159 (1980); Gerard K. Clark, *Monopoly Power in Defense of the Status Quo: A Critique of the ABA's Role in the Regulation of the American Legal Profession*, 45 *SUFFOLK U. L. REV.* 1009 (2012); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 *OHIO ST. L.J.* 243 (1985); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 *INT'L REV. L. & ECON.* 43 (2014) [hereinafter Hadfield, *The Cost of Law*]; Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 *DAEDELUS I* (2014); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Cost of Professional Control over Corporate Legal Markets*, 60 *STAN. L. REV.* 1689 (2008) [hereinafter Hadfield, *Legal Barriers to Innovation*]; James E. Moliterno, *Crisis Regulation*, 2012 *MICH. ST. L. REV.* 307; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 *J. INST. STUDY LEGAL ETHICS* 197 (1996); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 61 (1981) [hereinafter Rhode, *Policing the Professional Monopoly*]; Deborah L. Rhode, *Why the ABA Bothers: Functional Perspective on Professional Codes*, 59 *TEX. L. REV.* 689 (1981); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29 (1978); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799 (1992).

2. See Gillian K. Hadfield & Jamie Heine, *Life in the Law Thick World: The Legal Resource Landscape for Ordinary Americans*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* 21 (Samuel Estreicher & Joy Radice eds. 2016).

3. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

litigants topped ninety-five percent in several routine categories.<sup>4</sup> A lack of legal assistance with municipal and traffic violations has played no small part in the abusive use of arrest warrants and fines in poor communities.<sup>5</sup> Even in criminal matters where the *Gideon* right to counsel is constitutionally guaranteed, the inadequacy of legal help is staggering.<sup>6</sup>

The traditional response of the organized bar to the crisis in access to justice has been to promote increased funding for legal aid, increased pro bono obligations on practicing attorneys, and the creation of a government-funded “civil *Gideon*” right to counsel in some civil matters. But it is also painfully clear that these responses are wholly inadequate. Providing even one hour of attorney time to every American household facing a legal problem would cost on the order of \$40 billion.<sup>7</sup> Total expenditures on legal aid, counting both public and private sources, are now just 3.5% of that amount.<sup>8</sup> Fewer than two percent of all American lawyers work in legal aid or public defender jobs and pro bono work accounts for less than two percent of legal effort.<sup>9</sup> Providing just one hour of pro bono assistance per problem to households facing legal difficulties would require over 200 hours of pro bono work per year by every licensed attorney in the country.<sup>10</sup> No amount of volunteerism, ethical exhortation, or political pressure for increased taxation to fund legal services can ever fill the gap.

The principal obstacle to increasing access to legal assistance is the cost of the business model in which legal services have conventionally been available to ordinary consumers.<sup>11</sup> That model relies on individual

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4. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK I (2010).

5. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

6. AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 7–14 (2004); KAREN HOUPPERT, CHASING GIDEON, THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 154 (2013); RHODE, THE TROUBLE WITH LAWYERS, *supra* note 1, at 30–35; Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2319, 2321 (2013); Carol S. Steiker, *Gideon’s Problematic Promises*, 143 DAEDALUS 51, 53 (2014).

7. This calculation is based on data in Hadfield & Heine, *supra* note 2. It uses a straight-line average of the percentage of households reporting at least one legal problem in state surveys (sixty-two percent), the average number of problems experienced by these households (three) and an estimate of an hourly rate of \$200.

8. ALAN W. HOUSEMAN, CLASP, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013 (2013).

9. An ABA survey calculated that licensed attorneys provide on average 42.8 hours of pro bono services directly to people of limited means in 2012. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 6 (2013). Assuming forty-eight forty-hour weeks of work for an average lawyer, this is a little over two percent of annual legal effort.

10. *See supra* basis for calculation note 7.

11. Hadfield, *The Cost of Law*, *supra* note 1, at 44.

one-on-one lawyering, through traditional solo and small firm practices, generally billed on an hourly basis. The model foregoes the cost-reducing benefits of scale, branding, technology, and the ordinary efficiencies that would come from having lawyers specialize in legal functions, while others (software engineers, financial analysts, business managers, marketing experts, and so on) specialize in all the other functions.<sup>12</sup> Why has the traditional model of legal service delivery not achieved greater efficiencies and lower costs?

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

The fierce preservation of a legal professional regulatory model first adopted in the 1930s but substantially abandoned in other professions rests on two driving forces. The first is sheer protectionism. As much as we would like to deny that lawyers are using their special access to the regulatory levers to protect themselves from competition by alternative providers and business models, this is clearly part of the story.<sup>18</sup> Anticompetitive behavior is, of course, a temptation for any self-regulating profession, as the U.S. Supreme Court recently acknowledged

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12. *Id.* at 49.

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

14. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 2013). Washington, D.C. is a limited exception. D.C. RULES OF PROF'L CONDUCT r. 5.4(b) (2016) (allowing nonlawyer financial interest and managerial authority in law firm provided firm has as its sole purpose providing legal services and lawyers are responsible for nonlawyer participants).

15. *Id.*

16. *Id.*

17. For a history of professional regulation in medicine, see JAMES C. ROBINSON, *THE CORPORATE PRACTICE OF MEDICINE: COMPETITION AND INNOVATION IN HEALTH CARE* (1999).

18. Rhode's chronicles of these efforts span three decades. See Rhode, *Policing the Professional Monopoly*, *supra* note 1; Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public: Rethinking Unauthorized Practice Enforcement*, 82 *FORDHAM L. REV.* 2587 (2014); see also RHODE, *THE TROUBLE WITH LAWYERS*, *supra* note 1, at 42–44, 88–90.

in a landmark decision finding that regulatory boards that are controlled by members of a profession are not exempted from application of the antitrust laws in the absence of active supervision by the state.<sup>19</sup>

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

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

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

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19. N.C. Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015).

### I. WHY REGULATE LEGAL SERVICES?

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

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

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

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

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

Quality also includes attributes that service professionals sometimes do not think of as part of their job or as either legitimate or important expectations on the part of consumers. Other industries understand these attributes in terms of customer service. Are phone calls returned promptly and reliably? Does the professional convey respect and empathy for the client? Does the provider make it easy for the client to understand her situation, make choices, and implement solutions? Does the provider treat the client’s time as valuable? Does the provider listen to what the client is saying? Is the provider an agreeable person to work with? Are the provider’s procedures and modes of communication intuitive, easy to navigate, and appealing?

Table 1 gives a snapshot of failures of quality in legal services. It shows the frequency of different types of errors in claims made against legal malpractice insurance in Missouri from 2005 through 2014.<sup>20</sup> It is clear that many failures in legal practice involve attributes of service delivery other than legal knowledge or judgment.

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20. For an in-depth review of evidence of malpractice, see Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws up: A Portrait of Legal Malpractice Claims and Their Resolution* (June 2015) (unpublished manuscript) (on file with Duke University Law School).

