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The Future of Law as a Profession

Nancy J. Moore*

For far too many years, lawyers and commentators have debated whether law is a profession or merely a business.¹ The so-called business-profession dichotomy² is somewhat of a misnomer.³ For many, maybe most lawyers, law is clearly a business in the sense that these lawyers seek to maximize their individual wealth as much (or as little) as other business persons.⁴ More importantly perhaps, lawyers in private practice

* Professor of Law and Nancy Barton Scholar, Boston University School of Law.

¹ See generally Nancy J. Moore, *Review Essay: Professionalism Reconsidered*, 1987 AM. BAR FOUND. RES. J. 773, 774 (1987).

² See, e.g., Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1 (2005). A draft of my paper was presented at a panel organized by Professor Levine for the International Legal Ethics Conference VII, held on July 14–16, 2016 in New York City. The panel was entitled “International Perspectives on the Business/Profession Dichotomy,” drawing on Professor Levine’s seminal article on the topic. See Fordham Univ. Sch. Law, *International Perspectives on the Business/Profession Dichotomy (Program)*, FORDHAM UNIV. SCH. LAW, https://www.fordham.edu/info/25018/globalization_and_the_legal_profession/8033/international_perspectives_on_the_businessprofession_dichotomy_program [<http://perma.cc/PK43-LHLG>].

³ See, e.g., Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN STATE INT’L L. REV. 465, 465 (2008) (“[L]aw has almost always been an occupation that displays characteristics of *both* business and profession, with changes in emphasis over time.”).

⁴ See, e.g., Russell G. Pearce & Adam Winer, *Destabilizing the Business-Profession Dichotomy: Louis Brandeis on Professionalism and Identity at 1 (Preliminary Draft, Mar. 27, 2017)* (“[E]mpirical studies indicate that many lawyers tend to think of themselves as maximizing profits and as hired guns with little responsibility to the public good in their representation of clients.”) (on file with author). According to Pearce and Winer, Justice Brandeis viewed law as an occupation that “was part of the market,” but one that was not exclusively defined by the market. *Id.* at 14. Indeed, according to Brandeis, “[a] condition of professional success was applying efficiency and excellence to the work to the tasks of lawyers, seeking profit, and earning a high income”; however, he also believed that “a profession was an occupation ‘pursued largely for others and not merely for one’s self . . . in which the amount of financial return is not the [only] accepted measure of success.’” *Id.* at 14–15. Brandeis also believed that “business, too, could be a profession” in that it is “rich in opportunity for the exercise of man’s finest and most varied mental faculties and moral qualities.” *Id.* at 18.

Some commentators are more critical of lawyers who are motivated more by making money than by doing good. See, e.g., Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 706–07 (1998) (describing how “[f]or lawyers, money is increasingly the be-all and end-all” and how “the lives of senior lawyers—particularly those in the elite firms—have become dominated by the pursuit of billable hours”); Kristin L. Fortin, *Reviving the Lawyer’s Role as Servant Leader: The Professional Paradigm and a*

widely acknowledge that adopting improved business practices is critical to providing competent legal services.⁵ The question remains however, whether, unlike some other commercial occupations, law is *also* a profession and if so, what is the future for the professional aspects of legal practice in the United States and elsewhere?

The American Bar Association (“ABA”) Commission on Professionalism concluded that an occupation constitutes a profession when: (1) the “practice requires substantial intellectual training and the use of complex judgments”; (2) “clients cannot adequately evaluate the quality of the service, [and therefore] they must trust those they consult”; (3) “the client’s trust presupposes that the practitioner’s self-interest is overbalanced by devotion to serving both the client’s interest and the public good”; and (4) “the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client’s trust, and transcend their own self-interest.”⁶ Although other attributes are sometimes noted,⁷ the overriding theme appears to be dedication to serve the public good.⁸

Some believe that to constitute a true profession, members of the occupation must personally serve the public interest by consistently placing the needs of the community above their own selfish interests⁹—in other words, that lawyers and other professionals must be more altruistic than other business

Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution, 22 GEO. J. LEGAL ETHICS 589, 595–97 (2009) (describing how financial success has become many lawyers’ only goal).

