ARTICLES

LAWYER ETHICS FOR INNOVATION

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ABSTRACT

Law struggles to keep pace with innovation. Twenty-first century advancements like artificial intelligence, block chain, and data analytics are already in use by academic institutions, corporations, government entities, health care providers, and others but many questions remain about individual autonomy, identity, privacy, and security. Even as new laws address known threats, future technology developments and process improvements, fueled by consumer-demand and globalization, inevitably will present externalities that the legal community has yet to confront.

How do we design laws and systems to ensure accountability, equality, and transparency in this environment of rapid change? A solution can be found in a surprising source—the regulation of professional ethics. Lawyers have the capacity to play a critical role both in assessing the risks and benefits of innovation generally and also in deploying innovative tools to enhance the delivery of legal services. This Article is the first to articulate a formal obligation of ethical innovation as a component of professional discipline and licensing rules. This proposal comes at a time when the legal profession is increasingly immersed in innovation—whether measured by the number of "NewLaw" providers, exponentially increasing financial investment in legal tech, or by the American Bar Association's 2020 Resolution supporting innovation to address the access-to-justice crisis.

Rather than taking a particular side in the debate over whether lawyers and judges should adopt innovations like artificial intelligence or machine learning, this Article acknowledges that technology advancements inevitably are part of modern society, including the practice of law, and advocates for reforms to professional conduct rules to protect individuals in the midst of innovation. This protection is especially warranted when

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innovation is forced amidst a moment of crisis, for example as seen when the 2020 coronavirus pandemic abruptly halted law practice in its traditional form, canceling office meetings and jury trials and other in-person interactions. Some lawyers and courts were prepared, others were not. Some clients received the legal advice through virtual consultations or apps, and had their cases decided by judges via Zoom hearings, but many found themselves without the justice they needed. The lawyers and judges at the forefront of ethical innovation before the pandemic hit were the ones best able to serve their clients. Formalizing a duty to innovate as an ethical obligation will make the profession better prepared to serve the public in the future.

INTRODUCTION

Innovation outpaces law. Artificial intelligence, blockchain, data analytics, and other twenty-first century advancements are already in use by academic institutions, corporations, government entities, health care providers, and others, but many questions remain about individual autonomy, identity, privacy, and security. Even as new laws address known threats, future technology developments and process improvements inevitably will present unforeseen externalities. How do we design laws and systems to ensure accountability, equality, and transparency in this environment of rapid change? Professional ethics—especially the regulation of legal expertise—offers one potential solution.

This Article is the first to articulate an affirmative, formal obligation of ethical innovation as a component of professional discipline and licensing rules, both in assessing the benefits and risks of innovations and in actively pursuing innovations for the delivery of legal services. This proposal may seem controversial, especially for lawyers already well-settled into their professional lives. For future generations of lawyers, however, ethical innovation is as obvious as the duty of confidentiality to a client or the duty of candor to a tribunal or any other of the professional obligations contained in the American Bar Association (ABA) Model Rules of Professional Conduct. As a 27-year-old North Carolina attorney observed when asked to define her generation in one word during the competition for the Miss USA crown in 2019—they are "innovative."[1] (She won, by the way.)

Grappling with the concept of innovation in legal services raises difficult questions. The legal system is at its core the archive of precedent, constantly looking backwards with caution to determine the resolution of conflicts as they emerge, yet at the same time the best lawyers are also constantly inventing new mechanisms for protecting their clients, whether advancing civil rights or crafting a corporate governance tool. The twenty-first century culture of innovation that transformed industries like medicine, real estate, transportation,

1. Dylan Jackson, *And the Winner Is ... a Lawyer!*, AM. LAW. (May 3, 2019), https://www.law.com/americanlawyer/2019/05/03/and-the-winner-is-a-lawyer/ (last visited May 5, 2019).

travel planning, and much more is only beginning to take hold in the delivery of legal services. This Article raises and attempts to respond to these competing dynamics.

The duty of ethical innovation contemplated here is two-fold—both client centered and public facing. A majority of American jurisdictions, albeit unwittingly, already have adopted a component of the client-centered aspect by adding to the duty of competence an obligation to keep up with changes in technology. None has yet to formally embrace the public-facing component, though many have devoted substantial resources toward exploring aspects of it. Meanwhile jurisdictions outside of the United States have experimented with interventions designed to infuse innovation into legal services, with significant successes and some failures.

Some may contend that new ethics rules are not needed for governing innovation. While a special law for every innovation might be impractical, we do need regulatory structures to assess the benefits and risks of innovation. Look no further than the voting corruption associated with social media during the 2016 election cycle as justification for some sort of oversight. We are increasingly immersed in a world of fake news,[2] and deep fakes.[3] Infusing a duty to innovate ethically into the professional rules governing the practice of law can help avoid the need for constantly updating legal structures as society progresses via globalization, technology, and related forces. Some might be tempted to continually craft rules around the latest innovation-signaling fields like artificial intelligence, big data, blockchain, machine-learning, or whatever comes next. This Article proposes a more enduring and simultaneously nimble solution.

This proposal comes at a time when the legal profession is increasingly immersed in innovation—whether measured by the number of new providers, exponentially increasing financial investment in legal tech, or by the American Bar Association's 2020 Resolution supporting innovation to address the access-to-justice crisis. Rather than taking a particular side in the debate over whether lawyers and judges *should* adopt innovations like artificial intelligence or machine learning,[4] this Article acknowledges that technology advancements

2. *See, e.g.*, *Russia-Backed Facebook Posts 'Reached 126m Americans' During US Election*, GUARDIAN (Oct. 30, 2017, 9:26 PM), https://www.theguardian.com/technology/2017/oct/30/facebook-russia-fake-accounts-126-million; *see also* Danielle Kurtzleben, *Did Fake News on Facebook Help Elect Trump? Here's What We Know*, NPR (Apr. 11, 2018, 7:00 AM), https://www.npr.org/2018/04/11/601323233/6-facts-we-know-about-fake-news-in-the-2016-election; Alex Ward, *4 Main Takeaways from New Reports on Russia's 2016 Election Interference*, VOX (Dec. 17, 2018, 12:25 PM), https://www.vox.com/world/2018/12/17/18144523/russia-senate-report-african-american-ira-clinton-instagram.

3. *See, e.g.*, Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753 (2019).

4. *Cf.* Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1135 (2019) ("If the software can create persuasive opinions, capable of regularly winning opinion-writing competitions against human judges—and if it can be adequately protected against hacking and similar attacks—we should in principle accept it as a judge, even if the opinions do not stem from human judgment.");

like these inevitably are part of modern society, including the practice of law, and advocates for reforms to professional conduct rules to protect individuals in the midst of innovation.

This protection is especially warranted when innovation is forced amidst a moment of crisis, for example, as seen when the 2020 coronavirus pandemic abruptly halted law practice in its traditional form, canceling office meetings and jury trials and other in-person interactions. Some lawyers and courts were prepared, others were not. Some clients received the legal advice through virtual consultations or apps, and had their cases decided by judges via Zoom hearings, but many found themselves without the justice they needed. The lawyers and judges at the forefront of ethical innovation before the pandemic hit were the ones best able to serve their clients. Formalizing a duty to innovate as an ethical obligation will make the profession better prepared to serve the public in the future.

This Article proceeds as follows. Part I sets the stage with an overview of the exponential change driven by innovation, both technology based and other advances, and examines who is responsible for protecting human rights—government, industry, or individuals themselves. This Part also unpacks the meaning of "innovation," especially in the context of legal services. Part II hones in on professional licensing as another source of protection, in particular that of the legal profession, providing background on the reasons why we regulate expert knowledge and offering a comparative approach from international jurisdictions. Part III then makes the case for a formal obligation to innovate ethically. It proposes a more developed rule governing lawyer competence. Part IV anticipates and responds to potential objections, concluding with a call for other professions to incorporate similar provisions in their own definitions and licensing of professional expertise.

I. CHANGE, RIGHTS, RESPONSIBILITIES

Part I highlights concerns about human rights and the responsibilities for protecting them amidst a world of increasing change. It begins by describing what constitutes "innovation" and then turns to identifying concerns about compromises to autonomy, privacy, and more. Part I then discusses where responsibility should be placed in order to protect individuals.

Dana A. Remus, *The Uncertain Promise of Predictive Coding*, 99 IOWA L. REV. 1691, 1691 (2014) (regarding law practice and the judiciary, "I advise caution in the adoption of predictive-coding technologies"). *See also* Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501, 556 ("[W]e showed that while technology is undoubtedly advancing and changing the nature of legal practice, it is displacing lawyers at a modest pace."); Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 661, 619, 650–51 (2020) (advancing the position that there is only "a right to a well-calibrated machine decision" but not a decision by a human judge and observing that "[m]achines have the capacity to classify and predict with fewer errors than humans. At least from a dynamic perspective, this suggests that legal rules should incentivize the creation of better machines rather than their substitution with humans").

A. What Is Innovation?

To begin, it is important to set out the concept of innovation for purposes of this Article's thesis. Merriam-Webster Dictionary defines the word innovation as "the introduction of something new" or "a new idea, method, or device,"[5] a definition that proves amorphous depending on the speaker and the audience. It is an oft-used word in the new millennium, with many individuals offering their own spin on its meaning.[6] Some innovation destroys jobs and routines; other innovation creates new roles and enhances ways of living.[7] The term "disruptive innovation" was coined by Clayton Christiansen.[8] It "occurs when a competitor enters a marketplace with a product or service that most initially see as inferior—until successive improvements end up displacing established products or even entire industries."[9] While some challenge his thinking (most famously his Harvard colleague historian Jill Lepore in a 2014 *New Yorker* article, *What the Gospel of Innovation Gets Wrong*)[10] it remains a much-referenced force in the discussion of innovation, especially in the context of companies and work.[11]

5. *Innovation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/innovation (last visited Sept. 11, 2020).

6. *See* Nick Skillicorn, *What Is Innovation? 15 Experts Share Their Innovation Definition*, IDEA TO VALUE, https://www.ideatovalue.com/inno/nickskillicorn/2016/03/innovation-15-experts-share-innovation-definition/#anal (last visited Sept. 11, 2020).

7. *See, e.g.*, Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 263–64 (2018) ("In particular, major technological innovations from the mid-1800s to the mid-1900s brought vast improvements in most people's lives and standards of living. Since the mid-twentieth century, technology has continued to destroy some jobs, to create others, to reduce misery and drudgery on and off the job, and to generate economic growth and prosperity." (footnotes omitted)); Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1307 (2013) ("The profession faces unprecedented disruption in a 'race against the machine,' as more of the traditional lawyer roles, such as document review and dispute outcome prediction, become replaced or aided by computers.") (quoting ERIK BRYNJOLFSSON & ANDREW MCAFFEE, RACE AGAINST THE MACHINE: HOW THE DIGITAL REVOLUTION IS ACCELERATING INNOVATION, DRIVING PRODUCTIVITY, AND IRREVERSIBLY TRANSFORMING EMPLOYMENT AND THE ECONOMY 56 (2011)).

8. *See* CLAYTON CHRISTIANSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

9. Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L.J. 1, 4–5 (2015) [hereinafter *Disruptive Innovation*] (citing CLAYTON M. CHRISTENSEN ET AL., HOW WILL YOU MEASURE YOUR LIFE? 10–11 (2012)).

10. Jill Lepore, *The Disruption Machine: What the Gospel of Innovation Gets Wrong*, NEW YORKER (June 16, 2014), https://www.newyorker.com/magazine/2014/06/23/the-disruption-machine.

11. *See, e.g.*, Rick Edmonds, *Naysayers Are Swarming on Clayton Christensen and His "Gospel of Innovation,"* POYNTER (June 19, 2014), https://www.poynter.org/reporting-editing/2014/naysayers-are-swarming-on-clayton-christensen-and-his-gospel-of-innovation/ ("If business school professors were pop stars, Clayton Christensen would be Beyonce [sic]. His 1997 book, The Innovator's Dilemma, is wildly influential — in particular, it has been both the theoretical underpinning and rallying banner for would-be digital disruptors of legacy media.").

Not only is innovation difficult to define, but it is also challenging to discern what is truly innovative and what is not. As one commentator explains, for some their "mind-set equates innovation exclusively with invention and implies that if you just buy the next new thing, voilà! You have innovated!"[12] As a consequence, this "fear of missing out has led us to foolishly embrace the false trappings of innovation over truly innovative ideas that may be simpler and ultimately more effective."[13] Innovation can also vary between generations. A 2017 study by Canada's McGill University on law firm innovation is telling.[14] Where the overwhelming majority of law firm partners believed that innovation was one of the highest strategic priorities (84%), less than half of associates agreed (42%).[15]

While technology can play an important role in innovation through the development of new tools, technology alone is not itself true innovation. Rather, it is a means toward the goal.[16] Innovation may take a wide range of different forms, including design-thinking, methods, process improvements and other aspects of change. Let's be clear on what innovation is *not* meant to be for purposes of this Article. It is not meant to be a marketing buzzword. It is not whiteboards or prototypes or post-it notes on walls. It is not merely the latest technological advancements, like artificial intelligence or blockchain or whatever comes next. The *Tenth Annual Tech Trends Report* issued by Deloitte cautions readers to not just embrace technology, but to look beyond it: "To stay ahead of the game, companies must work methodically to sense new innovations and possibilities, define their ambitions for tomorrow, and journey beyond the digital frontier."[17]

B. What Is Innovation in Legal Services?

Innovation in the context of legal services carries a range of other connotations in addition to the notion of introducing something new. For example,

12. David Sax, *End the Innovation Obsession: Some of Our Best Ideas Are in the Rearview Mirror*, N.Y. TIMES (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/opinion/sunday/end-the-innovation-obsession.html.

13. *Id.*

14. *See* ALY R. HÁJI, THE ILLUSION OF INNOVATION AT CANADIAN LAW FIRMS (2017), https://jnper.com/wp-content/uploads/2017/01/Law-Firm-Innovation-1.pdf.

15. *Id.* at 11.