TABLE I: MISSOURI MALPRACTICE CLAIMS 2005–2014<sup>21</sup>

Error or Omission	Number of Closed Claims	Number of Paid Claims	Average Paid per Claim	Total Paid
Failure to ascertain deadline correctly	301	84	\$131,962	\$11,084,808
Planning or strategy error	261	73	\$241,574	\$17,634,902
Failure to know or properly apply law	171	53	\$96,574	\$5,118,422
Procrastination/lack of follow up	129	34	\$230,188	\$7,826,392
Inadequate investigation	122	36	\$120,483	\$4,337,388
Failure to follow client's instructions	111	17	\$211,126	\$3,589,142
Failure to file documents (no deadline)	102	26	\$70,962	\$1,845,012
Failure to react to calendar	96	40	\$61,955	\$2,478,200
Malicious prosecution of abuse of process	85	14	\$23,774	\$332,836
Failure to calendar properly	75	41	\$67,707	\$2,775,987
Fraud	74	14	\$57,871	\$810,194
Conflict of interest	62	15	\$239,342	\$3,590,130
Clerical error	50	13	\$24,742	\$321,646
Failure to obtain clients' consent	47	8	\$25,885	\$207,080
Violation of civil rights	39	4	\$101,250	\$405,000
Math calculation error	21	7	\$52,094	\$364,658
Improper withdrawal from representation	19	5	\$54,342	\$271,710
Error in public record search	16	6	\$68,768	\$412,608
Libel or slander	14	1	\$15,000	\$15,000
Failure to anticipate tax consequences	12	3	\$455,000	\$1,365,000
Lost file, document or evidence	5	1	\$17,500	\$17,500
Other	549	68	\$72,266	\$4,914,088

21. MO. DEP'T OF INS., FIN. INSTS. & PROF'L REGISTRATION, 2014 MISSOURI LEGAL MALPRACTICE INSURANCE REPORT 41 (2015).

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

A second reason to regulate professional services beyond ordinary marketplace regulation arises from society's interest in the provision of competent and ethical behavior. There may be externalities arising from the service provided to a particular individual. Fidelity to the rule of law promotes public confidence in the legal system and supports compliance with legal rules. In high stake matters, the public cares about how members of the community are treated. Society and third parties suffer from inadequate representation of those facing deportation, eviction, or loss of child custody.

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

In other cases, the stakes are relatively low and hence the need for costly specialized regulation is harder to justify. Courts and legislatures make judgments all the time about the relative importance of the stakes in a case and the consequences of short-changing the quality of legal attention they receive. They do this when they decide, for example, to prohibit the use of lawyers in small claims cases. Cases involving small dollar amounts often (but not always) are relatively low stakes for the parties involved.

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

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

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

## II. WHAT ARE THE REGULATORY OPTIONS?

There are four principal methods for regulating services when the incentives created by ordinary marketplace regulation are inadequate.<sup>22</sup> The traditional approach to regulation is *prescriptive*, sometimes called

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22. For an overview, see Peter J. May, *Regulatory Regimes and Accountability*, 1 REG. & GOVERNANCE 8 (2007).

*command-and-control*. Prescriptive regulation supplies specific and sometimes highly detailed rules about the training and qualifications that providers must possess, the practices they must follow, and/or the business models and techniques they must use to deliver the service. Violations of these rules can trigger fines or criminal sanctions. In addition, prescriptive rules can serve as prerequisites for a valid license to supply the service. Rule violations can then lead to license revocation.

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

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

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

A fourth approach, one that is relatively novel in the regulatory world, is *meta-regulation* or *competitive* regulation.<sup>25</sup> Under this approach, government regulators regulate regulators. That is, the particular rules and processes that are imposed on providers are developed by possibly private, possibly multiple, third-party regulators. Those regulators are in turn subject to oversight by the state. The government requires providers to specify a regulator from among a set of approved regulators. An advantage of this approach is that private regulatory entities can specialize in the tools and techniques of regulation, achieving even a greater level of innovation and investment in regulatory design than is possible with management-based regulation. A key challenge of this approach is ensuring that any entity to which the state has effectively delegated regulatory oversight authority achieves results consistent with the state's regulatory goals and is not captured by the regulated entities. As we discuss below, this approach to regulation is playing a central role in the United Kingdom and thus can inform discussion of reforms in American professional regulation to promote access, reduce costs, and increase the quality of lawyering.

A regulatory regime could combine elements from several of these approaches. Providers might have to satisfy certain educational requirements in order to obtain a license, for example. Once licensed, they might then be subject to prescriptive, performance-based, or management-based regulation, or a combination of these three—with some performance standards and practices imposed by the state, for example, and others

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23. For a discussion of this problem, see Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Regulation*, 55 ADMIN. L. REV. 705, 708 (2003).

24. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 691–93 (2003). This approach to regulation also goes under the labels of enforced self-regulation, principles-based regulation, process regulation, and meta-regulation. See Sharon Gilad, *It Runs in the Family: Meta-Regulation and Its Siblings*, 4 REG. & GOVERNANCE 485 (2010).

25. GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY (forthcoming Oct. 2016); CHRISTINE PARKER, THE OPEN CORPORATION (2002). Parker's use of the term "meta-regulation" is expansive and includes what we called management-based regulation, above—where the "regulator" is the self-regulating provider.

developed by the regulated entity. The regulator that directly oversees the provider might be the state itself, or an entity such as a professional association that is responsible to the state.

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

The design of a regulatory system has to take into account all of these considerations, and then assess the actual benefits of a particular approach as against the costs. On both dimensions, regulation of the American legal profession is seriously misaligned with the objective of ensuring that consumers have affordable access to quality legal help as they navigate a complex legal environment. As we, and many others, have noted elsewhere, existing professional regulation focuses almost exclusively on ensuring particular quality attributes—loyalty, independence, and confidentiality—for those few clients able to afford to hire lawyers at current rates under current business models.<sup>26</sup> Even for these clients, the protections available come at too high a cost, inhibiting innovation of lower cost and higher quality approaches to solving legal problems.<sup>27</sup>

### III. HOW THE UNITED KINGDOM REGULATES TO PROMOTE ACCESS, INNOVATION, AND THE QUALITY OF LAWYERING

Many current discussions of the need for reform of the American approach to legal professional regulation eventually circle around to the United Kingdom’s alternative model. This model diverges substantially from the modern American approach, and it is because of the ways in which it diverges that it succeeds in promoting access and innovation

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26. RHODE, *THE TROUBLE WITH LAWYERS*, *supra* note 1, at 30–52, 98–102.

27. Hadfield, *Legal Barriers to Innovation*, *supra* note 1, at 1725–26.

without sacrificing the quality of lawyering. In this Part, after a quick summary of the American approach, we show how the U.K. model achieves these goals.

The modern American approach to regulating the practice of law dates to the late nineteenth and early twentieth centuries, led primarily by deliberate efforts in the American Bar Association to regulate admissions and practice and to wrest control from state legislatures and lodge it in state supreme courts.<sup>28</sup> The resulting scheme, however, went far beyond the common law history of granting courts the power to determine who could appear before them. In effect, state courts delegated authority to bar associations to set rules (most of which followed the lead of the ABA Model Rules) that encompass all aspects of the practice of law. The power of these rules to exclude practitioners who did not meet bar standards or adhere to bar practice requirements (such as prohibitions on the corporate practice of law and fee-sharing) was often buttressed with legislation making it illegal to practice law without the authorization of the state supreme court.<sup>29</sup> As many have recounted, the boundaries of this regulatory authority have always been expansive, with the definition of what constitutes the “practice of law” stretching to incorporate effectively everything done by lawyers: legal advice, drafting, negotiation, representation, and support in dispute resolution processes.<sup>30</sup> Moreover, state supreme courts have claimed an inherent authority, grounded in the constitutional separation of powers, to regulate the legal profession in all of its activities.<sup>31</sup>

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

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28. See HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); see also Laurel Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—The Roots of the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65 (2009).