⁵ See, e.g., Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459, 461 (2012); Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 14 (1998).

⁶ A.B.A. COMMISSION ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 1, 10 (1986), http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf [<http://perma.cc/76VW-XLJL>].

⁷ For example, some cite “admission to practice by a qualifying licensure,” as well as “a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace,” as well as “a system of discipline of its members for violation of the code of ethics.” *Freeman v. Freeman*, 311 N.E. 2d 480, 483 (N.Y. 1974).

⁸ See, e.g., A.B.A. COMMISSION ON PROFESSIONALISM, *supra* note 6, at 10 (“The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.”).

⁹ See, e.g., Nancy J. Moore, *Implications of Globalization for the Professional Status of Lawyers in the United States and Elsewhere*, 40 FORDHAM URB. L.J. 217, 220 (2012) [hereinafter *Implications of Globalization*] (citing works by Julius Cohen and Tom Morgan).

persons. If so, then there is considerable skepticism that this has ever been the case.¹⁰

In my own writing on professionalism, however, I have focused on the criterion of self-regulation—the fact that professions are permitted to be, if not totally self-governing, at least more self-governing than other occupations.¹¹ True, it is courts and not bar associations that oversee the regulation of legal practice in the United States, including admission to practice and lawyer discipline;¹² however, given both the influence of lawyers on judges, who are themselves lawyers, and the status of judicially adopted codes of conduct as law, lawyers are in fact more self-governing than other U.S. professionals.¹³

Professions are permitted to be more self-governing than other occupations because they have persuaded society that it is in the public interest to allow them to do so.¹⁴ But society can change its mind, as it did in the United Kingdom, when in 2007 Parliament passed the Legal Services Act and dramatically changed the way in which the legal professions are regulated in England and Wales.¹⁵ Among other reforms, the Legal Services Act created an independent agency to oversee the lawyer disciplinary process and to assume primary responsibility for consumer complaints; moreover, this agency is required to have a chairperson and a majority of its members who are nonlawyers.¹⁶

¹⁰ See *id.* at 221 (citing work of Tom Morgan); see also Nancy J. Moore, *Professionalism Reconsidered*, 1987 AMER. BAR FOUND. RES. J. 773, 779 (1987) (“The notion that professions are more likely than other trades to put public interest above self-interest is often met with considerable derision.”).

¹¹ See, e.g., Moore, *supra* note 9, at 222 (“[S]o long as the public permits the occupation to be self-regulating, the occupation would appear, as a matter of descriptive reality, to constitute ‘a profession’”); John Flood, *The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation*, 59 CURRENT SOC. 507, 509 (2011) (“Self-regulation is traditionally a key component of occupational control and a core objective for professional projects.”).

¹² Outside the United States, lawyers may be subject to more direct regulation by state legislatures; however, local bar associations have control over the investigation and prosecution of lawyer misconduct. See CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE, CEELI CONCEPT PAPER SERIES 7–11 (Maya Goldstein Bolocan ed., 2002).

¹³ See Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 14–15 (1989).

¹⁴ See Moore, *supra* note 10, at 784; see also, e.g., Flood, *supra* note 11, at 509–10 (“Overall professional self-regulation has been seen as part of a broader regulative bargain where the state has granted professions a high degree of autonomy in organizing their own affairs in exchange for the professions’ pledge to guarantee quality and put public interest before their own.”).

¹⁵ See Moore, *supra* note 9, at 224–25.

¹⁶ *Id.* For a detailed description of the regulatory reforms in both the United Kingdom and in Australia, see generally Judith L. Maute, *Global Continental Shifts to a New Governance Paradigm in Lawyer Regulation and Consumer Protection: Riding the Wave*, in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 11 (Francesca Bartlett et al. eds., 2011); see also Ted Schneyer, *Thoughts on*

The legislation also overrode prior professional rules by permitting lawyers to collaborate with nonlawyers in the provision of legal or multidisciplinary services.¹⁷

So what is the future of the legal profession in the United States?