16. *See, e.g.*, Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, Sans Lawyers*, 31 GEO. J. LEGAL ETHICS 377, 379 (2018) (describing the concept of "surrogate lawyering" to increase access to justice, by which "a public interest legal services organization [provides] guidance to its intended client community through social service agency staff members" which "serves as an alternative and supplement to technology-based innovations").

17. Andy Main, *Beyond the Digital Frontier: Deloitte Publishes Its 10th Annual Tech Trends Report*, DELOITTE (Mar. 11, 2019), https://www.deloittedigital.com/ddglobalblueprint/en/blog-list/2019/beyond-the-digital-frontier—deloitte-publishes-its-tenth-annual.html (last visited Sept. 6, 2020).

> the word is often used to refer to developments in computer technology that lawyers can use to make practice more efficient, but it is also used to refer to the rise of online "do it yourself" legal services, to the expanding presence of Internet start-up companies looking to connect clients with lawyers or to provide what appears to be legal services even though the entities providing them are not licensed to practice law, to issues related to possible partnerships with nonlawyers, to nonlawyer ownership of law firms, and to limited practice of law by nonlawyers.[18]

Perhaps it is associated with so many different concepts in legal practice because opportunities for doing something new abound. Lawyers and law firms around the globe regularly win awards for being the "most innovative" according to entities such as the Financial Times,[19] the Client Choice Awards,[20] Fastcase50,[21] and the College of Law Practice Management.[22]

Legal innovation can mean developing ways to make law more accessible for those who need it, whether on the street corner or in the corner office and includes improvements in the practice of law as well as the delivery of it to those who need legal help. Lawyers have a special obligation to ensure that innovations in the delivery of legal services are ethical, not only complying with professional obligations but also protecting clients from harm.[23] Efforts at innovation inevitably will vary based upon practice setting and speciality. Large law firms will not necessarily engage in the same sorts of innovation as in-house corporate legal departments or community legal aid providers or government lawyers. The duty to innovate contemplated by this Article should not be confused with a client's seeking of "innovative" advice where the

18. Alberto Bernabe, *Justice Gap vs. Core Values: The Common Themes in the Innovation Debate*, 41 J. LEGAL PRO. 1, 3–4 (2016) (footnotes omitted).

19. *See Special Report: Innovative Lawyers*, FIN. TIMES, https://www.ft.com/innovative-lawyers (last visited Sept. 6, 2020).

20. *See Client Choice Awards Categories*, CLIENT CHOICE AWARDS, https://clientchoiceawards.net/award-categories (last visited Sept. 6, 2020).

21. *See About the Fastcase 50*, FASTCASE 50, https://www.fastcase.com/fastcase50/ (last visited Sept. 6, 2020). As a disclaimer, the author of this article was a recipient in 2013.

22. *See Recognizing Innovation in Action Around the World*, COLL. L. PRAC. MGMT., https://www.collegeoflpm.org/innovaction-awards (last visited Sept. 6, 2020). As another disclaimer, the author of this article also received one of these awards in 2013.

23. For resources discussing legal services innovation specifically, see Vicki Waye et al., *Innovation in the Australian Legal Profession*, 25 INT'L J. LEGAL PRO. 213–242 (2018); A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLS Report_FNL_WEB.pdf; LAW SOC'Y ENG. & WALES, CAPTURING TECHNOLOGICAL INNOVATION IN LEGAL SERVICES (2017), https://www.lawsociety.org.uk/en/topics/research/capturing-technological-innovation-report; Zoë Andreae, *The Digital Transformation of the German Legal Industry*, LEGAL TECH BLOG (Nov. 17, 2017), https://legal-tech-blog.de/the-digital-transformation-of-the-german-legal-industry.

concept of innovation is used as a "code for breaking the law."[24] Ideally, formalizing ethical obligations around innovation duties avoids precisely this sort of abuse while still providing space for legal advice about how to engage in good-faith challenges to existing law, for example in the context of civil disobedience.

Innovation in legal services is growing, as indicated by at least three measures: (1) the increasing number of providers relying upon technology and other advancements; (2) the amount of financial capital being poured into these organizations; and (3) the efforts devoted toward solving the so-called "access-to-justice crisis" through entrepreneurial and innovative tools. Each measure is taken up in turn below.

1. "NewLaw"

Acknowledgement of the emerging world of "NewLaw" is one method of assessment.[25] This term refers to "new ventures in legal entrepreneurship" that reflect an array of businesses offering legal services in ways that are more accessible to and affordable for clients, as well as more pleasant for the lawyers, offering a work-life balance often absent in a big law or corporate practice.[26] Professor Joan Williams identifies five categories of so-called NewLaw.[27] The categories include: (1) "Law and Business Companies," "marrying legal with business advice and services"; (2) "Secondment Firms," placing lawyers into corporate legal departments for limited periods of time; (3) "Law Firm Accordion Companies," which "provide law firms with lawyers to work as overload capacity or to provide specialized skills"; (4) "Virtual Firms," where "everyone works from home"; and (5) "Innovative Law Firms," with modernized "billing and personnel policies, better work-life balance, and women-friendly practices."[28] NewLaw is growing so quickly that "any list or taxonomy quickly becomes outmoded."[29]

24. For an excellent discussion of the role of lawyer as accomplice in advising clients engaged in quasi-(il)legal behavior, see Charles M. Yablon, *The Lawyer as Accomplice: Cannabis, Uber, Airbnb, and the Ethics of Advising 'Disruptive' Businesses*, 104 MINN. L. REV. 309 (2019), (citing the example of Uber, whose "basic business model certainly involved the deliberate violation of laws with criminal penalties . . . . [But] was seeking to build a popular constituency for changes in the law, change that it thought would be beneficial to consumers . . . ").

25. The term was initially coined by George Beaton in his eBook NEW LAW NEW RULES: A CONVERSATION ABOUT THE FUTURE OF THE LEGAL SERVICES INDUSTRY (2013). The book has been described as "in itself an innovation—it is available only on e-readers, and its content is an aggregation of tweets and online postings by commenters on this topic, interspersed with analysis." *Disruptive* Innovation, *supra* note 9, at 6.

26. *Disruptive Innovation*, *supra* note 9, at 3–4.

27. *Id.* at 5.

28. *Id.* at 5.

29. Ray Worthy Campbell, *The End of Law Schools: Legal Education in the Era of Legal Service Businesses*, 85 MISS. L.J. 1, 55 (2016) (citing Jordan Furlong, *An Incomplete Inventory of NewLaw*, LAW21 BLOG (May 13, 2014), https://www.law21.ca/2014/05/incomplete-inventory-newlaw/).

Indeed, Williams's study surveyed more than fifty different providers, a list growing so quickly that even as her research was published she added footnotes to name those discovered too late to include but worthy of mention.[30] The label itself may be a bit disingenuous, as noted by Professor Bill Henderson: "I don't dispute the categorization, except to point out that it's our awareness of alternative models that is new, not the companies themselves."[31] As examples, Henderson notes that two of the best-known NewLaw companies Axiom and Counsel on Call (which can be best described as operating under Williams' category of secondment firms) have been around since 2000.[32] (Nearly 20 years later, we probably should stop calling them "new.") Much of the growth is fueled by individuals who do not hold law degrees (and often are not even supervised by lawyers). These services include:

> [A]utomated legal document assembly for consumers, law firms, and corporate counsel; expert systems that address legal issues through a series of branching questions and answers; electronic discovery; legal process outsourcing; legal process insourcing and design; legal project management and process improvement; knowledge management; online dispute resolution; data analytics; and many others.[33]

2. Financial Investment

A second method to understand the pace of innovation might be the amount of financial capital being poured into the NewLaw ventures and legal tech start-ups. According to a report issued in Forbes, "[l]egal [t]ech [s]et [a]n [i]nvestment [r]ecord [i]n 2018" with "713% [g]rowth" at $1,663 million.[34] This was up from $224 million in 2016 and $233 million in 2017.[35] Among the largest investments were $75.5 million into "Atrium, a company that launched in 2017 with the promise of transforming the delivery of legal services,"[36] and $500 million the following year into LegalZoom, a provider of legal forms and

30. *See Disruptive Innovation*, *supra* note 9, at 7 nn.18–19.

31. Bill Henderson, *World Class Innovation and Efficiency, Billed by the Hour (010)*, LEGAL EVOLUTION (June 18, 2017) (emphasis omitted), https://www.legalevolution.org/2017/06/world-class-innovation-efficiency-billed-hour-010/.

32. *Id.*

33. Andrew Perlman, *Towards the Law of Legal Services*, 37 Cardozo L. Rev. 49, 99–100 (2015) (footnotes omitted).

34. Nick Dolm, *713% Growth: Legal Tech Set an Investment Record in 2018*, FORBES (Jan. 15, 2019, 11:19 AM), https://www.forbes.com/sites/valentinpivovarov/2019/01/15/legaltechinvestment2018/#c9ef83a7c2ba.

35. *Id.*

36. Debra Cassens Weiss, *Company That Promised to Revolutionize Legal Services Confirms Layoffs of Most of Its Legal Staff*, ABA JOURNAL (Jan. 14, 2020, 10:24 AM), https://www.abajournal.com/news/article/company-that-promised-to-revolutionize-legal-services-confirms-layoffs-of-most-of-its-legal-staff#:~:text=Layoffs-,Compa....

services founded in 2001.[37] This growth continues, with an additional $106 million invested by venture capitalists in January 2019 alone.[38] By September the field boasted $1.2 billion in investment, dubbed "[a] [r]ecord [y]ear [f]or [l]egal [t]ech [i]nvestment."[39] This included several contract management and review companies as well as others performing "law-related functions."[40] "Notarize, an online notary public service, raised $37 million. Farewill, a U.K. platform for creating wills, raised $9.4 million. Boundless, an immigration platform, raised $7.8 million."[41] Notably, this increased funding for legal tech does not necessarily mean more jobs for lawyers. Atrium, for example, announced in January 2020 that it would lay off most of its in-house lawyer team and focus exclusively on technology to aids startups in creating legal documents such as funding contracts and organizing necessary legal filings.[42]

3. Access-to-Justice

Yet a third possible measure of innovation can be found in the increasing push for expanding access to justice through entrepreneurship and innovation. In the United States, most people fail to recognize that their problems have a legal solution and, even if they do seek legal help, many find they do not qualify for legal aid but are unable (or unwilling) to pay for a lawyer who charges three-figures-an-hour.[43] Scholars have long lamented the lack of legal help for

37. *See LegalZoom Announces $500 Million Investment, Among Largest in Legal Tech History*, LEGALZOOM (July 31, 2018), https://www.legalzoom.com/press/press-mentions/legalzoom-announces-500-million-investment-among-largest-in-legal-tech-history.

38. *See* Savannah Dowling, *LegalTech Companies Snap Up $106M in VC During Active January*, CRUNCHBASE (Jan. 31, 2019), https://news.crunchbase.com/news/legaltech-companies-snap-up-106m-in-vc-during-active-january/.

39. Robert Ambrogi, *At $12. Billion, It's Already a Record Year for Legal Tech Investment*, ABOVE THE L. (Sept. 16, 2019, 4:16 PM), https://abovethelaw.com/2019/09/at-1-1-billion-its-already-a-record-year-for-legal-tech-investment/.

40. *Id.*

41. *Id.*

42. *See* Josh Constine, *Atrium Lays Off Lawyers, Explains Pivot to Legal Tech*, TECHCRUNCH, (Jan. 13, 2020, 6:20 PM), https://techcrunch.com/2020/01/13/atrium-layoffs/#:~:text=Atrium's%20laid%2Doff%20attorneys%20will,CEO%20Justin%20Kan%20tells%20TechCrunch..

43. *See generally* REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040; DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004) ("According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet."); Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (2013). For studies documenting similar unmet legal needs in England and Wales, see Pascoe Pleasence, Nigel J. Balmer & Catrina Denvir, *Wrong About Rights: Public Knowledge of Key Areas of Consumer, Housing and Employment Law in England and Wales*, 80 MOD. L. REV. 836, 854 (2017) ("Our findings shed important and extensive new light on the public's understanding of legal rights and responsibilities. In line with previous studies, our results make

much of the public since at least the 1930s.[44] Indeed, this description appearing in an ABA Report on the Economic Condition of the Bar from 1938 could have been written today: "[p]eople in the low income groups frequently go without legal assistance because they cannot afford to pay for it, or because they think they cannot afford to pay for it, or because they distrust lawyers or do not know any lawyers, or do not know when they need advice."[45]

Nearly a century later, the same "ordinary family obtains no legal help or advice with legal problems, muddling alone through the crises of job loss, divorce, bankruptcy, immigration challenges, access to services and benefits, injuries, and conflicts with neighbors or schools or health-care providers or local officials."[46]

Instead, "the bulk of civil legal services, and especially ex ante advisory services, are ultimately provided to corporations rather than ordinary folks."[47] Worldwide, five billion people face unmet legal needs, including "people who cannot obtain justice for everyday problems, people who are excluded from the opportunity law provides, and people who live in extreme conditions of injustice" according to the World Justice Project's 2019 Measuring the Justice Gap report.[48] In the United States, scholars have long argued that outside ownership and investment,[49] advertising,[50] competition,[51] multi-jurisdictional

evident a substantial public legal knowledge deficit across England and Wales."). For global statistics, see WORLD JUSTICE PROJECT, GLOBAL INSIGHTS ON ACCESS TO JUSTICE 2019, https://worldjusticeproject.org/our-work/research-and-data/global-insights-access-justice-2019 (last visited Sept. 6, 2020) ("Less than a third (29%) of people who experience a legal problem sought any form of advice to help them better understand or resolve their problem.").

44. *See* Stephen Love, Karl Llewellyn, Osmond Fraenkel & Malcolm Sharp, *Economic Security and the Young Lawyer: Four Views*, 32 ILL. L. REV. 662, 663 (1938).