29. Rigertas, *supra* note 28, at 118–19.

30. Hadfield, *Legal Barriers to Innovation*, *supra* note 1, at 1707.

31. Rigertas, *supra* note 28, at 69.

32. See generally Michael Burrage, *From a Gentlemen’s to a Public Profession: Status and Politics in the History of English Solicitors*, 3 INT’L J. LEGAL PROF. 45 (1996) (examining the professional formation of English solicitors to understand its contemporary transformation).

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

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rules of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of regulated services . . . ;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.<sup>33</sup>

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

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

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

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33. Legal Services Act 2007, c. 29, § 1(1) (Eng. & Wales).

34. *Id.* § 1(3).

35. The maintenance of a single profession of law was added to the list of core values of the profession in the ABA House of Delegates' resolution in 2000 rejecting recommendations from the ABA Commission on Multidisciplinary Practice to allow lawyers to share fees with nonlawyer professionals. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, RESOLUTION OF HOUSE OF DELEGATES ADOPTING REVISED RECOMMENDATION 10F (2000). As discussed in Hadfield, *Legal Barriers to Innovation*, *supra* note 1, at 1692–94, this suggests lawyers have an ethical duty, comparable to their duty to protect the public, to make sure that only traditionally licensed lawyers provide any form of legal services. This minimizes, rather than promotes, competition.

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

- (a) the exercise of a right of audience;
- (b) the conduct of litigation;
- (c) reserved instrument activities;
- (d) probate activities;
- (e) notarial activities;
- (f) the administration of oaths.<sup>36</sup>

This is where we see a major difference between the British and American approaches. The American bar associations and state courts effectively open the practice of law to bar-licensed attorneys only while reserving the right to add to the category of the practice of law down the line. This approach forces alternative providers to seek carve-outs for things like document assembly, supplying blank contracts (real estate agents), tax advice (accountants), non-profit assistance to immigrants in some hearings, and appearances before some federal administrative bodies such as the U.S. Tax Court, the Patent Office, and the Social Security Administration.<sup>37</sup> The U.K. approach, in contrast, carves out specific activities for licensed lawyers, and leaves the residual open for competition from alternative nonlawyer providers.<sup>38</sup>

A second major difference is that the category of “authorized person” in the United Kingdom includes multiple legal professions and licenses. Currently in the United Kingdom there are nine different professional licenses or designations for those performing reserved activities: solicitor, barrister, legal executive, notary, licensed conveyancer, patent attorney, trademark attorney, costs lawyer, and chartered accountant.<sup>39</sup>

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36. Legal Services Act 2007, c. 29, § 12(1) (Eng. & Wales). Reserved instrument activities refer to transactions involving real and personal property (sales, long-term leases, liens, and so on) but do not include wills, short-term leases, powers of attorney or stock transfers that do not involve a trust or limitation on the transfer. *See id.* § 12(2).

37. *See* KRITZER, *supra* note 28, at 202–16.

38. The Legal Services Board estimated in 2015 that twenty to thirty percent of expenditures on legal services are made to unregulated providers, noting that “this is permitted under the Legal Services Act 2007, which provides that individuals or firms must only be authorised and regulated if they wish to provide one of the six ‘reserved legal activities.’” *Unregulated Legal Services Providers*, LEGAL SERVS. BOARD, [http://www.legalservicesboard.org.uk/Projects/Unregulated\\_Legal\\_Services\\_Providers/index.htm](http://www.legalservicesboard.org.uk/Projects/Unregulated_Legal_Services_Providers/index.htm) (last visited May 29, 2016).

39. A Legal Executive is someone who has generally pursued a non-university training path to practice and has worked under the supervision of a licensed provider for a number of years. Legal Executives are able to engage in the same services as a solicitor or barrister under the Legal Services Act 2007. A Costs Lawyer is a practitioner who focuses specifically on resolving disputes involving the allocation of expenses under the British rule that allows a court to require a losing party to pay a portion of the winning party’s legal fees and costs. *See Approved Regulators*, LEGAL SERVS. BOARD, [http://www.legalservicesboard.org.uk/can\\_we\\_help/approved\\_regulators/](http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/) (last visited May 29, 2016).

Professionals practicing under these licenses have nonexclusive authorization to perform particular reserved activities and hence there is interprofessional competition.<sup>40</sup> Barristers, solicitors, and legal executives can perform all reserved activities with the exception of notarial activities, which only notaries can perform. Notaries, however, can, alongside licensed conveyancers, also engage in reserved instrument and probate activities; neither can exercise a right of audience or conduct litigation. Patent and trademark attorneys can appear in court, conduct litigation, and engage in reserved instrument activities. Costs lawyers can appear in court and conduct litigation. Chartered accountants can engage in probate activities only; they are the only legal professionals who cannot administer oaths.

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

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

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40. Legal Services Act 2007, c. 29, § 20, sch. 4 (Eng. & Wales).

41. *Id.*

42. *Id.* § 2, sch. 1.

43. A layperson is defined as someone who has never been an authorized person with respect to a reserved legal activity. *Id.* § 2, sch. 1. Committees and subcommittees of the Board must also have a majority of lay members. *Id.* § 2, sch. 1, pt. 20(4).

44. *Id.* §§ 29, 30.

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

The U.K. scheme also provides for the licensing of entities. These are known as *alternative business structures* ("ABS"), which supply an alternative to the law firm through which lawyers have traditionally offered their services. The LSB approves and oversees the bodies authorized to license ABSs. There are five licensing authorities: the Solicitors Regulatory Authority, the Bar Standards Board, the Council of Licensed Conveyancers, the Institute for Chartered Accountants, and the Intellectual Property Regulation Board (which regulates both patent and trademark attorneys). Collectively, as of 2015, these five licensing authorities had licensed over 800 entities, including solo practitioner entities, law partnerships, for-profit corporations, entities owned by unions and other non-profit organizations, and cooperatives. Most are private, not publicly listed, companies and include such recognizable names for Americans as Ernst & Young, LegalZoom, KPMG, and PriceWaterhouseCoopers.<sup>47</sup> Slater & Gordon LLP—an Australian firm with approximately twelve percent of the U.K. market in personal injury law in 2015—is one of the few publicly traded companies on the list.<sup>48</sup>

The regulation of ABSs is two-pronged: the entity is regulated and the authorized persons within the entity are regulated. Both are subject to losing their license or authorization to practice in the event of a breach of the rules of a licensing authority (in the case of an entity) or an approved regulator (in the case of an authorized person). The licensing authority must approve anyone who holds a material or interest in an ABS.<sup>49</sup> Approval is based on a determination that the holding of the

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45. *Id.* § 20, sch. 4.