Of course, it will be more difficult for society to enact dramatic reforms in the United States than it was in the United Kingdom. This is because U.S. lawyers are primarily regulated by fifty state courts as opposed to state legislatures or the federal government.¹⁸ Congress almost certainly has the authority to regulate lawyers, but so far has not shown the will to do so, except in an occasional, piecemeal fashion.¹⁹

Putting these practical questions aside, what other considerations are likely to affect the future of legal professionalism in the United States?

According to some critics, such as Tom Morgan, lawyer self-regulation has not benefitted the public.²⁰ As a result, these critics believe that right-thinking citizens, including lawyers, should favor a form of deregulation. In other words, let lawyers be viewed as primarily commercial actors and be regulated in the same manner as other commercial actors.²¹

I do not currently favor this position, as I am not yet convinced that lawyer self-regulation has produced more public detriments than benefits. I concede that the legal profession has often put the interests of lawyers ahead of the public,²² but I also

the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice, 2009 J. PROF. LAW. 13, 14 (2009).

¹⁷ See Moore, *supra* note 9, at 224–25.

¹⁸ See Schneyer, *supra* note 16, at 13–17, 24–25.

¹⁹ See generally Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 337 (1994).

²⁰ See, e.g., THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 66 (2010) (“Law in America is not a profession – and that’s a good thing.”). For a list of other publications by Morgan to the same effect, see Moore, *supra* note 9, at 217 n.2. See also *id.* at 228–29 (describing Morgan’s view that “the concept of law as a profession and lawyers as professionals is good neither for lawyers . . . nor for the public at large”) (footnotes omitted). Of course, Morgan is not alone. See, e.g., CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *FIRST THING WE DO, LET’S DEREGULATE ALL THE LAWYERS* 5 (2011); David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 207 (2004).

²¹ See Moore, *supra* note 9, at 228–29; see also, e.g., WINSTON ET AL., *supra* note 20; Barnhizer, *supra* note 20; cf. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 433 (calling for complete deregulation of lawyers except for in-court appearances).

²² See, e.g., Moore, *supra* note 10, at 786 (detailing some of the dangers of professional self-regulation).

believe that lawyers have enacted and enforced improvements in the rules of professional conduct and other forms of regulation, including the professionalization of the lawyer disciplinary system.²³

If I am right, then deregulation is not necessarily the preferred path for the future.²⁴ And along these lines, I take heart from the fact that the United Kingdom has not removed lawyers from the regulatory process, but rather permits lawyer organizations to function as front-line regulators, albeit with a significant amount of external oversight.²⁵

Similarly, I have no problem with, and would likely support limited regulatory reform in the United States, including having Congress enact certain limited measures to solve various problems that state courts have been unable or unwilling to solve; for example, uniform minimalist standards for lawyer advertising and solicitation and perhaps even uniform standards for confidentiality and conflicts of interest.²⁶

But there are other, perhaps more pressing, problems facing the U.S. legal profession today. For example, will globalization force changes that are already occurring outside the United States, including nonlawyer ownership of law firms and multi-disciplinary practices?²⁷ Advances in technology have

²³ See Moore, *supra* note 9, at 229–32; see also Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 29 GEO. J. LEGAL ETHICS (forthcoming 2017) (organized bar continues to act in altruistic and public-serving ways at the same time it acts in self-interested and protectionist ways).

²⁴ See generally Moore, *supra* note 9, at 232–37 (suggesting several reasons why U.S. lawyers and lawyer organizations should consider “reprofessionalism, along the lines suggested by the current reforms in the U.K. and Australia”); see also, Julian Webb, *The Dynamics of Professionalism: The Moral Economy of English Legal Practice – and Some Lessons for New Zealand?*, 16 WAIKATO L. REV. 21, 37 (2008) (noting that the debate preceding the adoption of the Legal Services Act of 2007 had moved “beyond a crude deregulation agenda” toward regulations designed to be “efficient, systematic, transparent and accountable”).