45. Lloyd K. Garrison et al., *Report of the Special Committee on the Economic Condition of the Bar*, 63 A.B.A. REP. 390, 391 (1938); *see also* Elliott E. Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973, 973 (1963); Barbara A. Stein, *Legal Services and the Middle Class*, 53 N.D. L. REV. 573, 580 (1977).

46. 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, 43 (2013); *see also* Rebecca L. Sandefur, *Money isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 222 (Michael Trebilcock et al. eds., 2012).

47. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 133 (2010).

48. WORLD JUSTICE PROJECT, MEASURING THE JUSTICE GAP (2019), https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap (last visited Sept. 11, 2020).

49. *See* Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO STATE L.J. 1 (2012).

50. *See* Renee Newman Knake, *Legal Information, the Consumer Law Market & the First Amendment*, 82 FORDHAM L. REV. 2843 (2014).

51. *See, e.g.*, Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1171 (2011) ("[The] traditional market for legal services is breaking down as lawyers lose their monopoly over law-related services and must compete with alternative providers of similar services.").

and multi-disciplinary practice,[52] and public education[53] each could help ameliorate this justice gap. Organizations like the Legal Services Corporation, which is a federally funded entity supporting legal aid across the country, and the American Bar Association, devote substantial time and resources to remedying this gap. But it endures.

C. Exponential Change; Protecting Human Rights

Technology is increasingly human-like, even surpassing the capacity of the mind. "The very terms 'artificial intelligence' and 'machine learning' hint at what is new: technology is acquiring and refining cognitive and sensory capabilities that had long been thought to be uniquely human, and is outpacing humans at increasingly complex tasks."[54] Machines can not only beat humans at games like chess and Jeopardy[55] but they can also translate language,[56] read lips,[57] author news articles,[58] discriminate in advertising,[59] and tweet in offensive language.[60] This bears on the lawyer's role both in considering ways artificial intelligence might replace an attorney and in ensuring that these innovations do not compromise human rights. Medical care is routinely offered by tele-ported providers,[61] smartphone apps[62] and life-like avatars or companion

52. *See* Knake, *supra* note 50.

53. *See* Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281 (2013).

54. Estlund, *supra* note 7, at 264–65.

55. *See* Greg Satell, *Having Conquered Chess and Jeopardy!, IBM Takes on Humans in Debate*, INC. (Aug. 4, 2018), https://www.inc.com/greg-satell/there-is-no-debate-ibm-is-pushing-through-a-new-frontier-of-artificial-intelligence.html.

56. *See* Jamie Condliffe, *AI Has Beaten Humans at Lip-Reading*, MIT TECH. REV. (Nov. 21, 2016), https://www.technologyreview.com/s/602949/ai-has-beaten-humans-at-lip-reading/.

57. *See id.*

58. *See* Jaclyn Peiser, *The Rise of the Robot Reporter*, N.Y. TIMES (Feb. 5, 2019), https://www.nytimes.com/2019/02/05/business/media/artificial-intelligence-journalism-robots.html.

59. *See, e.g.*, Nitasha Tiku, *ACLU Says Facebook Ads Let Employers Favor Men over Women*, WIRED (Sept. 18, 2018, 9:00 AM), https://www.wired.com/story/aclu-says-facebook-ads-let-employers-favor-men-over-women.

60. *See, e.g.*, James Vincent, *Twitter Taught Microsoft's AI Chatbot to Be a Racist Asshole in Less Than a Day*, VERGE (Mar. 24, 2016, 6:43 AM), http://www.theverge.com/2016/3/24/11297050/tay-microsoft-chatbot-racist.

61. *See* Julia Jacobs, *Doctor on Video Screen Told a Man He was Near Death, Leaving Relatives Aghast*, N.Y. TIMES (March 9, 2019), https://www.nytimes.com/2019/03/09/science/telemedicine-ethical-issues.html.

62. *See* Jennifer B. McCormick et al., *Medication Nonadherence: There's an App for That!*, MAYO CLINIC PROC. (Oct. 2018), https://www.mayoclinicproceedings.org/article/S0025-6196(18)30412-9/fulltext.

pets.[63] Legal services are not immune to automation.[64] But machines ought not replace lawyers completely. Indeed, lawyers—not machines—are necessary for "our law to be known, to be functional."[65] As one scholar explains:

> Given the rapid pace of evolutionary change brought on by technological advances, globalization, rapid urbanization, and climate change, as well as the displacement and economic inequality caused by these forces, the problems faced by society at large are problems lawyers should attempt to address if they are to remain relevant to the needs of the broader community.[66]

More than relevance is at stake, however. Lawyers should have an explicit ethical obligation to consider the impacts of innovation for their clients and for the practice of law.

Consider the system built by University of Toronto researchers and acquired by Google that facilitates facial recognition to organize photos and images on a smartphone. While accurate in some instances (and believed promising for use by other constituencies, including law enforcement) the product was "less accurate when used with women and people of color."[67] Naturally, questions emerged about how it might be used or misused.

Another example is the emerging phenomenon of "personalized law" where data is collected, "transferred, stored, organized, and analyzed in an efficient and timely manner, in order to tailor legal norms to individuals."[68] Personalized law, then, could take the form of special conditions placed on

63. *See* Dave Muoio, *Researchers Adding AI, Medication Reminders to Companion Robots for Seniors*, MOBIHEALTH NEWS (Nov. 6, 2017, 5:26 PM), https://www.mobihealthnews.com/content/researchers-adding-ai-medication-reminders-companion-robots-seniors ("Brown University researchers have announced a partnership with Hasbro to add medication reminders, basic artificial intelligence, and other capabilities to the toymaker's Joy for All Companion Pets, a collection of animatronic cats and dogs intended to relieve loneliness and improve mental health among older adults.").

64. *See, e.g.*, Joe Dysart, *A New View of Review: Predictive Coding Vows to Cut E-Discovery Drudgery*, A.B.A. J. (Oct. 1, 2011, 8:00AM), http://www.abajournal.com/magazine/article/a_new_view_of_review_predictive_coding_vows_to_cut_e-discovery_drudgery/ ("Research has shown that, under the best circumstances, manual review will identify about 70 percent of the responsive documents in a large data collection. Some technology-assisted approaches have been shown to perform at least as well as that, if not better, at far less cost."); *see also* Thomas McMullan, *A.I. Judges: The Future of Justice Hangs in the Balance*, MEDIUM (Feb. 14, 2019) https://medium.com/s/reasonable-doubt/a-i-judges-the-future-of-justice-hangs-in-the-balance-6dea1540daaa.

65. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1547–48 (1995).

66. Raymond H. Brescia, *Law and Social Innovation: Lawyering in the Conceptual Age*, 80 ALB. L. REV. 235, 244 (2016).

67. Cade Metz, *Seeking Ground Rules for A.I.*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/ethical-ai-recommendations.html.

68. Niva Elkin-Koren & Michal S. Gal, *The Chilling Effect of Governance-by-Data on Data Markets*, 86 U. CHI. L. REV. 403, 405 (2019).

driving for minors or drivers with a history of accidents, with sanctions administered "in real time by enabling parking, issuing a ticket, or even remotely disabling a car following a warning."[69] This is just one of many instances imaginable for individually tailored law via technology tools and it comes with distinct trade-offs. On the one hand, a legal system like this "may increase efficiency by improving law enforcement, reducing under- or overinclusive risk avoidance mechanisms, and reducing institutionalized discrimination."[70] On the other hand, it "may undermine important values, raising concerns regarding privacy, equality under the law, and civil liberties."[71]

Scholars focused on the "disparate impact" of big data offer a caution that applies to all innovation, especially technology-driven advancements like artificial intelligence: "If [we] are not careful, the process can result in disproportionately adverse outcomes concentrated within historically disadvantaged groups in ways that look a lot like discrimination."[72] Seemingly neutral processes "can reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society. It can even have the perverse result of exacerbating existing inequalities by suggesting that historically disadvantaged groups actually deserve less favorable treatment."[73]

But, who should be tasked to weigh these tradeoffs and prevent discrimination or other potential harms in innovation?

D. Who Is Responsible?

Government seems a logical place to turn for regulatory efforts aimed at protecting the public from known and unknown harms related to technology advancements and other innovations. In 2014, the White House issued a report concluding "that big data analytics have the potential to eclipse longstanding civil rights protections in how personal information is used in housing, credit,

69. *Id.*

70. *Id.*

71. *Id.* at 406; *see also* Jeremy Kun, *Big Data Algorithms Can Discriminate, and it's Not Clear What to Do About It*, CONVERSATION (Aug. 13, 2015, 1:56 AM), http://theconversation.com/big-data-algorithms-can-discriminate-and-its-not-clear-what-to-do-about-it-45849.

72. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 673 (2016); *see also* Gerhard Wagner & Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions*, 86 U. CHI. L. REV. 581, 582–83 (2019) ("Big data and artificial intelligence may enable businesses to exploit informational asymmetries and/or consumer biases in novel ways and on an unprecedented scale. Incentives to take advantage of naïve or biased consumers exist, and competitive pressures may force businesses to engage in exploitative practices. At first sight, this poses stark challenges both to market efficiency and to individual autonomy." (footnotes omitted)); Anthony Casey & Anthony Niblett, *A Framework for the New Personalization of Law*, 86 U. CHI. L. REV. 333, 336 (2019).

73. Barocas, *supra* note 72, at 674.

employment, health, education, and the marketplace."[74] The authors recommended the development of "a plan for investigating and resolving violations of law in such cases" placing responsibility upon enforcement agencies like the Department of Justice, Federal Trade Commission, Consumer Financial Protection Bureau, and Equal Employment Opportunity Commission.[75] Other countries have engaged in similar efforts.[76] In 2018, Congressional hearings examined the misuse of social media and search engine platforms like Facebook, Google, and Twitter in the 2016 elections.[77]

Reliance upon the state alone for protecting against algorithmic discrimination and bias has been called into question, which is a concern that can be applied more broadly to innovation generally. As Professor Sonia Katyal argues, "we are looking in the wrong place if we look to the state alone to address issues of algorithmic accountability."[78] She proposes other ways "to ensure more transparency and accountability that stem from private industry, rather than public regulation."[79] According to Katyal:

> The issue of algorithmic bias represents a crucial new world of civil rights concerns, one that is distinct in nature from the ones that preceded it. Since we are in a world where the activities of private corporations, rather than the state, are raising concerns about privacy, due process, and discrimination, we must focus on the role of private corporations in addressing the issue.[80]

She proposes measures "including codes of conduct, impact statements, and whistleblower protection, which . . . carr[y] the potential to encourage greater endogeneity in civil rights enforcement."[81] As examples, she cites the work of "researchers at Amazon, Facebook, IBM, Microsoft, and Alphabet [who] have been attempting to design a standard of ethics around the creation of artificial intelligence" and work by "professional organizations like the

74. EXEC. OFF. OF THE PRESIDENT OF THE U.S., BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

75. *Id.*

76. *See, e.g.*, *Submissions to the White Paper*, AUSTRALIAN HUM. RTS. COMM'N: HUM. RTS. & TECH., https://tech.humanrights.gov.au/submissions-white-paper (last visited July 23, 2019).

77. *See* Anthony Cuthbertson & Emily Shugerman, *Twitter and Facebook Executives Testify Before Congress – as It Happened*, INDEPENDENT (Sept. 5, 2018, 7:44 PM), https://www.independent.co.uk/news/world/americas/tech-senate-hearing-live-facebook-twitter-congress-google-latest-updates-a8523701.html.

78. Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 61 (2019); *see also* Ashley S. Deeks, *Predicting Enemies*, 104 VA. L. REV. 1529, 1592 (2018) (discussing concerns with discrimination and bias in the use of predictive algorithms by the military); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737 (2018); Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241 (2007).

79. Katyal, *supra* note 78, at 61.

80. *Id.* at 54.

81. *Id.*

Association for the Advancement of Artificial Intelligence (AAAI) and the Association of Computing Machinery (ACM)."[82] Notably absent from Katyal's list, however, are lawyers or the role of legal ethics.

The real challenge for reliance upon industry-sponsored "ethics" policies is the lack of any meaningful enforcement mechanism. At a summit on "New Work" held in early 2019, "a list of recommendations for building and deploying ethical artificial intelligence" was crafted by groups of attendees[83] that included academics, policymakers, and corporate representatives. The list contained ten goals that typically appear in these sorts of efforts: (1) transparency, (2) disclosure, (3) privacy, (4) diversity, (5) bias, (6) trust, (7) accountability, (8) collective governance, (9) regulation, and, (10) complementarity, i.e., treating technology "as a tool for humans to use, not a replacement for human work."[84] Social media[85] and technology[86] companies already have policies with similar components, as do institutions ranging from government bodies[87] to health care providers[88] to universities.[89]

But even with policies in place to protect individuals through principles like transparency and trust, innovations like data analytics have been misused. When representatives from Facebook, Google, and Twitter were summoned to testify before Congress in late 2018 about election interference, and admitted that their platforms were vulnerable to misuse, all had long-standing measures in place to avoid these harms.[90] Voluntary industry policies, alone, are simply

82. *Id.* at 109.

83. Metz, *supra* note 68. Leaders of the groups ranged from academics to corporate representatives to venture capitalists to policy makers:

> Frida Polli, a founder and chief executive, Pymetrics; Sara Menker, founder and chief executive, Gro Intelligence; Serkan Piantino, founder and chief executive, Spell; Paul Scharre, director, Technology and National Security Program, The Center for a New American Security; Renata Quintini, partner, Lux Capital; Ken Goldberg, William S. Floyd Jr. distinguished chair in engineering, University of California, Berkeley; Danika Laszuk, general manager, Betaworks Camp; Elizabeth Joh, Martin Luther King Jr. Professor of Law, University of California, Davis; Candice Morgan, head of inclusion and diversity, Pinterest.

Id.

84. *Id.*

85. *See Social Media Policy Examples*, INT'L ASS'N PRIV. PRO., https://iapp.org/resources/article/social-media-policy-examples/ (last visited July 23, 2019).