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

47. *Search for a Licensed Body (ABS)*, SOLICITORS REG. AUTHORITY, <http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page> (last visited May 29, 2016).

48. *See id.*

49. Legal Services Act 2007, c. 29, § 89, sch. 13 (Eng. & Wales). In general a material interest means at least a ten percent ownership of shares (a licensing authority can establish a higher threshold) or the capacity to exercise "significant influence" over management by virtue of ownership

restricted interest in the ABS will not interfere with the regulatory objectives of the LSA or the duties of the entity and any authorized person it employs to comply with their regulatory duties.<sup>50</sup> Reserved activities must be carried on within the entity only through people authorized to perform those activities.<sup>51</sup> There must be at least one manager who is authorized to engage in the reserved activities for which the ABS is licensed.<sup>52</sup> Unauthorized persons—owners, managers, employees—are subject to the regulation of the licensing body and obligated to refrain from doing anything that might cause the licensed body or the authorized persons within it to violate their professional duties.<sup>53</sup> An ABS is required to have a Head of Legal Practice, approved by the licensing authority.<sup>54</sup> That individual serves as a compliance officer responsible for ensuring that only authorized persons carry out reserved activities and that unauthorized persons (including owners and managers) do not violate their duty under the Act not to cause the licensed body or its employees and managers to breach applicable regulations. The LSA also requires approved regulators to have systems in place to protect confidentiality.<sup>55</sup> The traditional privilege against disclosure of confidential information covers any authorized provider or licensed entity.<sup>56</sup>

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

In terms of enforcement, the U.K. scheme relies on multiple strategies in addition to license revocation. It is a criminal offense punishable by fine or imprisonment for an entity to carry on a reserved activity through someone who is not an authorized provider.<sup>57</sup> Approved regulators can also impose substantial fines: the maximum fines approved by the LSB are £250 million for an ABS and £50 million for a manager or employee

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or voting rights, either in the entity or its parent. Any change in ownership must be reported to the licensing authority and the authority can place conditions on ownership. *Id.* § 20, sch. 13.

50. Individual licensing authorities can impose further restrictions on owners. For example, the Bar Standards Board proposes to require all nonlawyer owners to also be managers. BAR STANDARDS BD., BAR STANDARDS BOARD HANDBOOK r. S108 (2015).

51. Legal Services Act 2007, c. 29, § 16, sch. 11, pt. 3 (Eng. & Wales). This includes activities that are carried out by unauthorized persons but at the direction and under the supervision of an authorized person.

52. *Id.* § 16, sch. 9, pt. 2.

53. In some cases, submission to the regulatory authority is accomplished through contract. See BAR STANDARDS BD., *supra* note 50, at r. S90.3.

54. Legal Services Act 2007, c. 29, § 11, sch. 11, pt. 2 (Eng. & Wales).

55. *Id.* § 17, pt. 3.

56. *Id.* § 190, pt. 8.

57. *Id.* §§ 14–17, pt. 3.

of an ABS.<sup>58</sup> Regulators can disqualify individuals from serving as owners or managers of an ABS.<sup>59</sup> Licensing authorities are authorized to intervene and take over management of an ABS that has violated regulations when necessary to protect clients.<sup>60</sup> Approved regulators carry out annual compliance surveys and spot checks. They can also impose supervision on individuals and entities, as well as conditions on licenses.<sup>61</sup>

The U.K. regulatory approach also takes other steps to protect the interests of clients. The major approved regulators require individual lawyers and ABSs to hold indemnity, in essence malpractice, insurance.<sup>62</sup> Those licensed by the Solicitors Regulatory Authority (the largest licensing authority) must have client compensation funds. The LSA establishes an Office of Legal Complaints (“OLC”), with which any consumer can lodge a grievance. The OLC operates a Legal Ombudsman scheme, consisting of a chief ombudsman (who must be a layperson) and an assistant ombudsmen. Ombudsmen are authorized to resolve complaints by remedies such as apologies, fee rebates, compensation, and rectification of errors.<sup>63</sup>

The U.K. approach thus substantially relaxes or eliminates the traditional restrictions on the business models within which lawyers can practice and the financial and managerial relationships they can enter into with nonlawyers without sacrificing the professional values that have so worried American judges and bar associations.

These tradeoffs—between the benefits arising from greater competition and flexibility in business models and the risks to consumers of failures of the quality they expect or are entitled to—are in fact an overt part of the regulatory framework. The U.K. approach is self-consciously risk and outcome-based; it identifies the nature of risks and the outcomes that regulation seeks to achieve. For example, in its rules for determining whether to approve a regulator, the LSB has set out a

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58. Legal Services Act 2007, Rules on Licensing Authorities and Maximum Penalty no. 1659 (effective Aug. 2011) (Eng. & Wales).

59. Legal Services Act 2007, c. 29, §§ 99–100, pt. 5 (Eng. & Wales).

60. *Id.* § 102, sch. 14, pt. 5.

61. *See, e.g.*, BAR STANDARDS BD., LICENSING AUTHORITY APPLICATION 23 (2015) (regarding spot checks and sampling to confirm compliance); Legal Services Act 2007, c. 29, § 10(3)(b), sch. 16 (Eng. & Wales); *id.* § 85, pt. 5.

62. BAR STANDARDS BD., *supra* note 50, at r. C76; SOLICITORS REGULATION AUTH., SRA INDEMNITY INSURANCE RULES 2013 (2013); CHARTERED INST. OF LEGAL EXECS., PROFESSIONAL INDEMNITY INSURANCE RULES (2015); INTELLECTUAL PROPERTY REGULATION BD., RULES OF CONDUCT FOR PATENT ATTORNEYS, TRADE MARK ATTORNEYS AND OTHER REGULATED PERSONS r. 17 (2015); INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND & WALES, PROFESSIONAL INDEMNITY INSURANCE RULES, at r. 3.1 (2011).

63. Legal Services Act 2007, c. 29, § 137, pt. 6 (Eng. & Wales). The value of compensation or the cost of rectifying errors cannot together exceed £30,000. *Id.* § 138, pt. 6. Both respondent and complainant are bound by the ombudsman’s resolution as final if the complainant accepts the resolution. *Id.* § 140(4), pt. 6.

chart that specifies the evidence it will be looking for to confirm that specific principles and risks are addressed. To gain approval, the regulators must “ensure that authorised persons must keep clients['] money separate from own... [and] must be able to compensate clients[;]” “demonstrate how regulated persons and entities are indemnified against losses arising from claims[;]” have a code of conduct that “enshrines the primacy of acting in the client interest and subjugates other pressures, be they commercial or otherwise to that principle[;]” and “ensure that definitions of appropriate skill and competence are proportionate in order to ensure both value and professionalism[.]”<sup>64</sup>

The largest approved regulator, the Solicitors Regulation Authority (“SRA”), has defined four outcomes they expect to achieve and adopted an explicit risk framework to guide approvals for ABSs. They have expressly stated that their approach “is in contrast to our historical rules-based approach: we no longer focus on prescribing how those we regulate provide services, but instead focus on the outcomes for the public and consumers that result from their activities.”<sup>65</sup> They focus “attention and activity upon issues, firms and potential risks that pose the greatest threat to our regulatory outcomes.”<sup>66</sup> The SRA publishes annually a Risk Outlook that reports their ongoing assessment of where the risks lie.<sup>67</sup>

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64. LEGAL SERVS. BD., RULES FOR APPLICATIONS FOR APPROVED REGULATOR AND QUALIFYING REGULATOR DESIGNATION pt. 2, at 18–19 (2011).