²⁵ See Moore, *supra* note 9, at 224–27, 228, 233–35. For an argument that maintaining a significant level of professional self-regulation in the United Kingdom was the result of lobbying by English law firms based on their desire to remain competitive in Europe, where professionalism remains a core value among business clients, see Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT’L L. REV. 465, 469 (2008).

²⁶ See, e.g., Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 FORDHAM L. REV. 2541, 2560 (2012) (“[I]t may be time for Congress to impose national standards in selective areas, such as conflict of interest rules for lawyers engaged in multistate or multinational practice.”).

²⁷ See, e.g., Laurel S. Terry, *Putting the Legal Profession’s Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2933 (2014) (discussing global pressures on the scope of the legal profession’s monopoly, including “governmental pressure, market developments, or both”); cf. James E. Moliterno, *The Trouble With Lawyer Regulation*, 62 EMORY L.J. 885, 904 (2013) (“[T]he need to compete [with U.K. law firms]” will drive U.S. law firms to lobby the ABA and Congress for the opportunity to compete more effectively in global markets.”); cf. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 38

already lead to a significant presence of online legal services such as LegalZoom in the United States.²⁸ Many of these services are owned and operated by nonlawyers, presumably with the assistance of lawyers in creating the software programs.²⁹

Can lawyer self-regulation survive these changes? Or will lawyers and nonlawyers inevitably become so entangled³⁰ that lawyer self-regulation will become meaningless? This is where U.S. lawyers will need to be the most creative in determining whether the profession can continue to regulate lawyers in a world of increasing integration of legal service providers. Is this possible?

Assume, for example, that U.S. jurisdictions are eventually forced by competition to permit nonlawyer ownership of law firms and multi-disciplinary practices.³¹ Can lawyer self-regulation work in these types of practices? Both the United Kingdom and Australia seem to think so. In these countries, lawyers are still bound by regulations applicable to other lawyers, and there must be at least one lawyer in each of these “alternative business structures” who is responsible for ensuring that the professional rules are followed in the provision of legal services.³²

(2012) (discussing wide range of law and law-related services provided by nonlawyers or by lawyers in combination with nonlawyers, particularly in the corporate sector and the extent to which globalization has increased this trend).

²⁸ See, e.g., Lauren Moxley, Note, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer’s Monopoly and Improving Access to Justice*, 9 HARV. L. & POL’Y REV. 553, 553 (2015).

²⁹ LegalZoom was created by two lawyers who formerly practiced at Sullivan & Cromwell and Skadden Arps. *Id.* at 556. It makes sense to infer that lawyers play a significant role in product development, although LegalZoom’s website does not say so. Indeed, although the vice-president in charge of Legal Research and Product Development is a graduate of Yale Law School (see Vanessa Davis, LINKEDIN, <https://www.linkedin.com/in/vanessa-davis-0285a74> [<http://perma.cc/NE9V-EEYE>]), the LegalZoom website does not describe her as either a licensed lawyer or a law school graduate. *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> [<http://perma.cc/4R57-KM4Y>]. LegalZoom probably chooses not to advertise the role that lawyers play in product development in order to avoid consumers relying on the company as providing legal services. Any such reliance would make it more difficult for LegalZoom to defend against unauthorized practice of law challenges. See generally Moxley, *supra* note 28.

³⁰ See, e.g., Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 14 (2016) (“As legal and non-legal work becomes more integrated, and entangled, within the firm employees may also be more likely to engage in the unauthorized practice of law or share confidential client information across different departments of the company.”); Benjamin H. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 HOFSTRA L. REV. 541 (2015) (describing various online legal service providers, possible common law responses to claims of injury, and the role of lawyers in developing software programs).