86. *See id.*

87. *See USA: Data Protection Laws and Regulations 2020*, INT'L COMPAR. LEGAL GUIDES, https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa (last visited July 23, 2019).

88. *See Health Information Privacy Law and Policy*, HEALTHIT.GOV, https://www.healthit.gov/topic/health-information-privacy-law-and-policy (last visited July 23, 2019).

89. *See University Data Protection and Regulatory Compliance – What You Need to Know*, VIRTU, https://www.virtru.com/blog/university-data-protection-2/ (last visited July 23, 2019).

90. *See* Cuthbertson & Shugerman, *supra* note 77.

not sufficient to protect individual rights. Someone must have "skin in the game" besides the individuals who are subject to the innovation.

The regulation of professional knowledge is a potential solution to this dilemma. Most disciplines (e.g., law, medicine, engineering, social or physical sciences, trades, etc.) define what constitutes competence within a specific field via specialized education/training, certifications, and licensing. Often this is described as a code of ethics. These codes are different than a corporation's aspirational pledge; if a lawyer violates the relevant ethics code under which she holds her license to practice, she may lose that privilege and, indeed, her very livelihood.

Lawyer ethics can help protect human rights in the face of rapid innovation.

II. THE REGULATION OF LEGAL ETHICS

Professional licensing offers a mechanism for instilling protections even where we cannot yet predict the consequences of a particular innovation. While the focus here is the legal profession, this analysis applies to other occupations—a point this Article returns to at the conclusion. The concept of a profession assumes that individuals, through specialized education, training, and licensing, hold access to knowledge that the general public does not. This has been termed a "knowledge community," i.e., "a network of individuals who share common knowledge and experience as a result of training and practice."[91] Those in the knowledge community are continually "solving similar problems by drawing on a shared reservoir of knowledge, which, at the same time, they help define and to which they contribute . . . . Additionally, the knowledge community shares certain norms and values: professional norms."[92] For lawyers, these norms and values are articulated in a code of professional responsibility, often referred to as "legal ethics."

A. The American Experience

The American Bar Association (ABA) issued its first formal statement of legal ethics in 1908, the Canons of Ethics. It was largely aspirational, but also clearly established that lawyers have obligations not only to the client but also as officers of the court and to the public. Over the years, the Canons evolved into a set of disciplinary rules and aspirational statements, culminating in what is now a unified Model Rules of Professional Conduct. While not a regulator itself, the rules adopted by the ABA House of Delegates serve as templates for all American jurisdictions. Many states adopt the Model Rules nearly verbatim, and all states include broad-sweeping duties such as competence, diligence, and confidentiality among their professional obligations for lawyers. State courts and bar licensing authorities are the dominant regulators, with lawyers and

91. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1250–51 (2016).

92. *Id.* at 1251.

lawyer-judges effectively self-regulating[93] or at least heavily influencing state-based regulation.[94] California is an exception, though the legislature-made rules are mostly similar to those drafted by the ABA.[95] Failure to comply can result in reprimand, fines, or even forfeiture of the law license itself.

The ABA Model Rules stem from values of professionalism and independence, covering licensing, conduct obligations, and discipline. They define lawyers' obligations to clients, courts, third-parties, the profession, and the public. Among the protections extended to clients are duties of competence, confidentiality, and diligence.[96] The Rules also encompass protections from conflicts of interest and interference with professional judgment.[97] Beyond clients, the Rules place significant duties on lawyers to avoid misleading third-parties or assisting clients in violating the law[98] and to respect the court, including prohibitions on making frivolous arguments or facilitating client perjury.[99] The Preamble to the Rules describes the lawyer's special role as a public citizen, and aspirational goals including the provision of pro bono assistance are among those extending beyond duties to clients.[100]

Importantly, under this regime, only lawyers—i.e., those satisfying the mandatory education and licensing requirements—may engage in the practice of law.[101] These rules establish requirements for maintaining one's license to practice law and typically are supplemented by a state statute that separately prohibits unauthorized practice. The ABA has declined to officially delineate what constitutes the practice of law, so the definition varies state-to-state but generally is understood to include legal advice, representation in court, drafting

93. *See, e.g.*, BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2011); Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 161 (2010); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1174 (2009).

94. *See, e.g.*, Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL'Y REV. 123, 132 (2011); Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, J. PROF. LAW. 13, 27 (2009).

95. *See Rules of the State Bar*, STATE BAR CAL. (2018), http://rules.calbar.ca.gov/SelectedLegalAuthority/TheStateBarAct.aspx.

96. *See* MODEL RULES OF PRO. CONDUCT r. 1.1, 1.3, 1.6 (AM. BAR ASS'N 2019).

97. *See id.* at r. 1.7, 1.9, 1.11, 1.12, 5.4, 5.5.

98. *See id.* at r. 1.2, 4.1, 4.4.

99. *See id.* at r. 3.2, 3.3.

100. *See id.* at r. 6.5.

101. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (AM. L. INST. 2000) ("A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law . . . . "). The prohibition on unauthorized practice is found in state statutes for most jurisdictions. All states have statutes to this effect. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2587 (1999).

of legal documents, and may extend to negotiation and general dispute resolution.

The American legal profession is unique in the degree to which it enjoys self-governance, and the Preamble offers this explanation:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.[102]

Professional licensing has, at times, been used to restrict innovations to the benefit of the professionals. The American Medical Association, for example, was famously critiqued by Milton and Rose Friedman in the 1960s for its "ability to restrict technological and organizational changes in the way medicine is conducted."[103] The legal profession is similarly restrictive, most notably in the United States.[104] A number of legal scholars and economists have offered a compelling case for removing many of the barriers to entry and other anti-competitive restrictions upon law practice, an action that arguably would facilitate innovation.[105] But, to date, the ABA has not engaged in these reforms.

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102. MODEL RULES OF PRO. CONDUCT PREAMBLE & SCOPE cmt. 10 (AM. BAR ASS'N 2019). *But see* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 668 (1981) ("[R]ules of legal ethics are an attempt by elite lawyers to convince themselves that they have resolved their ethical dilemmas."); Zacharias, *supra* note 93; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

103. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 154–55 (4th ed. 2002); *see also* Clayton M. Christensen et al., *Will Disruptive Innovations Cure Health Care?*, HARV. BUS. REV., Sept.–Oct. 2000.

104. *See, e.g.*, Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should License Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1140 (2014); Renee Newman Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293 (2018); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 245–46 (1985) (suggesting that the ABA's Model Rules of Professional Conduct were drafted with the view that what was good for lawyers was good for the public and that such a view should be reconsidered); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6 (1981) (examining the Bar's unauthorized practice campaign and its attendant constitutional and policy implications, arguing for alternatives that give greater voice to first amendment and due process values).

105. *See, e.g.*, CLIFFORD WINSTON ET AL., FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 82–94 (2011) (arguing that costs of restriction and competition in legal services could be reduced by deregulating entry into the legal profession, allowing any person to provide legal services without licensing, and permitting free market forces to determine the relative value of legal training and licensing); Stephen Gillers, *A Profession, if You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 956–58 (2012) (endorsing the view that rules regulating lawyers should accommodate and direct information technology developments in order to preserve the efficient delivery of legal services at reasonable cost, or else they will become increasingly

The ABA House of Delegates did take one notable step toward *encouraging* more innovation, if not affirming it. In February 2020, the House passed Resolution 115 calling for increased innovation to address the access to justice crisis. Subsection C of this Part describes and critiques the Resolution in detail, but first it is important to understand a comparative approach to the regulation of lawyers followed in countries like Australia, England, and Wales.

B. A Comparative Approach

In the early 2000s, even as the United States resisted, nations around the globe began to experiment with regulatory interventions crafted to spur innovation in the delivery of legal services. In 2001, the United Kingdom's now-dissolved Office of Fair Trading produced a report, "Competition in the Professions"[106] that was ultimately ushered in by England and Wales' adoption of the Legal Services Act of 2007 ("LSA"), which promised competition and innovation.[107] That same year, changes to Australia's Legal Profession Act[108] allowed for firms to be structured as limited liability companies and permitted nonlawyer ownership.

Why were Australia and England/Wales the first to engage regulatory interventions in an effort to expand innovation in legal services? At least part of the answer can be found in the fundamental approach to lawyer regulation. While the United States and Canada are professionalist-independent, Australia and England/Wales are consumerist-competitive.[109] As for the results of these innovation-fueled regulatory endeavors? When the LSA became effective in 2007 in England and Wales, that same year the first publicly-traded law firm,

irrelevant); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751–52 (2010) (using economic analysis to argue for a fundamental restructuring of large law firm practice business models in a way that will overcome regulatory barriers and promote economic viability); Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 14 (1998) (arguing that the prohibition on non-lawyer investment in law firms is an outdated rule that should be lifted); Knake, *supra* note 49; Knake, *supra* note 104.

106. JOHN VICKERS, REPORT ON COMPETITION IN PROFESSIONS (2000), https://webarchive.nationalarchives.gov.uk/20140402172414/http://oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf.

107. LEGAL SERVICES ACT, 2007, ch. 29 (U.K.). The Legal Services Act of 2007 created a new form of business structure for legal services, known as the "alternative business structure" or "ABS." *Id*. at § 71–111. As this Article went to press, more than 1,300 ABSs have been granted; *see* Michael Cross, *Partnership Model Declines in Growing Legal Services Market*, LAW SOC'Y GAZETTE (Feb. 27, 2019), https://www.lawgazette.co.uk/practice/partnership-model-declines-in-growing-legal-services-market/5069424.article.

108. *See* Legal Profession Act, 2004 (Act No. 99/2004) (Austl.), http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/num_act/lpa200499o2004225/.

109. *See* Russell G. Pearce, Noel Semple & Renee Newman Knake, *A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England/Wales, and North America*, 16:2 LEGAL ETHICS 258 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396041.

Slater and Gordon, appeared on the Australian Stock Exchange.[110] In the Middle East, also that same year, the Dubai International Financial Center opened a simplified small-claims tribunal which currently resolves 90% of disputes within 30 days, notably *without* lawyers.[111] Two years earlier, in 2005, the Hague Institute for Innovation of Law was founded with the goal to "ensure that by 2030, 150 million people will be able to prevent or resolve their most pressing justice problems" and the plan to accomplish this "by stimulating innovation and scaling what works best."[112] Numerous studies document the successes and the struggles that remain in these jurisdictions, including Solicitors Regulatory Authority Innovation in Legal Services Report;[113] New South Wales Future of Law and Innovation in the Profession Report;[114] and the Law Society of England and Wales Future of Legal Services Report.[115] The LSA is attributed with fueling the increased number of alternative business structures offering legal services and developing sophisticated technology tools for delivering legal services, though actual adoption of these services and

110. *See* Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535, 535 (2009).

111. Press Release, Dubai Int'l Fin. Ctr., Sustained Growth for the DIFC Courts as Value of Commercial Claims Surge (Aug. 28, 2018), https://www.difc.ae/newsroom/news/sustained-growth-difc-courts-value-commercial-claims-surge/ (last visited May 1, 2019).

> I initially learned about the DIFC Small Claims Tribunal while teaching a course on law practice innovation in Dubai as part of Michigan State University's graduate program in 2012. The first Australian publicly-traded firm, Slater and Gordon, has not fared as well as the DIFC Small Claims Tribunal. While initially the stock soared and many other firms became incorporated legal practices, Slater and Gordon announced a $90 million error in its bookkeeping in 2015 causing the stock to become essentially worthless. Few firms have opted to join Slater and Gordon on the stock exchange.

112. *About Us*, HAGUE INST. INNOVATION L., https://www.hiil.org/who-we-are/ (last visited May 1, 2019). When HiiL was founded in 2005, its name was the Hague Institute for the Internationalisation of Law. The name was changed, substituting Innovation for Internationalisation, because: "It became clear that we need innovation. We were hungry for change. Based on this research we developed the way we work today. We moved from research to action. HiiL is now a social enterprise." *Our History*, HAGUE INST. INNOVATION L., https://www.hiil.org/who-we-are/our-history/ (last visited May 1, 2019).

113. *See Capturing Technological Innovation in Legal Services Report*, THE L. SOC'Y., https://www.lawsociety.org.uk/topics/research/capturing-technological-innovation-report (last visited February 14, 2021) .

114. *See* COMM'N OF INQUIRY, LAW SOC'Y OF NEW S. WALES, FUTURE OF LAW AND INNOVATION IN THE PROFESSION, https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf (last visited July 23, 2019).

115. *See* LAW SOC'Y OF ENGLAND AND WALES, THE FUTURE OF LEGAL SERVICES, https://www.lawsociety.org.uk/support-services/research-trends/the-future-of-legal-services/ (last visited July 23, 2019).

technologies "remains limited, meaning that the capabilities and benefits of these technologies are yet to be fully harnessed."[116]

These foreign innovations did not all end in success stories. The United Kingdom's "leading supermarket chain" Tesco experimented over the years in offering legal services by contracting with outside lawyers, but began to do so directly after enactment of the Legal Services Act.[117] Tesco was the first to file as an "alternative business structure," the name the LSA gave to legal providers forming under the new legislation.[118] Services included will writing, do-it-yourself divorce kits, rental agreements, and forms for setting up a small company.[119] The concept was championed "as a pioneer in this area and reports suggest[ed] that other high street businesses will follow their lead, perhaps expanding on what Tesco is offering, especially in light of the ownership reform rules."[120] But, the world of Tesco law never fully took hold.[121] WH Smith convenience stores in London soon followed Tesco by setting up kiosks decorated in black and hot pink offering legal consultations with the law firm Quality Solicitors.[122] Launching initially in 150 locations, with a projection of 500, the venture folded after just 2 years.[123] Interestingly, countries where the regulatory structure resisted innovation have had greater success with efforts at retail-law like Tesco and WH Smith. In 2012, Wal-Mart leased space for law firms to serve their customers in Kentucky and Missouri,[124] as well as Canada in 2014.[125] These providers still exist but there has not been wide-spread growth. Recall Slater and Gordon, the first law firm publicly traded on a stock market? After opening strong on the Australian Stock Exchange and experiencing significant growth for several years, shares became meaningless—

116. *Lord Mayor of London Calls for Legal Sector 'To Move into the 21st Century*,' ARTIFICIAL L. BLOG (July 3, 2019), https://www.artificiallawyer.com/2019/07/03/lord-mayor-of-london-calls-for-legal-sector-to-move-into-21st-century/.