65. SRA *Risk Framework*, SOLICITORS REG. AUTHORITY, <https://www.sra.org.uk/risk/risk-framework.page> (last visited May 29, 2016).

66. *Id.* The attention to risk is not just hortatory: the LSB denied the Council of Licensed Conveyancers application to become an approved regulator for litigation activities because the CLC “failed to demonstrate an appropriate understanding of the specific risks of the new activities” and failed to demonstrate that its proposed regulatory arrangements were outcomes focused and risk based. “Key to this,” they noted,

the applicant needs to be able to demonstrate that they have a good understanding of the risks and issues presented by the activities and that proposed regulatory and operational arrangements have been designed or adapted to mitigate those risks. They need to be able to satisfy us that they have considered the different market in which they will be operating including (but not limited to) the types of clients that might use the new services and the different types of businesses (e.g. size, business models, ownership, financing arrangements) that may seek authorisation. An understanding of the risks and issues is necessary if the applicant is to be able to be effective at targeting its authorisation, supervision and enforcement arrangements and resources in a risk based way[.]

LEGAL SERVS. BOARD, DECISION NOTICE ISSUED UNDER PART 2 OF SCHEDULE 4 AND PART 1 OF SCHEDULE 10 TO THE LEGAL SERVICES ACT 2007, at 4 (2012), [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/decisionnoticefinal.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/decisionnoticefinal.pdf).

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

How well is the U.K. approach working? As one of us has documented elsewhere, the evidence to date is promising. Both as a result of the longstanding acceptance of the idea that useful legal help can be provided by a variety of legal and lay professionals, and as a result of the licensing of ABSs, the U.K. framework includes many more options for English and Welsh consumers of legal services than the American model. Many of these options come in the form of unbundled services to support what in the United Kingdom is called “DIY” law and a wide range of advisory services to help people manage legal questions and issues that have not turned into lawsuits (yet).<sup>68</sup> Total revenues in the legal sector increased eighteen percent between 2010 and 2014.<sup>69</sup> There has been no loss of employment for lawyers. The number of practicing solicitors increased 2.3% from May 2014 to May 2015, and the number of vacancies advertised for law firms increased forty-eight percent in 2014. There has been substantial consolidation of practice, with the percentage of solo practitioners falling from forty-six to thirty-nine percent, and the percentage of firms with two to four partners growing from forty-one to forty-six percent between 2008 and 2011.<sup>70</sup> As of 2013, ABSs were more likely than other practice entities to use technology: ninety-one percent reported having a website to deliver information and services, compared to fifty-two percent of solicitor firms using a website for advertising.<sup>71</sup> Overall, ABSs showed higher productivity and innovation<sup>72</sup> and were statistically more likely to have seen an increase in revenues (fifty-seven percent compared to forty-nine percent).<sup>73</sup> A 2015 study found that ABSs were thirteen percent to fifteen percent more likely to introduce new legal services and that twenty-five percent of all legal services providers had introduced a new or improved service in the three years following the introduction of ABS licensing. In short, “the major effect of innovation in legal services has been to extend service range, improve quality and attract new clients.”<sup>74</sup>

Consumers are clearly benefitting from the U.K. changes. Although we lack systematic studies of the impact of changes on pricing, it is clear that the U.K. environment offers much more flat fee pricing than the

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SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2014/15 (2014) [hereinafter SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2014/15]; SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2015/16 (2015).

68. Hadfield, *The Cost of Law*, *supra* note 11, at 43; Hadfield, *Innovating to Improve Access*, *supra* note 1.

69. LEGAL SERVS. BD., STRATEGY 2015, at 18 (2015).

70. LEGAL SERVS. BD., MARKET IMPACT OF THE LEGAL SERVICES ACT 82 (2012).

71. *Id.*

72. *Id.* at 80.

73. LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS: AN EMPIRICAL ANALYSIS 6 (2013).

74. ENTER. RESEARCH CTR., INNOVATION IN LEGAL SERVICES: A REPORT FOR THE SOLICITORS REGULATION AUTHORITY AND THE LEGAL SERVICES BOARD 4 (2015).

U.S. environment—a pricing model that supports increased access by reducing uncertainty and risk and promoting transparent choices among providers. In 2014, 46% of consumers reported paying a fixed fee for services, up from 38% in 2012.<sup>75</sup> Moreover, there are clear improvements in choice and perceptions of value, with the greatest gains in family law. The percentage of fixed fees in this area increased from 12% in 2012 to 45% in 2014. Between 2011 and 2014 the percentage of consumers saying they shopped around for services increased from 21% to 41%, and the perception that they had received value for their money increased from 50% to 62%.<sup>76</sup>

There is no evidence of a flood of problems along lines that American commentators have raised. The SRA Risk Outlook for 2014/2015 indicates, for example, that dangers that the SRA in previous years had identified as possible risks—a lack of due diligence over outsourcing arrangements and a lack of transparency in complex alternative business structures—had failed to materialize.<sup>77</sup> The rate of errors by unregulated will providers, while substantial, was equivalent to that of regulated solicitors, which led the government to reject a proposal to make will writing a reserved activity.<sup>78</sup> Law firms with nonsolicitor managers and partners, known as Legal Disciplinary Partnerships (“LDPs”), generated fewer complaints on a revenue adjusted basis than solicitor-only firms from 2011 to 2013. ABSs resolved a higher percentage of complaints received than solicitor firms (93% compared to 83%).<sup>79</sup> Although these are still early days, if anything the call has been for further loosening of restrictions to prompt even greater innovation and improvements for consumers.<sup>80</sup>

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75. LEGAL SERVS. CONSUMER PANEL, TRACKER SURVEY 2014 BRIEFING NOTE: A CHANGING MARKET 4 (2014) (“The five areas where fixed fees are most common are: will-writing (71%); power of attorney (65%); conveyancing (66%); immigration (55%); and family (45%).”).

76. *Id.* Across all categories, choice satisfaction increased from 65% to 68%; shopping around increased from 21% to 23%; those finding it difficult to compare providers dropped from 28% to 14%; those using the same lawyer as before dropped from 25% to 21% and those perceiving value for their money increased from 57% to 63%. *Id.* at 1.

77. SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2014/2015, *supra* note 67, at 8.

78. LEGAL SERVS. CONSUMER PANEL, REGULATING WILL-WRITING 20–22 (2011) (discussing the rate of errors); LEGAL SERVS. BD., FINAL REPORTS: SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES (2013) (proposing to make will-writing a reserved activity); U.K. MINISTRY OF JUSTICE, DECISION NOTICE RE: EXTENSION OF THE RESERVED LEGAL ACTIVITIES (May 14, 2013) (rejecting recommendation to make will writing a reserved activity).

79. LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS 77–78 (2013). The SRA allowed solicitors to form Legal Disciplinary Partnerships with nonsolicitor owners who were also managers and partners beginning in 2009; these converted to ABS licenses (which allows approved nonlawyer owners who are not also managers or partners) in 2012 when ABS licensing first became available. *Id.*

80. *See, e.g.*, Press Release, Legal Servs. Bd., The Case for Change: Legislative Options Beyond the Legal Services Act 2007 (July 27, 2015) (on file with authors); *see also* Stephen Mayson, *The Legal Services Act: What Might Replace It and When?* STEPHEN MAYSON: AN INDEP. MIND (Apr. 1, 2015),

## IV. AMERICAN OPTIONS

The U.K. regulatory scheme, which balances the need to promote innovation, quality improvements, and cost reductions against the potential for harm to consumers, has clear advantages over the approach in the United States. American unauthorized practice enforcement is not dependent on actual client harm.<sup>81</sup> Nor do American discussions of regulatory reform rest on evidence of probabilities and harms. In a recent discussion, for example, one opponent of regulatory change told an ABA Commission that *all* legal services raise tremendous risks for clients that only licensed attorneys can manage.<sup>82</sup> No evidence was cited and our previous discussion suggests why.

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

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

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<http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/mayson-2015-Isa-what-might-replace-it-final.pdf>; Richard Moriarty, Innovation and Legal Services Regulation at Westminster Legal Policy Forum (July 9, 2015); Sir Michael Pitt, The Future of Legal Services Regulation at Westminster Legal Policy Forum (September 4, 2014) (transcript available at [http://www.legalservicesboard.org.uk/news\\_publications/speeches\\_presentations/index.htm](http://www.legalservicesboard.org.uk/news_publications/speeches_presentations/index.htm)).

81. Rhode & Ricca, *supra* note 18, at 2604.

82. Larry Fox, Submission to ABA Commission on the Future of Legal Services (July 2015).

Even the most routine divorce can and *will* cascade out of control. . . . *All* clients, particularly the poor, deserve real lawyer supervision, responsibility and control for *all* that is undertaken on their behalf. And that is because the only routine surgery is surgery that is being performed on someone else, and *only* a full-fledged lawyer will be able to identify when it is that the legal services required are anything but routine.

*Id.* (emphasis added). Fox's approach rejects the very idea that risks vary across settings or that it can be possible to identify higher risk cases and divert those that need higher-level services to avoid bad outcomes into that appropriate level without sending all into high-cost solutions. There is after all a category of routine surgery and not all surgery calls for or is conducted by a specialist. And indeed much of health care is not surgery but routine treatment of routine medical needs. The medical profession relies heavily on non-MD professionals such as nurse practitioners, certified nurse anesthetists, pharmacists, and physical therapists to appropriately allocate expensive MD services where they are needed and reduce the cost of routine care. Fox offers no answer to the point that it is simply not possible, even with massive increases to legal aid and pro bono, to provide the millions of people who currently get *no* help on these important matters with services from "full-fledged" lawyers. Nor does he identify any evidence to suggest that this is necessary.

participants cannot be allowed to regulate their own markets free from antitrust accountability.<sup>83</sup>

In what may be a new era for antitrust enforcement of self-regulated professions,<sup>84</sup> bar associations and state supreme courts must ensure that their regulation of lawyers is based on systematic attention to real, not imagined, risks, and that those risks are appropriately balanced against the costs of regulations that raise costs, inhibit innovation, and fail adequately to protect consumers.<sup>85</sup> The evidence from the United Kingdom demonstrates that relaxation of many American restrictions on practice poses little risk and significant gains for the public.

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

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83. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1111 (2015). The Court expressly notes that the concerns extend to legal professional regulation. *Id.* (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975)) (noting the fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members).

84. LegalZoom, for example, filed an antitrust suit against the North Carolina Bar in 2015, shortly after the North Carolina Board of Dental Examiners case, alleging antitrust violations arising from the Bar's refusal to register its legal aid plans. Complaint at \*3-4, *Legalzoom.com, Inc., v. N.C. State Bar*, 2015 WL 3499887 (M.D.N.C. June 3, 2015) (No. 15 Civ. 439).

85. Bar association leaders are hardly circumspect about the extent to which their regulatory actions are responsive to the interests of lawyers. In testimony before the ABA's Ethics 20/20 Commission, the chief deputy counsel in Colorado's office of attorney regulation maintained that a Colorado open-border policy, allowing attorneys licensed in other states to practice in Colorado up to the point of litigation, as long as they do not become domiciled there or open an office, has "worked well." Former ABA president Carolyn Lamm responded that advocating such an approach would impair the Commission's credibility and would "not go over in the ABA House of Delegates." Joan C. Rogers, *Ethics 20/20 Commission Gets Earful About Its Draft Proposals on Foreign Lawyers*, *MJP*, 27 *LAW. MANUAL PROF'L CONDUCT* 669, 671 (2011) (quoting James Coyle and paraphrasing Carolyn Lamm). That objection underscores the problems of vesting so much authority over regulatory policy in the organized bar, which is anything but disinterested concerning issues affecting professional competition. Similarly, efforts by the 20/20 Commission to develop proposals for relaxed rules on nonlawyer participation in law firms was squelched by, among other things, opposition from the New York State Bar Association based on a survey of its members and the discovery that there was little demand among lawyers for change. For a discussion and citations, see Hadfield, *The Cost of Law*, *supra* note 1. We also note that Larry Fox has been unabashed in his comments to the ABA's Commission for the Future of Legal Services about the fact that he sees the significant commercial threat to lawyers—and corporate law firms like the one at which he practices—as a basis for putting the brakes on the Commission's reform agenda. He titles his submission to the Commission "A Message from the Legal Profession: SOS." Mr. Fox also subsequently sent to the Commission an e-mail containing a link to a story about how accounting firms are making inroads into corporate M&A work in Australia under Australia's U.K.-style approach to regulation with the subject line "Help!"

individuals subject to ordinary protections of the market supplied by consumer protection, contract, and tort law.<sup>86</sup>

While we believe that the ideal reforms would follow the British model and establish specific legal activities that require licensing, leaving the residual to the ordinary protections of the market, we recognize that such a shift is only likely to be acceptable in the United States on the basis of evidence that these protections achieve acceptable outcomes for American consumers. Although the U.K. evidence here is very promising, we realize that the American marketplace may differ from the U.K. marketplace, which has a long tradition of nonlawyer-based legal advice and assistance.<sup>87</sup> In the United States, a wait-and-see approach that seeks to test the impact of relaxed constraints on the scope of authorized practice is consistent with the prudent outcomes- and risk-based approach to regulation that we advocate. Similarly, although we also think it would be ideal to have multiple separately regulated professional bodies, allowing a form of interprofessional regulatory competition as there is in the United Kingdom, this too seems like something that would need to emerge over time in a changed regulatory landscape in the United States.

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

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86. See RHODE, *THE TROUBLE WITH LAWYERS*, *supra* note 1, at 40–51; Hadfield, *The Cost of Law*, *supra* note 1; Hadfield, *Innovating to Improve Access*, *supra* note 1.