³¹ See *supra* note 27 & accompanying text.

³² See Moore, *supra* note 9, at 225–27. In the United Kingdom, all employees of a legal disciplinary practice (including practices owned by nonlawyers) are subject to the regulations applicable to lawyers, including all the nonlawyers. *Id.* at 225–26. An alternative business structure (which may provide multidisciplinary services) must have

Many U.S. lawyers have questioned the efficacy of this form of self-regulation in the context of nonlawyer ownership of both law firms and multidisciplinary practices. For example, even if the sole purpose of the firm is to provide legal services, critics have argued that nonlawyer ownership will place undue pressure on the lawyers to increase profits at the expense of client interests.³³ This particular concern is almost certainly overstated, as many lawyers in lawyer-owned firms are “already predominantly driven by this desire.”³⁴ Other concerns include conflicts of interest involving nonlawyer owners who have other commercial interests likely to conflict with client interests.³⁵ These concerns may be stronger in some forms of practice rather than others,³⁶ but it is unclear why these types of conflicts cannot be addressed in the same way that law firms currently regulate conflicts involving the law firm’s financial interest in maintaining ties to its most lucrative clients.³⁷

For example, consider the possibility that Walmart will someday provide traditional legal services through lawyer-employees who work in offices located within a Walmart retail store.³⁸ Conflicts may arise as a result of Walmart’s other commercial interests, including prospective clients who want to

at least one manager authorized to practice law and must appoint a head of legal practice to ensure compliance with the ABS license and to report to the licensing authority any failure to comply with the terms of the license. *Id.*

³³ See, e.g., Robinson, *supra* note 30, at 46 (discussing concerns of others).

³⁴ Robinson, *supra* note 30, at 46.

³⁵ *Id.* at 46–47.

³⁶ See, e.g., *id.* at 47 (discussing a large business process outsourcer with multiple contracts with the U.K. government, which was running both the migrant removal process and a government telephone hotline for indigents to access entitlement to legal aid: author expresses fear over conflicts arising from the concern that confidential information from immigrants who call the legal aid hotline might be shared with employees running the migrant removal process).

³⁷ Further, it should be noted that personal injury defense lawyers have been permitted to practice in a law firm owned by the insurance company that funds the defense even though such a practice appears to violate the letter of ethics rules that prohibit lawyers from practicing in firms owned by a nonlawyer. See, e.g., Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 260 (1997).

³⁸ Even prior to its passage, the 2007 Legal Services Act was dubbed “Tesco law” because of the possibility that supermarkets like the English chain Tesco would be providing legal services. See, e.g., Katherine H. Reardon, Note, *It’s Not Your Business! A Critique of the U.K. Legal Services Act of 2007 and Why Nonlawyers Should Not Own or Manage Law Firms in the United States*, 40 SYRACUSE J. INT’L L. & COM. 155, 156 (2012). Tesco does indeed provide legal services in the United Kingdom today. See *Legal*, TESCO, <http://www.tesco-careers.com/Jobs-in-our-Office/Career-Path/Legal.aspx> [http://perma.cc/96XY-H82M]. Previously, in the United States, lawyers commonly referred to the specter of legal services being offered by giant retailer Sears, Roebuck & Co. as a consequence of permitting nonlawyer ownership of law firms. See, e.g., Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?* 40 HASTINGS L.J. 577, 578 (1989).

sue one of Walmart's major suppliers. If the lawsuit is related to a matter involving Walmart, then the lawyer may have a material limitation conflict under Rule 1.7.³⁹ If the lawsuit is unrelated to Walmart, then there would not be a directly adverse conflict under that rule (because the supplier is not a "client" of the Walmart law firm);⁴⁰ however, if Walmart has a significant financial interest in not disturbing its relationship with the supplier, then there may be a so-called "punch pulling" conflict,⁴¹ which is yet another form of a material limitation conflict.⁴² Either way, the Walmart lawyers would be expected to identify the conflict and deal with it accordingly, by either refusing the proffered representation or obtaining the informed consent of the client.⁴³