117. Knake, *supra* note 49, at 40.

118. *See* Neil Rose, *Wait for ABSs Is over: Tesco Law Is Here*, GUARDIAN (Apr. 2, 2012), https://www.theguardian.com/law/2012/apr/02/abs-tesco-law-here.

119. *Id.*

120. Knake, *supra* note 49, at 40 (citation omitted).

121. Thomas Laidlaw, *"Tesco Law" in Theory Will Be "Asda Law" in Reality*, LEXISNEXIS (Jan. 19, 2015), https://www.lexisnexis.co.uk/blog/future-of-law/tesco-law-in-theory-will-be-asda-law-in-reality.

122. John Hyde, *QualitySolicitors Leaves WH Smith Stores*, LAW SOC. GAZETTE (Aug. 8, 2013), https://www.lawgazette.co.uk/practice/qualitysolicitors-leaves-wh-smith-stores/5037010.article.

123. *Id.*

124. *See* Victor Li, *Law Firms Are Already Inside Some US Wal-Marts*, A.B.A. J. (June 21, 2016), http://www.abajournal.com/news/article/wal-mart_law_firms_are_already_in_the_us*; see also Find the Law Store Near You*, LAW STORE, https://thelawstore.com/locations (last visited July 24, 2019).

125. Laidlaw, *supra* note 121. Axess Law still has locations in Canadian Wal-Marts at the time this Article went to press. *Our Locations*, AXESS LAW, https://www.axesslaw.com/our-locations/ (last visited July 24, 2019).

not because of the regulatory process that allowed it to sell shares of stock, but because of poor business judgments. Other firms have remained publicly traded without such losses.[126] Meanwhile, many legal services innovators have come and gone,[127] often acquired by larger entities.[128]

C. Future Innovation Regulatory Efforts

To be sure, the regulatory interventions first established by Australia and England/Wales in the early 2000s set the stage for a new culture of legal services innovation. Nearly two decades later, there are now hundreds if not thousands of legal service innovation initiatives and organizations throughout the world.[129] All of law is "innovative," so it seems.[130] The word is proudly displayed on

126. *See* Elliot Klim, *UK Law Firm DWF Valued at £366m Ahead of London Listing*, FIN. TIMES (Mar. 11, 2019), https://www.ft.com/content/eed209a0-43e3-11e9-a965-23d669740bfb.

127. For example, the store-front retailer for legal services that appeared in 2013 on downtown Palo Alto's main street no longer exists. *See* Lorraine Sanders, *Inside the Curious Bricks-and-Mortar Store for Legal Advice, Books, Tablets*, FAST CO. (Mar. 27, 2013, 6:00AM), http://www.fastcompany.com/3007499/tech-forecast/inside-curious-bricks-and-mortar-store-legal-advice-books-tablets; *see also* Debra Cassens Weiss, *Once-Confident Law Firm Clearspire Closes its Virtual Doors, but its Software Will Go Global*, A.B.A. J. (June 4, 2014), http://www.abajournal.com/news/article/once-confident_law_firm_closes_its_virtual_doors_but_its_software_will_go_g ("Last year the virtual law firm Clearspire appeared confident of its future, touting plans to hire up to 100 lawyers a year for each of the next five years. A little more than a year later, on May 15, the firm dissolved, *Legal Times* reports. Only 25 lawyers worked at the firm at the time of its closing. Clearspire will live on, however, in the form of a legal technology business.").

128. As just a handful of examples, 2008 start-up Quality Solicitors (UK) became part of LegalZoom (US) in 2012. *See* Catherine Baksi, *LegalZoom in QualitySolicitors Tie-Up*, LAW GAZETTE (Sept. 19, 2012), https://www.lawgazette.co.uk/news/legalzoom-in-qualitysolicitors-tie-up/67432.article (last visited May 30, 2019). In 2011, start-up Riverview Law (UK) became a part of EY (UK), what was once one of the Big Four accounting companies Ernst and Young has grown into an international professional services firm. *See* Michael Kapoor & Sam Skolnik, *EY Eyes More Acquisitions of Legal Services in Global Push*, BLOOMBERG (Apr. 4, 2019, 2:16 PM), https://news.bloombergtax.com/financial-accounting/ey-eyes-more-acquisitions-of-legal-services-in-global-push (last visited May 30, 2019). Elevate Services, founded in 2011, has acquired a number of legal service companies including 2007 start-up Halebury over the past year. *See* Thomas Alan, *New Year Brings Major New Law Consolidation as Elevate Acquires Halebury*, LEGAL BUS. (Jan. 8, 2019, 10:00 AM), https://www.legalbusiness.co.uk/blogs/new-year-brings-major-new-law-consolidation-as-elevate-acquires-halebury/ (last visited May 30, 2019).

129. No single comprehensive list of legal services innovations exists, though several entities have created innovation indexes and inventories. *See, e.g.*, *Legal Services Innovation Index*, LEGAL TECH INNOVATION, https://www.legaltechinnovation.com/ (last visited July 23, 2019). The ABA Commission on the Future of Legal Services created an online Inventory of Innovations (https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services/inventory/) that is no longer publicly available. At the time, it listed more than 300 examples of legal services innovations compiled from public hearings, written testimony, and other submissions.

130. *See* Michael O'Bryan, *Innovation: The Most Important and Overused Word in America*, WIRED, https://www.wired.com/insights/2013/11/innovation-the-most-important-and-

firm websites and law school marketing brochures. The Legal Services Corporation—the largest supporter of legal aid organizations in the United States—hosts an annual "Innovations in Technology Conference."[131] More than 100 law firms and legal departments have created new positions for "innovation counsel" or "legal solutions architects" or "chief innovation officer."[132] Some have chosen to create structural incentives. The law firm Reed Smith, for example, credits up to 50 innovation hours toward an attorney's yearly billable requirements.[133] A group of Austrian law firms created a Vienna-based "Legal Tech Hub" to facilitate innovation in legal advice.[134] To help support community legal aid, Justice Connect of Australia embedded an innovation team to offer advice on every new project or client.[135] The Global Legal Hackathon (started in 2018) professes to be "bringing the legal industry together with tech and innovation, world-wide, with one purpose: rapid development of solutions for improving the legal industry world-wide."[136]

Regulators continue to press for more innovation in legal services delivery models. For example, the Victorian Legal Services Board—which regulates law practice for the State of Victoria, Australia—includes a Manager of

overused-word-in-america/ (last visited July 1, 2019); Laura Bliss, *How 'Maintainers,' Not 'Innovators,' Make the World Turn*, BLOOMBERG CITY LAB (Apr. 8, 2016, 3:54 PM), https://www.citylab.com/design/2016/04/how-maintainers-not-innovators-make-the-world-turn/477468/ (noting "that the word 'innovation' is overused to the point of meaninglessness—and worse, that it can obfuscate the bleak realities of the status quo").

131. *Legal Tech Community Gathers at LSC's Innovations in Technology Conference*, LEGAL SERVS. CORP. (Jan. 3, 2019), https://www.lsc.gov/media-center/press-releases/2019/legal-tech-community-gathers-lscs-innovations-technology-conference.

132. *See* Michele DeStefano, *The Law Firm Chief Innovation Officer: Goals, Roles and Holes (Parts 1 &2)*, GLOBE L. & BUS. (Oct. 2018) (discussing interviews conducted with more than 100 heads of innovation in law firms and legal departments); Sam Skolnik, *New Breed of Law Firm Execs Drive Innovation to Next Level*, BLOOMBERG L. (Jan. 16, 2019, 2:31 PM), https://biglawbusiness.com/new-breed-of-law-firm-execs-drive-innovation-to-next-level (last visited May 1, 2019).

133. *See Innovation Doesn't Magically Happen: Why Reed Smith's Innovation Hours Programme Should Be Applauded*, LEGAL IT INSIDER (May 16, 2018), https://legaltechnology.com/innovation-doesnt-magically-happen-why-reed-smiths-innovation-hours-programme-should-be-applauded/.

134. *Are Incubators Only for Big Law? Austrian Firms Show Collaboration Is the Answer*, ARTIFICIAL LAW. BLOG (July 3, 2019), https://www.artificiallawyer.com/2019/07/03/are-incubators-only-for-big-law-austrian-firms-show-collaboration-is-the-answer/ ("Most people assume that legal tech incubators and accelerators are only for larger law firms. But, a group of seven Austrian law firms, most with less than 100 lawyers, took a different approach and pooled their resources to create a new shared Legal Tech Hub in Vienna that has just completed its first incubator cohort . . . The founding members believed that the legal field is ready for change. They wanted to redesign legal advice by joining forces to move forward the whole legal market to enhance services for their clients.").

135. Interview with Kate Fazio, Head of Innovation and Engagement, Justice Connect (May 10, 2019).

136. GLOBAL LEGAL HACKATHON, https://globallegalhackathon.com/ (last visited May 15, 2019).

Innovation and Consumer Engagement among its staff and has explored creating an 'Innovation In-Box' where developers of new legal services can receive guidance on ethics, technology, design-thinking and more.[137] The Canadian Bar Association issued a futures report in 2014,[138] followed soon after by American Bar Association (ABA) producing its own in 2016 which resulted in the ABA Center for Innovation.[139] Bar associations throughout North America and beyond launched initiatives devoted to the future of the profession.[140] Singapore arguably has been the most bold, with government-backed efforts actively pursuing innovation in legal services in an effort to set the nation apart as a global leader.[141]

A handful of American states have dabbled in regulatory reforms aimed at increasing innovation in access to justice. Some states considered lifting the ban on outside ownership and investment in 2019,[142] including Arizona,[143]

137. Interview with Fiona McLeay, Commissioner, Victorian Legal Services Board & Jennie Pakula, Manager of Innovation and Consumer Engagement, Victorian Legal Services Board (Feb. 7, 2019).

138. *See* CANADIAN BAR ASS'N, C.B.A. LEGAL FUTURES INITIATIVE, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA (2014), http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf.

139. *See* A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 23; *see also* ABA CENTER FOR INNOVATION, https://www.americanbar.org/groups/centers_commissions/center-for-innovation/ (last visited May 15, 2019) ("The ABA Center for Innovation is creating more accessible, efficient, and effective legal services in the United States and around the globe. We improve legal services through innovation, education, and collaboration."); NEIL RICKMAN & JAMES M. ANDERSON, RAND CORP., INNOVATIONS IN THE PROVISION OF LEGAL SERVICES IN THE UNITED STATES (2011), https://www.rand.org/pubs/occasional_papers/OP354.html.

140. *See, e.g.*, A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 23, at app. 4 ("STATE AND LOCAL BAR ASSOCIATION WORK ON ACCESS TO JUSTICE AND THE FUTURE OF LEGAL SERVICES").

141. Anna Zhang, *Is Singapore the Next Center for Legal Innovation?*, AM. LAW. (July 5, 2018, 1:58 PM), https://www.law.com/international/2018/07/05/is-singapore-the-next-center-for-legal-innovation/.

142. Christine Simmons, *Bar Groups Line Up Against Changes to Lawyer Regulation*, AM. LAW. (Feb. 7, 2020), https://www.law.com/newyorklawjournal/2020/02/05/bar-groups-line-up-against-dangerous-changes-to-lawyer-regulation/.

143. *See* Stephanie Francis Ward, *Training for Nonlawyers to Provide Legal Advice Will Start in Arizona in the Fall*, A.B.A. J. (Feb. 6, 2020, 3:18 PM), http://www.abajournal.com/web/article/training-for-nonlawyers-to-provide-legal-advice-starts-in-arizona.

California, [144] and Utah.[145] Arizona announced in early 2020 plans to train nonlawyers to offer legal advice on civil matters related to domestic violence.[146] Utah next moved forward with changes to professional conduct rules in early August 2020 that "represent perhaps the most promising effort by courts to tackle the access-to-justice crisis in the last hundred years."[147] The reforms adopted by the Utah Supreme Court will "allow for nonlawyer ownership or investment in law firms and permit legal services providers to try new ways of serving clients during a two-year pilot period."[148] In justifying the reforms, the court explained:

> What has become clear during this time is that real change in Utahns' access to legal services requires recognition that we will never volunteer ourselves across the access-to-justice divide and that what is needed is market-based, far-reaching reform focused on opening up the legal market to new providers, business models, and service options.[149]

To support this effort, the court established a "regulatory sandbox" for legal services providers to experiment and also formed an "Office of Legal Services Innovation" charged with evaluating applicants and overseeing those selected to participate in the regulatory sandbox.[150] The reforms also authorize "attorney fee sharing with nonlawyers as long as there is written notice to the client."[151] By the end of August 2020, the Arizona Supreme Court joined Utah, announcing the elimination of the ban on nonlawyer ownership/investment in a

144. *See* Roy Strom, *California Opens Door to More Legal Tech, Non-Lawyer Roles (1)*, BLOOMBERG L. (July 2, 2019, 5:05 PM), https://biglawbusiness.com/california-opens-door-to-more-non-lawyer-roles-tech-solutions ("California has taken a step towards altering the role of lawyers after a state bar task force last week advanced controversial proposals for new ethics rules that would allow non-lawyers to invest in law firms and tech companies to provide limited legal services.").

145. *See* Debra Cassens Weiss, *Nonlawyers Could Invest in Law Firms and Own Legal Businesses Under Utah Work Group's Proposal*, A.B.A. J. (Aug. 28, 2019, 11:13 AM), http://www.abajournal.com/news/article/nonlawyers-could-invest-in-law-firms-and-own-legal-businesses-under-utah-work-groups-proposal.