87. The U.K. history of nonlawyer legal services also developed within the framework of extensive legal aid. Many of those providing such services have done so through publicly funded legal help centers or were paid for by government. Because of public funding, these providers have been under some government oversight, if only on the basis of maintaining their eligibility for and success in obtaining legal aid contracts. For evidence that nonlawyer legal services have provided high quality assistance in the United Kingdom in the context of legal aid, see Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *LAW & SOC'Y REV.* 765 (2003).

attorneys. The discussion below offers greater detail on how such a system might operate in practice. But first we address a major challenge in the American context: supporting the operation of entities and legal practices at national scale in light of the constraints of federalism and the long history of state-by-state regulation of lawyering.

In order to achieve national scale, entities ideally should have a single regulator. With fifty different regulators, the barriers to entry are significant, particularly in light of the way in which professional regulation is now conducted through bar committees that operate with little transparency and little active supervision from state courts.<sup>88</sup> One obvious route to a single regulator is for Congress to create a national licensing authority, exercising authority under the Commerce Clause to regulate interstate commerce. Proposals for a national bar exam and system of admission are not new—state-by-state licensing has been a longstanding barrier to mobility and national practice for attorneys. Prior objections to a centralized governance scheme have included concerns that federal licensing of attorneys is inconsistent with state courts' inherent regulatory power and that the federal bureaucracy necessary to administer the system would be vulnerable to political capture and would pose an undue risk to the independence of the profession.<sup>89</sup>

A federal licensing authority for entities, however, need not entirely displace existing state-by-state bar admissions and regulation of attorneys. As we have seen with the U.K. example, the introduction of entity licensing need not terminate judicial control and discipline of lawyers. Nor need it displace professional control over education, bar admissions, and lawyer discipline. Licensing and regulation of ABSs in the United Kingdom is layered on top of lawyer licensing and regulation. Federal licensing of such entities in the United States could obligate entities to ensure that legal services are supplied in a manner that is consistent with professional principles, and could require that legal work be conducted under the responsible oversight of licensed attorneys. Failure to abide by these requirements would result in enforcement against the entity: criminal proceedings, fines, suspension, or revocation

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88. Although formal enforcement processes such as disciplinary proceedings against a licensed attorney and criminal proceedings against those charged with unauthorized practice are carried out with state court participation, most regulatory oversight and intervention is carried out by bar committees composed entirely of practicing attorneys who open investigations and send out warnings or cease and desist letters without state court oversight or who refuse to register legal aid plans. See generally Complaint, Legalzoom.com, Inc., v. N.C. State Bar, 2015 WL 3499887 (M.D.N.C. June 3, 2015) (No. 15 Civ. 439). These are the practices found anticompetitive in the North Carolina Board of Dental Examiners case. See N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

89. See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 706 (1995); see also Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers—Why the Sky Really Is Falling*, PROF. LAW., Winter 2000, at 1359.

of the entity's license, for example. Entities could be required to hold minimum levels of malpractice insurance, establish compensation funds, and cooperate with remedial orders emerging from an independent complaints resolution process (along the lines of the U.K. Legal Ombudsman).

The only substantial modification to state-by-state professional rules of conduct that would be required in such a regime would be authorization for state-licensed attorneys to practice within or with a licensed entity.<sup>90</sup> This would mean modifying the rules that currently make it professional misconduct for an attorney to be an employee of an entity providing legal services to the public or to be in a revenue-sharing arrangement with an entity. State regulators could continue to prohibit any employment or fee-sharing relationships with *unlicensed* entities. All other professional duties imposed by state regulators on attorneys could remain in place: competence, the avoidance of conflicts of interest, loyalty to the client, independence and upholding duties to courts, and the fair administration of justice. Attorneys would still be subject to state-based discipline including suspension and revocation of a license for misconduct. Attorneys would still be required to meet state-based standards for admission to the bar. State courts would continue to determine who could appear before them.

Specific concerns about the impact of federal licensing on the independence of state-licensed attorneys and the inherent authority of state supreme courts to oversee the administration of justice in their states could be addressed with appropriate provisions in the federal licensing law or state statutes or court rules. For example, as with the U.K. regime, the client's privilege against the disclosure of confidential communications could be expressly extended through federal and state rules in order to cover communications shared between the attorney and the employees of a licensed entity. Express obligations on entity personnel not to interfere with the exercise of independence by attorneys with whom they work could be written into the federal licensing law—as they are in the U.K. Legal Services Act—and enforced with the threat of license revocation.

To facilitate a federal entity licensing regime, state laws prohibiting the unauthorized practice of law by corporate entities might have to be

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90. Depending on the business model pursued by the licensed entity, other changes might be needed to ensure that attorneys working with and within licensed entities are not at risk of violating state professional conduct rules. For example, bar associations sometimes suggest that lawyers who participate in websites that review or rate lawyers or who are identified as specialists are in violation of bar rules about advertising. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Opinion 972 (June 26, 2013); S.C. Bar Ethics Advisory Comm., Opinion 09-10 (Mar. 22, 2010). Other possible changes include allowing attorneys to practice under a firm name other than a personal name and permitting licensed entities to direct work to a particular (appropriate) lawyer to perform services.

amended to allow a valid entity license to be recognized as a complete defense to prosecution. Alternatively, we can imagine that courts would be bound to recognize federal preemption of state law as applied to licensed entities. State prosecutors could still pursue charges against unlicensed entities and individuals engaged in the unauthorized practice of law, although they should be required to have evidence of public harm.<sup>91</sup> In effect, such a federal licensing scheme would leave in place existing state-based attorney regulation and unauthorized practices rules but create a safe harbor for entity practice.

An important advantage of federal licensing of entities is that a federal regulatory authority could achieve the independence from practicing attorneys necessary to ensure that oversight develops in the public interest and with protection of consumers as the primary consideration. Moreover, a fresh start on regulation makes it much more likely that a new regulatory authority could follow the U.K. model and adopt an outcomes- and risk-based approach to regulation that uses the data collection advantages of national scale to ensure that regulation is evidence based. Funding for a federal agency can also draw on license fees levied on regulated entities based on nationwide revenues. The United Kingdom's Solicitors Regulatory Authority, for example, in addition to collecting dues from solicitors, imposes licensing fees that scale with revenues.<sup>92</sup> For an entity such as LegalZoom, with U.S. revenues thought to be on the order of \$200 million, licensing fees at comparable rates would amount to about \$350,000.<sup>93</sup> For entities hitting the billion-dollar mark, as the largest U.S. corporate law firms do, the fee to become a licensed entity on a nationwide scale would approximate \$1.5 million.

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

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91. See Rhode & Ricca, *supra* note 18, at 2597–99.

92. *Fee Policy 2014/2015*, SOLICITORS REG. AUTHORITY (June 26, 2014), <http://www.sra.org.uk/mysra/fees/fee-policy-2014-2015.page>.

93. Michael Carney, *The \$425M Legalzoom Deal Is a Win for VCs, but Less Exciting for the Company or LA*, PANDO (Jan. 6, 2014), <https://pando.com/2014/01/06/the-legalzoom-deal-is-a-win-for-ves-but-less-exciting-for-the-company-or-la/>.