Similarly, lawyers who provide legal services in the context of a multidisciplinary practice should be able to address conflicts of interest and other ethical issues, so long as the legal services are provided in much the same way as in a traditional law firm. Assume, for example, that a lawyer, an accountant, and a social worker form a partnership to provide the different services typically required in family law matters. The lawyer will be in charge of providing the legal services, and will not permit her nonlawyer partners to "direct or regulate the lawyer's professional judgment in rendering such legal services."⁴⁴ If there are conflicts of interest arising from the partners' relationships with their own clients, these conflicts can be identified and addressed as in traditional law firms or law firms owned by nonlawyers, such as Walmart.⁴⁵ To the extent that the nonlawyer partners assist the lawyer in the provision of legal services, they

³⁹ See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016) (concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

⁴⁰ See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2016) (a conflict of interest exists if "the representation of one client will be directly adverse to *another client*") (emphasis added).

⁴¹ See, e.g., Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 884 n.196 (2005).

⁴² The concern is that the lawyer's financial interest in pleasing the nonclient adverse party "might tempt the lawyer the [sic] 'pull her punches' on behalf of a client." *Id.*

⁴³ See MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2016). This is precisely what lawyers in England and Wales are currently required to do when practicing in an alternative business structure. See *Alternative Business Structures*, THE LAW SOCIETY, ¶4 <http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/> ("You may not be able to accept instructions from some clients where aims of different parts of an ABS may conflict with a client's best interests.") [<http://perma.cc/RMCS-BKTM>].

⁴⁴ MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 2016) (concerning persons who recommend, employ, or pay a lawyer to render legal services).

⁴⁵ See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

would be subject to the supervision of the lawyer, as in any other law firm.⁴⁶

The more difficult challenges will come when lawyers become more integrated with nonlawyers in the provision of services that are not clearly or primarily legal services. For example, consider Richard Susskind's prediction that many future lawyers will become "legal knowledge engineer[s]" working alongside business and computer experts developing standardized working practices and computer systems.⁴⁷ Are they providing legal services or are they providing interdisciplinary services that are not clearly or solely legal?⁴⁸ Should these lawyers be regulated by lawyer codes or are they more like compliance officers, who may or may not have a law degree but who are nonetheless knowledgeable about the law?⁴⁹

Legally trained compliance officers are but one of several "quasi-legal" roles that lawyers have assumed in recent years.⁵⁰ As Tanina Rostain has explained, many lawyers are now serving as "law consultants," working at corporate risk management firms and employment law consulting firms that offer "investigative, compliance, and other law-related services," purportedly "outside the confines of the attorney-client relationship."⁵¹ Thus far, the assumption has been that these

⁴⁶ See MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2016) (responsibilities regarding nonlawyer assistants, including nonlawyers "associated with a lawyer").

⁴⁷ See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS?* 272 (2010). This is the role that lawyers presumably play in companies that provide online legal documents or other forms of online legal or law-related services, such as Legal Zoom. See *supra* notes 28–29 & accompanying text.

⁴⁸ See *supra* note 29 (describing the likely role of lawyers in Legal Zoom's software product development and Legal Zoom's efforts to downplay that role in order to avoid engaging in the unauthorized practice of law). For a discussion of various efforts to characterize Legal Zoom as engaged in the unauthorized practice of law, see, e.g., Moxley, *supra* note 28, at 558.

⁴⁹ See, e.g., Tanina Rostain, *The Emergence of "Law Consultants,"* 75 *FORDHAM L. REV.* 1397, 1410 (2006) ("Recognizing that compliance expertise is not primarily legal, regulations that require the designation of internal compliance personnel as part of a compliance program do not specify that the corporate officer or employee in question be a lawyer or have a law degree."). For a more detailed discussion of the role of compliance officers, see generally Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law,* 82 *FORDHAM L. REV.* 2961, 2964 (2014).