146. *See* Stephanie Francis Ward, *Training for Nonlawyers to Provide Legal Advice Will Start in Arizona in the Fall*, A.B.A. J. (Feb. 6, 2020, 3:18 PM), http://www.abajournal.com/web/article/training-for-nonlawyers-to-provide-legal-advice-starts-in-arizona.

147. Lyle Moran, *Utah Embraces Nonlawyer Ownership of Law Firms as Part of Broad Access-to-Justice Reforms*, A.B.A. J. (Aug. 14, 2020, 3:45 PM), https://www.abajournal.com/web/article/utah-embraces-nonlawyer-ownership-of-law-firms-as-part-of-broad-reforms.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

law firm and participation in fee sharing.[152] As another access to justice measure, Arizona also authorized "Legal Paraprofessionals" as a new, nonlawyer licensing regime to expand legal service providers.[153] (It should be noted that Washington, DC also is an exception to the American Bar on nonlawyer partnership, but only in limited circumstances that do not allow for full investment opportunities to fuel innovation.)

The State of Washington received significant attention several years ago when it implemented a new program that allows individuals to provide legal help in specialized areas without traditional legal education and licensing requirements. Known as limited license legal technicians (LLLTs), the move was proclaimed as innovative regulation,[154] but the reality has not yet borne this out. Indeed, the effort has been described by more than one scholar as a "failure" with

> just fifteen candidates [who] completed the coursework to become LLLTs in the first year. Of those fifteen, only nine took the licensing exam and a mere seven passed. This paltry showing contrasts with the 814 would-be lawyers who took the Washington bar exam around that same time. The Practice of Law Board that had launched the program then publicly resigned.[155]

In June 2020, the Washington Supreme Court voted to end the program.[156] Another innovation for in court access that emerged around the same time as the implementation of the LLLTs seems to have had a more sustained success—the New York City Navigators Program provides trained, supervised individuals to help unrepresented parties navigate the city's civil courts.[157]

In February 2020, the ABA House of Delegates, with the support of the Conference of Chief Justices, approved a new resolution advocating for "innovative approaches to the access to justice crisis" that "encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services" but

152. *See* News Release, Arizona Supreme Court, Administrative Office of the Courts, "Arizona Supreme Court Makes Generational Advance in Access to Justice" (Aug. 27, 2020).

153. *Id.*

154. *See Limited License Legal Technician Licensing and Admission*, WASH. STATE BAR ASS'N, http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians (last visited Nov. 15, 2015); Deborah L. Rhode, *Reforming American Legal Education and Legal Practice: Rethinking Licensing Structures and the Role of Nonlawyers in Delivering and Financing Legal Services*, 16 LEGAL ETHICS 243 (2013).

155. Michael Simon et al., Lola v. Skadden *and the Automation of the Legal Profession*, 20 YALE J.L. & TECH. 234, 265 (2018) (footnotes omitted).

156. Lyle Moran, Washington Supreme CourtSunsets Limited License Program for Nonlawyers, A.B.A. J. (June 8, 2020, 3:55 PM), https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program

157. *Roles Beyond Lawyers: Evaluation of the New York City Court Navigators Program*, SELF-REPRESENTED LITIG. NETWORK (June 21, 2019), https://www.srln.org/node/1320/roles-beyond-lawyers-evaluation-new-york-city-court-navigators-program; *see also Court Navigator Program*, N.Y. CTS., http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml.

neglects to even mention, let alone provide for, the ethical concerns associated with innovation other than an acknowledgement of the need for "protections that best serve . . . the public."[158] Protection for individual rights in the face of innovation is notably absent. The Resolution does urge jurisdictions "to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the [public interest]."[159] But it does not include language about innovation as an ethical duty.

* * *

None of these regulatory endeavors aimed at innovation—whether in the United States or internationally—address the inquiry posed by this Article: Whether a lawyer has an obligation to affirmatively engage in innovation and, if so, what are the ethical implications of doing so? Moreover, to the extent innovation occurs in legal services in the United States, it appears motivated not by an ethical obligation but by financial gain, personal fulfilment,[160] or fear, with calls to "innovate or die" or threats of "seismic" catastrophe.[161] Others are

158. A.B.A. H. Dels. Res. 115 (Feb. 17, 2020), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2020/2020-midyear-115.pdf. The full resolution states:

> RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider innovative approaches to the access to justice crisis in order to help the more than 80% of people below the poverty line and the majority of middle-income Americans who lack meaningful access to legal services when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure;
>
> FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve the public; and
>
> FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the public interest.

159. *Id.*

160. Eilene Zimmerman, *More Lawyers Skip the Partner Track to Be Entrepreneurs*, N.Y. TIMES, Nov. 24, 2011, at B5 (describing two lawyers who left a large firm to start their own for lifestyle improvements, among others who have acted entrepreneurially).

161. *See, e.g.*, Jayne Reardon, *Embrace Legal Innovation or Die?*, 2CIVILITY BLOG (May 2, 2019), https://www.2civility.org/embrace-legal-innovation-or-die/; Naomi Neilson, *New Technology Hit and Miss for Lawyers*, LAWS. WKLY. (July 10, 2019), https://www.lawyersweekly.com.au/biglaw/26041-new-technology-hit-and-miss-for-lawyers-2 ("As the mainstream world adapts to changes in technology—and therefore policies and practices—the law profession seems to be narrowly missing its mark. The legal profession is in the middle of an 'industrial revolution,' but is without flexibility to adapt to new technological advancements."); Lucy Endel Bassli, *The Legal Ecosystem: A Look at Tension Points for an Industry in Turmoil (Part 1)*, THOMSON REUTERS: LEGAL EXEC. INST. (June 18, 2018),

nudged, even forced, by governmental actors.[162] But the public, and our clients, should not need to rely upon lawyers' passions, financial incentives, fears or external actors to fuel innovation in legal services. Instead, ethical innovation should be seen as a formal obligation. Part III describes the contours of this ethical duty and proposes modifications to the ABA Model Rules of Professional Conduct that state regulators could adopt.

III. THE LAWYER'S DUTY OF ETHICAL INNOVATION

The idea of regulation to instill ethical innovation may seem counterintuitive but consider the experience of regulatory bodies governing the practice of law over the past two decades, especially in Australia and England/Wales, as discussed above. Even jurisdictions that have not overtly embraced regulatory reform nonetheless devote substantial resources to evaluation and promotion of innovation in legal services.[163] These measures can support an overarching duty of ethical innovation. There are at least two options for formalizing the duty to innovate within the body of professional regulation: revisions to the existing rules of professional conduct or the addition of a new rule. Recommendations for both are set forth below.

The notion of a duty to innovate ethically as a component of lawyer regulation follows whether core values are based in professionalism and independence or consumer-protection. It has a place whether the profession is self-regulated or involves lay participation. The duty to innovate as conceived here is an ethical responsibility with two dimensions. The first aspect is a narrower, client-specific obligation to continually evaluate the risks and benefits of relevant technology and other innovations as they occur in real-time. This duty already is partially addressed (though not well understood) in the ABA Model Rules and exists in many jurisdictions under the umbrella of the duty of competence. The second aspect is a broader obligation to seek out improved practice techniques and to facilitate greater access to legal help. This duty is inherent (but not specifically articulated) in a lawyer's duties to clients, the legal profession and the public.

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http://www.legalexecutiveinstitute.com/legal-ecosystem-tension-points-part-1/ (last visited July 24, 2019) ("It should come as no surprise that many practicing lawyers are unaware of the seismic changes happening across the legal industry all around them.").

162. *See, e.g.*, *Lord Mayor of London Calls for Legal Sector 'To Move into the 21st Century*,*'* ARTIFICIAL L. BLOG (July 3, 2019), https://www.artificiallawyer.com/2019/07/03/lord-mayor-of-london-calls-for-legal-sector-to-move-into-21st-century/ ("The Law Society has found that adoption of technology amongst UK legal firms remains limited, meaning that the capabilities and benefits of these technologies are yet to be fully harnessed . . . In order to address this issue, [we] will bring together leaders in the legal and tech sectors to promote the uptake of technology across the legal and wider financial services sector preserving the excellent reputation of the UK's legal services and retaining the UK's competitive advantage as a legal technology hub.").

163. *See, e.g.*, A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 23, at app. 2 ("COMMISSION WORK PLAN AND METHODOLOGY") (listing bar associations' commissions, reports, and other initiatives related to innovation).

A. Ethical Innovation as a Matter of Competence

One part of ethical innovation as a duty contemplated by this Article is rooted in lawyer competence. In order to provide competent representation to clients, a lawyer must continually assess the intended, known, and unintended consequences of innovation in law and legal practice. In 2012, the American Bar Association House of Delegates voted to make an element of this duty explicit in the Model Rules of Professional Conduct. Model Rule 1.1, Comment 8, now states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of *changes* in the law and its practice, including the *benefits* and *risks* associated with relevant technology, ..."[164]

As of early 2020, thirty-seven American jurisdictions had adopted the revised Comment 8 language verbatim or some sort of provision with similar wording.[165] The states are listed below by year of adoption (followed by year effective, if not the same year of adoption):

2013

- Connecticut (effective 2014) [166]
- Delaware[167]
- New Mexico[168]
- Pennsylvania[169]

2014

- Arkansas[170]
- Kansas[171]

164. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2019) (emphasis added).

165. For an ongoing update of jurisdictions adopting Comment 8 or similar revisions, see *Tech Competence*, LAWSITES, https://www.lawsitesblog.com/tech-competence (last visited Jan. 20, 2020); *Id.*

166. *See* Order Adopting Practice Book Revisions, Superior Court Rules, Rules of Professional Conduct, CONN. L. J. (July 16, 2013), https://www.jud.ct.gov/Publications/PracticeBook/Old/pblj_071613.pdf (last visited Jan. 20, 2020).

167. *See* Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Del. Lawyers' Rules of Pro. Conduct (Del. 2013).

168. *See* RULES OF PRO. CONDUCT r. 16-101 cmt. 9 (N.M. 2017).

169. *See In re* Amendment of Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Pa. Rules of Pro. Conduct (Pa. 2013); *see* Amendments to the Pennsylvania Rules of Professional Conduct to Address the Need for Changes in Detection of Conflicts of Interest, Outsourcing, Technology and Client Development, and Technology and Confidentiality, 43 Pa. Bull. 1997, 2002 (Apr. 13, 2013).

170. *See In re* Ark. Bar Ass'n Petition Proposing Amendments to the Ark. Rules of Pro. Conduct, 2014 Ark. 316 (Ark. 2014).

171. *See* Order Amending Rules Relating to Discipline of Attorneys Kan. Rules of Pro. Conduct r. 226 (Kan. 2014).

- Idaho[172]
- North Carolina[173]
- West Virginia[174]
- Wyoming[175]

2015

- Arizona[176]
- California[177]
- Illinois (effective 2016)[178]
- Iowa[179]
- Massachusetts[180]
- Minnesota[181]
- New Hampshire (effective 2016)[182]
- New York[183]
- North Dakota[184]
- Ohio[185]
- Utah[186]
- Virginia (effective 2016)[187]

2016

172. *See* IDAHO RULES OF PRO. CONDUCT (IDAHO BAR ASS'N 2019).

173. *See* N.C. RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (N.C. STATE BAR 2014).

174. *See* Re: Approval of Amendments to W. Va. Rules of Pro. Conduct (W. Va. 2014).

175. *See* In the Matter of the Amendments to Wyo. Rules of Pro. Conduct for Att'ys at Law (Wyo. 2014).

176. *See* ARIZ. RULES OF PRO. CONDUCT r. 1.1 cmt. 6 (STATE BAR OF ARIZ. 2015).

177. *See* State Bar of Cal. Standing Comm. on Pro. Resp. and Conduct, Formal Op. 193 (2015) (affirmatively cites ABA Model Rule 1.1, Comment 8 and notes that "[m]aintaining learning and skill consistent with an attorney's duty of competence includes keeping 'abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .'").

178. *See* ILL. RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (Ill. 2015), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm (last visited Jan. 20, 2020).

179. *See* IOWA RULES OF PRO. CONDUCT r. 32:1.1 cmt. 8 (IOWA STATE BAR ASS'N 2015).

180. *See* Report of the Standing Advisory Comm. on the Adoption of Revised Rules of Pro. Conduct Effective July 1, 2015, https://www.massbbo.org/Files?fileName=mrpc-changes.pdf (last visited Jan. 20, 2020).

181. *See* Order Regarding Proposed Amendments to the Minn. Rules of Pro. Conduct (Minn. 2015).

182. *See* N.H. RULES OF PRO. CONDUCT r. 1.1 Ethics Comm. cmt. (N.H. BAR ASS'N 2015).

183. *See* N.Y. RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (N.Y. BAR ASS'N 2020).

184. *See* N.D. RULES OF PRO. CONDUCT r. 1.1 cmt. 5 (STATE BAR ASS'N OF N.D. 2015).

185. *See* OHIO RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (OHIO STATE BAR ASS'N 2020).

186. *See In re* Proposed Amendments to Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, 7.3, and 8.5 of the Rules of Pro. Conduct (Utah 2015).

187. *See* PRO. GUIDELINES AND RULES OF CONDUCT r. 1.1 cmt. 6 (VA. STATE BAR ASS'N 2018).

- Colorado[188]
- Florida (effective 2017)[189]
- Montana (effective 2017)[190]
- Oklahoma[191]
- Washington[192]
- Wisconsin (effective 2017)[193]

2017

- Alaska[194]
- Indiana (effective 2018)[195]
- Kentucky (effective 2018)[196]
- Missouri[197]
- Nebraska[198]
- Tennessee[199]

2018

- Louisiana[200]
- Vermont[201]

2019

- Texas[202]

Most have been relatively conservative in processing disciplinary actions based upon the Comment 8-type language, limiting it only to computer-related technology. The lack of detail, not to mention the diminished status of the duty in that it is relegated to a Comment, has caught some attorneys unaware. But

188. *See* COLO. RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (COLO. BAR ASS'N 2016).

189. *See In re* Amendments to Rules Regulating the Fla. Bar 4-1.1 and 6-10.3 (Fla. 2016).