A second, but in our view inferior, possibility that does not involve federal legislation is the establishment of a national board for the development of uniform entity licensing standards and practices. Individual state supreme courts could then provide in their own rules requiring that compliance with the national standards and practices will meet state standards. Alternatively, on the model of drivers' licenses, states could recognize as valid entity licenses obtained in any state that met national standards. This is the approach followed in Australia for attorney licensing. There, lawyers are admitted by a state or territory, but under uniform standards, so that their admission is recognized nationally.<sup>94</sup> A drawback of this approach is that the burden of actual licensing and oversight would still fall on the states. In addition, as a practical matter, state supreme courts—heavily burdened with overwhelming caseloads and inadequate budgets—would still face the pressure they experience today to delegate substantial regulatory power to bar associations. That means that despite common nationwide standards, licensed entities could face the risk that the application and enforcement of standards would diverge across states and lack transparency. Such an approach might well fail to produce a single set of nationwide standards for entity practice.

The creation of a national entity licensing authority, whether as a creature of federal law or of cooperation among the state supreme courts in their rulemaking capacity, also holds out the potential for other regulatory reforms, beyond entity regulation, that can improve access, promote innovation, and improve the quality of lawyering. We noted earlier that a narrowing in the scope of legal practice for which a license is required in the first place—along the lines of what is permissible in the United Kingdom for example—would be likely to emerge in the United States only on the basis of evidence about actual risks of poor outcomes for consumers. A national licensing authority could move that process along by undertaking to license providers of designated likely low-risk activities. The national authority could then monitor performance in these market segments: collecting data on prices, serving as a central complaints office, auditing performance to assess the incidence of errors, for example. Licenses could be revoked on the basis of evidence that a provider has fallen beneath acceptable standards. Again, a major advantage of this approach is the capacity to collect evidence on a national scale in order to develop outcomes and risk-based regulation that appropriately balances the goals of access, innovation, and competition against legitimate concerns for client protection. Regulators, state and national, would then be able to determine which activities

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94. Murray Hawkins, *Questions and Answers Australian Legal Education and Bar Admissions*, 77 BAR EXAMINER 11, 18 (2008).

really do impose low risks of generating problems, and where enforcement resources should focus on to prevent the truly serious risks. The “notario” scams that haunt state regulators now merit close attention;<sup>95</sup> the development of online advice platforms for routine legal questions may not.

In 2015, Washington State took the first steps toward such a licensing framework by recognizing limited license legal technicians (“LLLTs”). The program, adopted after twelve years of study, will enable graduates to handle out-of-court family matters without a lawyer’s supervision.<sup>96</sup> Although only fifteen individuals were in the initial class, the program has already attracted considerable attention. In 2014, the ABA Task Force on the Future of Legal Education released a report calling for limited licensing and the expansion of training programs for such practitioners by law schools.<sup>97</sup> California and Oregon are considering such proposals.<sup>98</sup> New York has adopted a pilot program that allows trained nonlawyer “navigators” in specific locations in the Brooklyn Housing Court and Bronx civil court to answer questions by the trial judge and assist pro se litigants in preparing papers and negotiating settlements.<sup>99</sup> A major virtue of limited licenses is that they can promise to provide higher quality, due to specialization, than that provided by general practitioners.<sup>100</sup>

The Washington State experience, however, also speaks to the challenge of developing alternative licenses that promote access to justice within the framework of our existing state supreme court-based system of regulation. First, there is the reality that state supreme courts are already overburdened and lack the policymaking and regulatory oversight resources necessary to develop brand new regulatory regimes. Given this reality, the Washington State Supreme Court, which ordered

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95. Amy Yarbrough, *Limited-Practice License Idea Faces Challenging Path*, CAL. B.J. (May 2013), <http://www.calbarjournal.com/May2013/TopHeadlines/TH1.aspx>.

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

97. AM. BAR ASS’N TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 3, 24–25 (2014).

98. See Elizabeth Chambliss, *Law School Training for Licensed “Legal Technicians”?: Implications for the Consumer Market*, 65 S.C. L. REV. 579, 591–92 (2014); LEGAL TECHNICIANS TASK FORCE, FINAL REPORT TO THE BOARD OF GOVERNORS (Feb. 13, 2015).

99. Jonathan Lippman, *The State of the Judiciary 2014: Vision and Action in Our Modern Courts*, N.Y. ST. UNIFIED CT. SYS. 8 (2014), <https://www.nycourts.gov/whatsnew/pdf/2014-SOJ.pdf>.

100. See Moorhead et al., *supra* note 87. As Andrew Perlman notes, the LLLT licensing process is “arguably a greater guarantee of competence than the training most law students receive. After all, lawyers are permitted to practice in any area once they obtain a license, even if they have never had any formal training in the subject.” Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 110–11 (2015).

the creation of the LLLT scheme, chose to vest responsibility for its development with an independent board, responsible to the court, composed of volunteers, a majority of whom are lawyer members of the Washington State Bar Association. Staffing is provided by the bar association. This has arguably led to the reproduction of the shortcomings of existing professional regulation—an overreliance on prescriptive rules, with little in the way of evidence regarding the relationship between requirements and outcomes. In addition, the dominance of lawyer-members on the governing board generated an inherent conflict of interest: asking one set of professionals—licensed J.D.s—to develop and oversee a regime for professionals they see as their competitors. The Washington program came into being only by order of the Washington State Supreme Court over opposition from the Washington State Bar Association.<sup>101</sup> The LLLT Board adopted stringent qualifications.<sup>102</sup> Whether these qualifications and other practice requirements will discourage large numbers of applicants, and thus prevent robust price competition or inhibit significant efficiency gains, it is too soon to tell.

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

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101. The Washington Bar Association opposed the LLLT program, citing concerns that it would institutionalize “second class, separate but unequal, justice” and “take work away from young, rural, and less affluent lawyers.” Holland, *supra* note 96, at 75 (quoting Washington Board of Governors). The chair of its Family Law Section claimed that legal technicians would lack the “competency to actually do for the poor what needs to be done. Just because you’re poor doesn’t mean your legal problems are simple.” Robert Ambrogi, *Authorized Practice*, 101 A.B.A. J. 72 (2015) (quoting Ruth Laura Edlund). California’s consideration of a licensing program has drawn similarly harsh criticism from practitioners. One commentator said she was “astonished that [the bar] would consider actions that would be detrimental to the honest attorneys who are trying to make a living in California.” Samson Habte, *California and Oregon Task Forces Endorse Licensing of Nonlawyer “Legal Technicians,”* 31 LAW. MANUAL PROF. CONDUCT 164 (2015).

102. The Board’s responsibilities are set forth in Washington Courts, Limited Practice Rule for Limited License Legal Technicians, at r. 28C(2) (effective Sept. 3, 2013). Admission requirements include an associate’s degree, forty-five core credits of paralegal instruction, fifteen “practice area” credits developed in collaboration with an ABA-approved law school, and 3000 hours of lawyer-supervised experience, as well as passage of core and practice area exams. *Id.* at r. 28(D)–(E); *id.* at r. 28 app. Reg. 3. LLLTs must also satisfy character and fitness requirements and carry liability insurance. *Id.* at r. 28(D)(2); *id.* at r. 28 app. Reg. 12.

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

#### CONCLUSION

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

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