⁵⁰ Rostain, *supra* note 49, at 1398. See generally Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession,* 63 *DUKE L.J.* 1243, 1246 (2014). Another example of a "quasi-legal" service is legal process outsourcing, which includes "not only the repetitive administrative functions associated with legal work and paralegal work, but also the complex work involved in legal research, due diligence, contract negotiations, etc." Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?* 80 *FORDHAM L. REV.* 2791, 2795 n.21 (2012).

⁵¹ Rostain, *supra* note 49, at 1398.

“law consultants” are not practicing law.⁵² Indeed, to avoid any contrary appearance, consulting firms emphasize that they do not provide legal advice and avoid advertising their legally-trained personnel as licensed lawyers.⁵³

One potential benefit of explicitly permitting multidisciplinary practices and other forms of alternative business structures is that at least some of these “law consultants” may choose to acknowledge and embrace the fact that the services they are offering are in fact legal services. If so, then to the extent that they provide these legal services in much the same way as in a traditional law firm, they, too can be “self-regulated” in the manner described above.⁵⁴ However, other “law consultants” may prefer to continue holding themselves out as performing nonlegal services. As Rostain and others have noted, there are benefits to the nonlawyer role, including the “fundamentally contractual nature of the relationship with clients,”⁵⁵ which avoids the imposition of fiduciary duties to clients and special obligations to third persons.⁵⁶ Thus, although some lawyers now beyond the pale of lawyer regulation may opt back into the self-regulatory lawyer system, even more lawyers may now opt out of that system.

What is to be done? Recall that I am positing that these changes *will* occur,⁵⁷ whether we want them to or not.⁵⁸ Rostain

⁵² *Id.* at 1410–11; *see also, e.g.*, Remus, *supra* note 50, at 1261–62.

⁵³ *See* Rostain, *supra* note 49, at 1407 & n.51.

⁵⁴ *See supra* notes 11–13 & accompanying text.

⁵⁵ Rostain, *supra* note 49, at 1398.

⁵⁶ *Id.* at 1420–25; *see also* Remus, *supra* note 50, at 1269–73 (referring to the ability of some corporations to employ “ethical arbitrage” by using law consultants to perform work that would otherwise be done by a lawyer). Rostain also notes the decreasing advantages often thought to accrue as a result of hiring a lawyer in an attorney-client relationship, i.e. the advantages of the attorney-client privilege and work-product doctrine, which she suggests are of less importance today due to pressures on companies to waive such privileges in the context of government investigations. *See* Rostain, *supra* note 49, at 1412–19.

⁵⁷ Commentators have noted that at least the corporate side of the legal services market is already moving toward effective deregulation, including not only the emergence of consulting services, but also the rise of legal process outsourcing. *See, e.g.*, Ray Worthy Campbell, *Rethinking Reg. and Innovation in the U.S. Legal Services Mkt.*, 9 N.Y.U. J.L. & BUS. 1, 47–49 (2016).

⁵⁸ Whether or not to permit either nonlawyer ownership of law firms or multidisciplinary practices has been a continuing topic of debate. *See, e.g.*, ABA COMM’N ON ETHICS 20/20, ISSUES PAPER CONCERNING ALT. BUS. STRUCTURES (2011) (including brief history of ABA’s consideration of nonlawyer ownership of law firms and other forms of alternative business structures). The ABA recently confirmed its firm resistance to any form of alternative business structures by rejecting a modest proposal to permit nonlawyer professionals to participate in the ownership of law firms. *See* ABA COMM’N ON ETHICS 20/20, ABA COMM’N WILL NOT PROPOSE CHANGES TO ABA POLICY PROHIBITING NONLAWYER OWNERSHIP OF LAW FIRMS (2012). For a recent discussion of the pros and cons of nonlawyer ownership of legal services, see Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-lawyer Ownership, Access and Professionalism*, 29 GEO. J. LEGAL

finds it “difficult to envision a successful regulatory strategy to address” the risk that law consultants will use “their expertise and authority in ways that may harm the interests of employees and other third parties.”⁵⁹ Dana Remus proposes that, in order to avoid this form of “ethical arbitrage,”⁶⁰ lawyers in “quasi-legal” roles who want to retain their professional licenses should be forced to accept the “obligations of professional regulation.”⁶¹ This would entail expanded professional rules tailored explicitly to the new law consultant.⁶²