190. *See In re* The Rules of Pro. Conduct (Mont. 2016).

191. *See In re* Okla. Rules of Pro. Conduct (Okla. 2016).

192. *See* RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (WA. STATE BAR ASS'N 2016).

193. *See* In the Matter of the Petition for Amendments to Rules of Pro. Conduct for Att'ys (Wis. 2016).

194. *See* Order No. 1905 (Alaska 2017) (Order amending Rules of Pro. Conduct).

195. *See* Order Amending Ind. Rules for Pro. Conduct (Ind. 2017).

196. *See In re* Order Amending Rules of the Sup. Ct. (Ky. 2017).

197. *See* Order re: Rules 4-1, 4-4, 4-5 and 8.105 (Mo. 2017).

198. *See* NEB. RULES OF PRO. CONDUCT § 3-501.1 cmt. 6 (NEB. STATE BAR ASS'N 2017).

199. *See In re* Petition to Amend Selected Provisions of Tenn. Sup. Ct. Rule 8 (Tenn. 2017).

200. *See* Nicole Black, *Lawyers and Technology Competency: Louisiana Weighs in*, LEGAL NEWS (April 25, 2019), http://legalnews.com/detroit/1473369/ ("In 2018 Louisiana in its own unique way when it amended its Code of Professionalism (which is a set of principles separate from its Rules of Professional Conduct).").

201. *See* Order Promulgating Amendments to Comments to Rule 1.1 of the Vt. Rules of Pro. Conduct (Vt. 2018).

202. *See* Order Amending Comment to the Tex. Disciplinary Rules of Pro. Conduct (Tex. 2019).

for courts and disciplinary authorities, the lack of notice is not a sufficient defense. "In this technological age, the days of claiming 'the dog ate my homework' are well over,"[203] as one federal district court put it. Despite the wide-spread revisions of professional conduct rules, less than a dozen jurisdictions—Alaska,[204] Colorado,[205] Illinois,[206] Missouri,[207] North

203. *In re* Moore, 532 B.R. 614, 633 (Bankr. W.D. Pa. 2015) (finding that attorneys have an affirmative "obligation to monitor the court's docket to inform themselves as to the entry of orders" (citation omitted)).

204. *See* Alaska Bar Ass'n, Ethics Op. 3 at 2 (2014) ("A lawyer engaged in cloud computing must have a basic understanding of the technology used and must keep abreast of changes in the technology.").

205. *See* Colo. Bar Ass'n, Formal Op. 90 at 5 (2018) ("The frequency of advances in technology notwithstanding, Colorado lawyers 'should keep abreast of . . . changes in communications and other relevant technologies.'") (quoting COLO. RULES PRO. CONDUCT r. 1.1 cmt. [8]) (2019)).

206. *See* Ill. State Bar Ass'n Pro. Conduct, Advisory Op. 16-06 at 2 (2016) ("lawyers who use cloud-based services must obtain and maintain a sufficient understanding of the technology they are using to properly assess the risks of unauthorized access and/or disclosures of confidential information."); Ill. State Bar Ass'n Pro. Conduct, Advisory Op. 18-01 at 2 (2018) ("It is appropriate and reasonable to expect lawyers to understand metadata and other ubiquitous aspects of common information technology. But it would be neither appropriate nor reasonable to charge all lawyers with an understanding of the latest version of tracking software that might be chosen, and then employed without notice . . . ." (footnote omitted)).

207. *See* Mo. Bar Ass'n, Informal Advisory Op. 2018-09 (2018) ("Because what constitutes adequate provider policies and practices in these areas may change as relevant technology evolves, Attorney is encouraged to consult with a qualified information technology professional, take continuing legal education courses on use of technology in practice, and/or engage in regular self-study of materials from reputable sources to maintain competence in the use of cloud computing in the practice of law.").

Carolina,[208] Ohio,[209] and Wisconsin[210]—have weighed in on the contours of the lawyer's duties within the context of technology through opinion letters. A number of others have addressed use of social media and other innovations in law practice.[211]

At least one lawyer has been permanently suspended from practice for failure to maintain competence in technology-based innovation.[212] A long-time bankruptcy attorney failed repeatedly to "meet the federal court's expectations with electronic pleading requirements."[213] According to the disciplinary authority, there was no concern about the attorney's competence as related to his "knowledge of substantive bankruptcy law" but his "frustration" with the innovation in the court's modernized processes led to the loss of his license to practice.[214] While this outcome has been described as "extreme" by some, "it does provide an example of the potential for disciplinary proceedings resulting from failure to maintain technology competence."[215]

208. *See* N.C. State Bar, 2014 Formal Ethics Op. 5 (2015) ("Rule 1.1 requires lawyers to provide competent representation to clients. Comment [8] to the rule specifically states that a lawyer 'should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice.' 'Relevant technology' includes social media."); N. C. State Bar, 2018 Formal Ethics Op. 5 (2019) ("The technology and features of social networks are constantly changing. It is impossible to address every aspect of a lawyer's ethical obligation when utilizing a social network to prepare or to investigate a client's legal matter. Every lawyer is required by the duty of competence to keep abreast of the benefits and risks associated with the technology relevant to the lawyer's practice, including social networks. Rule 1.1, cmt. [8]. Further, when using a social network as an investigative tool, a lawyer's professional conduct must be guided by the Rules of Professional Conduct.").

209. *See* Ohio Bd. of Pro. Conduct, Op. 2017-05 at 2 (2017) ("Because of the nature of a VLO, a lawyer who chooses to maintain a virtual office must competently manage and maintain the technology used to run the practice and 'keep abreast of . . . the benefits and risks associated with relevant technology.' Prof.Cond.R. [sic] 1.1, cmt. [8]. Consequently, a VLO lawyer should possess a general knowledge of the security safeguards for the technology used in the lawyer's practice, or in the alternate hire or associate with persons who properly can advise and inform the lawyer. Fl. Bar Op. 10-2 (2010).").

210. *See* Wis. Formal Ethics Op. EF-15-01 at 3 (2017) ("Lawyers who use cloud computing have a duty to understand the use of technologies and the potential impact of those technologies on their obligations under the applicable law and under the Rules. In order to determine whether a particular technology or service provider complies with the lawyer's professional obligations, a lawyer must use reasonable efforts. Moreover, as technology, the regulatory framework, and privacy laws change, lawyers must keep abreast of the changes.").

211. *See, e.g.*, N.H. Bar Ass'n, Op. 2012-13/05 ("[C]ounsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.").

212. *See* State *ex rel*., Okla. Bar Ass'n v. Oliver, 369 P.3d 1074 (Okla. 2016).

213. *Id.* at 1075.

214. *Id.*

215. Darla Jackson & Kenton Brice, *The Ethics of Using Cloud-Based Services and Products*, 90 OKLA. B.J. 14, 14 (2019).

Other jurisdictions also have disciplined attorneys for failing to comply with technology-based competence obligations.[216] Failure to use new technology has forced at least one judge to resign from office.[217] Two states mandate continuing education related to technology competence.[218]

Amidst the uncertainty of the COVID-19 pandemic and the government-imposed mandates to work from home in many states, jurisdictions like Pennsylvania offered ethical guidance that suggests an expanded reading of Comment 8. In an April 2020 formal ethics opinion, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility wrote:

> The duty of technological competence requires attorneys to not only understand the risks and benefits of technology as it relates to the specifics of their practices, such as electronic discovery. This also requires attorneys to understand the general risks and benefits of technology, including the electronic transmission of confidential and sensitive data, and cybersecurity, and to take reasonable precautions to comply with this duty. In some cases, attorneys may have the requisite knowledge and skill to implement technological safeguards. In others, attorneys should consult with appropriate staff or other entities capable of providing the appropriate guidance.[219]

Inevitably, however, the Comment 8 language will be read more expansively over time through ethics opinions and disciplinary rulings, but this effort will be piecemeal at best and likely lead to inconsistent obligations.

A better practice, however, would be to revise the existing language *now* to make explicit that the scope of the rule is meant to encompass innovations beyond technology and to include assessment of intended, known, and unintended consequences of innovation, not simply just technology. Another complication is understanding when innovation results in preserving or returning to a process that was more effective and when innovation demands an entirely new practice or regime. In other words, sometimes there may be an ethical obligation *not* to innovate. Lawyers regularly exercise judgment about

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216. *See, e.g.*, In the Matter of Reisman, No. 2013-21 (Oct. 9, 2013) (finding lawyer violated obligations related to client communication and competence for failing to preserve digital evidence based upon a "lack of experience in electronic discovery"); James v. National Finance LLC, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014) ("Professed technological incompetence is not an excuse for discovery misconduct.").

217. *See* News Release, New York State Commission on Judicial Conduct, Town Court Justice in Chautauqua County Resigns After Being Charged with Administrative Deficiencies (Dec. 13, 2018) (Harmony, New York Justice Bruce S. Scolton faced charges for ignoring his email account for more than three years and refusing to use the Office of Court Administration's computer system), http://cjc.ny.gov/Press.Releases/2018.Releases/Scolton.Bruce.S.Release.2018-12-13.pdf.

218. *See* Mark D. Killian, *Court Approves CLE Tech Component*, FLA. BAR (Oct. 15, 2016), https://www.floridabar.org/the-florida-bar-news/court-approves-cle-tech-component/; *Technology Training CLE Required Effective in 2019*, N.C. STATE BAR CONTINUING LEGAL EDUC. (Nov. 27, 2018), https://www.nccle.org/about-us/news-publications/2018/11/technology-training-cle-required-effective-in-2019/.

219. Pa. Bar Ass'n, Formal Op. 300 (2020).

whether or not to adhere to precedent, or to forge new paths for changing law's substance. That same sort of lawyerly calculation should apply to questions about innovation.

Moreover, for the remaining jurisdictions, they should consider adopting broader guidelines from the outset. One way to do so would be to revise ABA Model Rule 1.1, Comment 8 as follows: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of ~~changes~~ *innovations* in the law and its practice, including the benefits and risks associated with relevant [*innovations such as* technology]."[220] The duty to keep up with innovation in law practice covers both evaluating potential harm and also engaging in innovation itself. Alternatively, a new Model Rule could be crafted: *Every lawyer has a professional responsibility to engage in ethical innovation. The duty to innovate is an obligation to continually assess the intended, known, and unknown consequences of innovation in law and its practice, including the benefits and risks associated with relevant technology and other advancements. A lawyer also has an obligation to pursue ethical innovations for the improvement of the legal system.*

Given that innovation often requires breaking rules, one might question whether this duty could be misappropriated as a defense to otherwise unethical behavior. Successful innovation often is disruptive, if not illegal, before it becomes widely accepted—think Uber's defiance of laws meant to protect the taxi industry or Airbnb's flouting of restrictions on home rentals. How can such a duty be reconciled with a lawyer's obligations to follow the law? The duty to innovate as conceived here is not intended to supplant any obligations owed to the client elsewhere in the Rules. It is not a defense to actions taken that otherwise result in the intentional violation of a Rule. Indeed, by expanding the already existing language in Comment 8, ethical parameters can be imposed to address these very concerns. Such language would obligate lawyers to engage in ethically responsible innovation and could also encompass aspects of transparency to prevent harm and to address it quickly when it occurs.

B. Ethical Innovation as an Officer of the Legal System and a Public Citizen

A second part of a duty of ethical innovation is grounded in a lawyer's obligations to the profession and the public. As the Preamble to the Model Rules explains, in addition to acting as "a representative of clients" the lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice."[221] The public citizen component is especially relevant in the context of innovation: "[A] lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[222] Thus, another

220. *C.f.* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2019) (compare to original text: "[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law, including the benefits and risks associated with relevant technology . . . .").

221. MODEL RULES OF PRO. CONDUCT Preamble 1 (AM. BAR ASS'N 2019).

222. MODEL RULES OF PRO. CONDUCT Preamble 6 (AM. BAR ASS'N 2019).

recommendation is to revise the Preamble to the Model Rules to include an explicit mandate to engage in ethical innovation in a manner that fulfills the existing responsibilities to preserve justice as officers of the legal system and as public citizens.

* * *

To be sure, these recommendations alone will not resolve all of the concerns surrounding ethical innovation.[223] Even so, revising Comment 8 and adding language to the Preamble regarding a duty to innovate is a pragmatic step forward and is responsive to efforts already underway among pockets of lawyers, legal services providers, judges, and the legal academy.

IV. POTENTIAL OBJECTIONS AND RESPONSES

The concept formalizing a duty of ethical innovation is likely to generate a number of objections. This Section anticipates these concerns and offers responses.

A. Enforcement Is Impractical if Not Impossible

A likely resistance to formalizing an obligation of ethical innovation is that it would be impractical if not impossible to enforce a rule of this nature through the discipline process. But there are other existing rules that similarly are not well-suited for discipline.

This is not dissimilar to the affirmative obligation to provide free legal services, found in ABA Model Rule 6.1, Voluntary Pro Bono Publico Service.[224] Some argue that this rule is a form of indentured servitude, even the suggestion that a lawyer should work without compensation.[225] Many, however, see the importance of doing so.[226] To be sure, the aspirational nature of the rule means many lawyers will ignore it. As Deborah Rhode has observed in the context of pro bono work: "Nowhere is the gap between professional ideals and professional practice more apparent than on issues of pro bono responsibility."[227] Rhode cites "estimates suggest[ing] that most attorneys do not perform significant pro bono work and that only between ten and twenty

223. *See, e.g.*, Renee Knake, *How Big Data Analytics Is Changing Legal Ethics*, BLOOMBERG L. (Aug. 9, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341579.

224. *See* MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2019).

225. *See* Susan Cartier Liebel, *NY's New Lawyer Mandatory Pro Bono Is Indentured Servitude*, SOLO PRAC. UNIV. (May 2, 2012), http://solopracticeuniversity.com/2012/05/02/nys-new-lawyer-mandatory-pro-bono-is-indentured-servitude/.