But not all law consultants, including legal knowledge engineers,⁶³ are nefariously seeking to avoid professional regulation.⁶⁴ And it seems highly unlikely that lawyers will succeed in extending their current authority to routinely regulate the lawyers who perform such “quasi-legal” roles.⁶⁵ In situations where there is genuine confusion regarding whether an attorney-client relationship has been formed, then-existing law is probably sufficient to impose current regulatory requirements on these lawyers and their firms.⁶⁶

If and when the use of law consultants raises an unreasonable risk of corporate overreaching or other harm to third persons or the public, then we should trust judges and legislators to regulate these practices in the same way they choose to regulate (or not) other providers of commercial services. Although it is true that the political will is probably lacking to enact any comprehensive regulation of law consulting (or

ETHICS 1, 53–54 (2016) (concluding, contrary to most academic commentators and other competition advocates, that it is unlikely that deregulatory approaches will make legal services more affordable and identifying challenges to professionalism).

⁵⁹ Rostain, *supra* note 49, at 1425.

⁶⁰ See Remus, *supra* note 50 and accompanying text.

⁶¹ Remus, *supra* note 50, at 1276.

⁶² *Id.* at 1277–85.

⁶³ See SUSSKIND, *supra* note 47 and accompanying text.

⁶⁴ See, e.g., Rostain, *supra* note 49, at 1409–10 (detailing how some compliance regimes “require the deployment of multidisciplinary expertise,” including the design of systems that “interweave[] legal, financial, and software expertise”).

⁶⁵ See *id.* at 1425–26 (lawyers might seek to protect third parties by extending the meaning of legal practice to include legal consultants, but “[p]roposing an expanded definition of law practice would also meet significant resistance on a variety of . . . grounds, including its detrimental effects on the capacity of the public to obtain access to the legal system”). *But see* Remus, *supra* note 50, at 1284–85 (acknowledging significant obstacles to these types of reforms, but concluding that such reform is possible if state courts take the lead).

⁶⁶ In determining whether an attorney-client relationship has been formed, “[c]ourts are alert to what a person claiming to be a client might reasonably have believed under the circumstances, especially if the person has given the lawyer confidential information to enable the lawyer to perform a legal service that would benefit that person” STEPHEN GILLERS, REGULATION OF LAWYERS 24 (9th ed. 2012). See generally Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 919 (2005).

consulting generally),⁶⁷ specific problems can be addressed on a piecemeal basis, which is how most businesses are currently regulated. Such a piecemeal approach may not be ideal, but neither is the current regulation of the legal profession, given the many disadvantages of lawyer self-governance.⁶⁸

When lawyers and nonlawyers are truly integrated in a practice, it is probably true that lawyers cannot be regulated in the same manner as lawyers providing more traditional legal services. But this state of affairs does not necessarily mean the end of either lawyers or lawyer self-regulation. Even in Susskind's world of the future,⁶⁹ many, perhaps even most lawyers will continue to provide legal services in more or less traditional attorney-client relationships, although the work may not always be of the customized, or bespoke, variety.⁷⁰ And in this future world, it may well be that lawyer self-regulation, albeit in a somewhat different form, will continue to be both possible and even desirable. We shall see.

⁶⁷ See Rostain, *supra* note 49, at 1426.

⁶⁸ See *supra* note 21 and accompanying text.

⁶⁹ See *supra* note 47 and accompanying text.

⁷⁰ See SUSSKIND, *supra* note 47, at 271.