226. *See* David A. Lash, *The Overlooked Importance of Firm Pro Bono Work*, ABOVE THE L. (Feb. 9, 2018, 11:37 AM), https://abovethelaw.com/2018/02/the-overlooked-importance-of-firm-pro-bono-work/.

227. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2415 (1999).

percent of those who do are assisting low-income clients. The average for the profession as a whole is less than a half an hour per week."[228] Whatever one's perspective, including the rule as a component of the lawyer's professional obligations raises awareness of the value of pro bono service and increases the likelihood a lawyer will participate. A duty of ethical innovation could serve similar goals.

Moreover, the pro bono rule is not intended to be enforced through the disciplinary process and it contains a specific statement in this regard.[229] Instead, it sets a standard to which lawyers should aspire in providing free legal help to those who need it. That said, at least one jurisdiction has disciplined an attorney for failing to keep abreast of changes in relevant technology.[230] In that instance, however, other professional conduct rules also kicked in, namely competence and supervision, because the lawyer inappropriately delegated aspects of discovery disclosures to a nonlawyer.[231] Sometimes a failure to fulfill the duty to innovate may lead to discipline, but as contemplated here that would only be the case if other ethical obligations are also violated. For example, in the context of complex civil litigation, the duty to innovate imposes an ethical obligation on a lawyer to consider using technology tools relevant for conducting electronic discovery. Failing to do so, in and of itself, would not result in discipline unless that failure constituted a violation of other ethics rules. The affirmative obligation, however, might very well prevent harms that otherwise might occur if the lawyer does not proactively consider relevant innovations.

Sometimes well-intended innovation results in unintended consequences. Lawyers might fear that an affirmative duty to innovate might result in discipline when harms result even if the outcome was intended to improve the legal system in compliance with ethical obligations. A safe-harbor provision, either in the Rule itself or the Comments, can ameliorate this: *When a lawyer engages in innovation pursuant to this Rule, and a harm occurs, the lawyer shall not be subject to discipline provided that the innovation was intended to comply with the lawyer's ethical obligations to the client, the profession, and the public.* Regulators could facilitate this sort of safe-harbor by following the model from Australia's Victorian Legal Services Board's Innovation In-Box, offering a presumption against discipline to lawyers who proactively seek out compliance support.

Another strand of this argument might contend that while it is true that legal ethics rules once limited innovation,[232] regulatory barriers to competition and innovation are in the midst of transformation at the state level and we should let this play out among the laboratories of the states rather than formalize it in

228. *Id.*

229. *See* MODEL RULES OF PRO. CONDUCT r. 6.1 cmt. 12 (AM. BAR ASS'N 2019).

230. *See* State *ex rel*., Okla. Bar Ass'n v. Oliver, 369 P.3d 1074, 1074–75 (Okla. 2016).

231. *Id.*

232. *See, e.g.*, Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998).

the Model Rules. In other words, innovation in legal services is alive and well without the need for a mandatory obligation—just look at the exponential growth for financial investment in legal-tech ventures and the number of "new law" firms and providers. The problem with this assertion—essentially that the innovators are already innovating—is that it overlooks the cohort of lawyers most in need of a formal obligation. That some already engage in innovation is not a justification for refusing to obligate all. Those most likely to feel they do not know how, or simply do not see the value, are the very ones who will benefit from an affirmative obligation.

A final related concern about enforcement might be that measuring the success and impact of innovation is expensive and time-consuming.[233] But incorporating a duty to innovate does not in itself require the implementation of a successful innovation. The duty to innovate is a process, both of assessing the potential benefits and harms for clients and also of assessing the access to and delivery of justice. Moreover, researchers have begun to measure innovation in various ways.[234] Formalizing the duty likely would lead to additional resources for assessing and evaluating innovation both at the individual level and for the legal services industry as a whole.

B. Compliance Is Difficult Because Innovation Is Hard to Define

Many lawyers are likely to object because the concept of innovation can mean different things to different audiences, making compliance with the rule difficult to achieve even if it is not a disciplinary measure. But, this is precisely why a formal duty is warranted—to encourage more lawyers to learn about and engage in innovation efforts. Thirty-seven states already incorporate aspects of the duty to innovate in their professional conduct rules via the requirement to keep up with relevant technology advancements and to assess the associated risks and benefits of the technology. Two states mandate continuing legal education in technology and many allow CLE requirements to be fulfilled with courses that cover legal services innovation.[235] A formal obligation would only increase the opportunities for lawyers to better understand the meaning of innovation.

A similar concern is how best to reconcile the duty to innovate when it conflicts with duties to the client. This tension might surface where a client benefits from inefficient processes in the legal system, or where a client prefers

233. *See generally* D. James Greiner, *The New Legal Empiricism and Its Application to Access-to-Justice Inquiries*, 148 DAEDALUS 64 (2019).

234. *See, e.g.*, *Legal Services Innovation Index*, LEGALTECHINNOVATION.COM, https://www.legaltechinnovation.com/; Susan Urahn, *The Modernization Our Civil Legal System Needs*, PEW (Nov. 6, 2018), https://www.pewtrusts.org/en/about/news-room/opinion/2018/11/06/the-modernization-our-civil-legal-system-needs; *WJP Rule of Law Index 2019*, WORLD JUST. PROJECT (2019), https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019; *Supporting Justice Innovations*, HAGUE INST. FOR INNOVATION OF L., https://www.hiil.org/what-we-do/the-justice-accelerator/ (last visited July 26, 2019).

235. *See supra* note 218.

to interact one-on-one with a lawyer rather than via a chat-bot. That a tension may exist is not a reason to abandon the duty to innovate wholesale. Instead, as with many of the professional conduct rules, this duty would need to be weighed against other obligations. For example, Model Rule 3.3 requires a lawyer to disclose material false statements made to a tribunal, even if a client directs the lawyer not to do so.[236] At the same time, a lawyer is bound under Model Rule 1.6 to keep all aspects of a representation confidential unless the client permits disclosure or one of a handful of exceptions apply.[237] In this example, Comment 10 addresses the confidentiality obligation and allows the lawyer to reveal information that falls under Model Rule 3.3.[238] A formal duty to innovate could similarly address potential tensions in the Comment, as appears in the draft language above, making clear that the lawyer's obligations to the client remain paramount.

C. Law Schools Are Ill-Equipped for Teaching a Duty to Innovate

Teaching innovation as part of the law school curriculum is a recent phenomenon embraced by some,[239] but not most legal education institutions. Many may believe that law schools are not well-suited for teaching a duty to innovate, even if some have implemented courses or a fully developed curriculum. Others are concerned that innovation-based programs are more "hype" for marketing purposes than substantive.[240] This may be due, at least in part, to the lack of law faculty with the relevant expertise. For schools offering these sorts of courses, faculty typically have experience in technology, design-thinking, or entrepreneurship. Framing innovation as an ethical obligation, however, allows it to be taught as part of the required professional responsibility or legal ethics courses, and recognizes that lawyers can and should fulfill this duty even without a background in technology or the sciences. For some schools, teaching innovation is increasingly viewed as an imperative

236. *See* MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2019).

237. *See* r. 1.6.

238. *See* r. 3.3.

239. For a list of American law schools, see Professor Dan Linna's Law School Innovation Index, *Legal Services Innovation Index*, LEGALTECHINNOVATION.COM https://www.legaltechinnovation.com/law-school-index/ (last visited July 26, 2019) (identifying 40 schools of approximately 230 in the United States). For a list of Australian law schools, see Andrea Perry-Peterson and Michael Lacey's *"Legal Innovation" Education Courses in Australian Law Schools*, (2018), http://www.andreaperrypetersen.com.au/wp-content/uploads/2018/09/Legal-Innovation-Education-Sep-2018.pdf (last visited July 26, 2019); *see also* Ed Sohn, *alt.legal: Law Schools Can, Should, and Must Teach Innovation*, ABOVE THE L. (Nov. 22, 2017, 4:34 PM), https://abovethelaw.com/2017/11/alt-legal-law-schools-can-should-and-must-teach-innovation/.

240. Abby Young-Powell, *More Universities Are Teaching Lawtech – But Is it Just a Gimmick?*, GUARDIAN (Apr. 12, 2019), https://www.theguardian.com/law/2019/apr/12/more-universities-are-teaching-lawtech-but-is-it-just-a-gimmick ("Eager to be ahead of the curve, universities have started to offer specialist modules. Should lawyers believe the hype?").

for properly training the next generation of lawyers.[241] As Professor Charles Reich declared in 1965:

> [T]he most important reason for a new approach to the study of law is not simply to improve the present job of educating scholars, public servants, and practitioners as that job is now conceived. The ultimate justification for curricular revision, or rather the necessity, comes from the fact that the role of law in society has changed and is changing, and hence the role of lawyers must change.[242]

His observations remain true today, and the adoption of a formal duty to innovate would force all law schools to recognize this and appropriately prepare students.

Moreover, traditional legal education prepares lawyers well for engaging in innovation about the substance of law. The civil rights movement is but one example of lawyers engaging in innovative litigation strategies to define and cultivate previously nonexistent rights. As a very different example, the corporate takeover defense known as the "poison pill" is "one of the most important legal inventions . . . developed by an entrepreneurial law firm—Wachtel, Lipton . . . ."[243] The long-established capacity of lawyers to innovate in law's substance can and should be broadened to innovation in law practice and legal services delivery, a role that law schools would do well to embrace.

D. Efforts to Promote Innovation Are Best Done on an Ad Hoc Basis

One might argue that innovation should be left to the "laboratory of states" to experiment and determine best practices. Some state courts, as well as the Conference of Chief Justices[244] and the National Center for State Courts, have

241. *See, e.g.*, Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2280 (2017) ("Some call this a time of crisis in legal education; others emphasize innovation and renewal. With new strains on constitutional democracies around the globe, serious chasms between the ideals and realities of justice systems in the United States and elsewhere, and perhaps unprecedented disruptive innovations in the ways legal knowledge is shared and law is practiced, Harvard Law School and legal education generally face significant questions and opportunities."); Julian Webb, *Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training*, 24 STAN. L. & POL'Y REV. 533, 569 (2013) ("If the LSA 2007 changes are to achieve their regulatory objectives, education has a potentially key role to play, in building and sustaining competence, in developing legal values and ethical infrastructure, and in fostering innovation. To do that, however, may require a radical rethink of at least some features of the education and training regime.").

242. Charles A. Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402, 1406–07 (1965).

243. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 779 (2010).

244. *See, e.g.*, The Hon. Jonathan Lippman, *The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569, 1574–75 (2014) ("Momentum has been building around the country. The Conference of Chief Justices and the Conference of State Court Administrators have urged the nation's top judges 'to take a leadership role in their respective jurisdictions to prevent denials of access to justice.'" (footnote omitted)).

been leaders in driving legal services innovation. Now-retired Judge Jonathan Lippman, who was the head of New York's highest state court, called these efforts "beacons of hope . . . fueled in large measure by state judiciaries who, on access issues, are uniquely suited to initiate discussion, deliver the message, and generate large-scale change and innovation."[245] Some judges use their role as the chief judge to spearhead innovation efforts.[246] Others innovate through their authority to issue advisory opinions.[247]

But judicially driven innovation is not the norm, and neither is bar-driven innovation.[248] That some state courts and their leaders have embraced innovation does not mean all will, or that these efforts will continue beyond an individual judge's term. A duty to innovate would make innovation pervasive for all engaged in law practice (and might also have a place in the ABA Code of Judicial Conduct, especially for improving access to the courts and streamlining court procedures).

E. The Legal Profession Is Too Reliant on Traditional Delivery Models to Adopt Wide-Spread Innovations

While this might have been true as recent as early 2020, in the wake of the COVID-19 pandemic we now know that the profession can adopt innovations

245. *Id.* at 1572. *See also* Marla N. Greenstein, *Innovation and Ethics*, A.B.A. JUDGES' J. (Jan. 1, 2015), https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/winter/innovations_and_ethics/ ("So, too, where procedural innovations through electronic filing, increased security, and direct access to court documents mean greater access to the court system and judicial resolution in a safe environment, public confidence will increase. Judges can experiment, innovate, and grow. And by thoughtfully embracing innovation, judges will embody the integrity of the justice system.").

246. Lippman, *supra* note 244, at 1575 (citing examples of innovations in "Texas, under the leadership of its Chief Justice Wallace B. Jefferson, . . . Connecticut's Chief Judge Chase T. Rogers[,] . . . the State of Washington's Supreme Court . . . [and] Chief Justice Stuart Rabner in New Jersey . . . .").

247. *See, e.g.*, Marla N. Greenstein, *Judicial Innovations Lead to Inevitable Ethics Questions*, A.B.A. JUDGES' J., (Jan. 1, 2014), https://www.americanbar.org/groups/judicial/publications/judges_journal/2014/winter/judicial_innovations_lead_to_inevitable_ethics_questions/ ("Examples of advisory opinions addressing innovative efforts by judges last year include a Colorado opinion (2013-02) finding that a juvenile court judge may participate in the contracting process selecting parents' counsel eligibility and a Florida opinion (2013-010) allowing a judge to create public service announcements soliciting foster parent volunteers and use the courts' technology department to create the ads but not request certain media outlets broadcast the ads . . . . Advisory opinions will be needed more than ever before to address this changing landscape, providing clear lanes between which innovative judges can navigate.").

248. *See, e.g.*, Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 527 (2000) ("Judicial innovation proceeds incrementally; as Holmes put it, the courts, in their legislative capacity, 'are confined from molar to molecular motions.'" (footnote omitted)); Lippman, *supra* note 244, at 1575 ("To be sure, some may not view the role of Chief Justices so expansively and may instead see their primary responsibility as limited to the adjudication of legal issues that come before our state high courts. But, as indispensable as that role is, being proactive in ensuring access to justice for all is foundational to the judicial role.").

overnight. As one law firm innovator observed: "In just one week, we achieved what we've been trying to do for years."[249] Innovations in how lawyers work—like telecommuting and the use of the cloud for file storage—were implemented or expanded extensively. Courts around the country quickly moved to video hearings. In Texas alone, "the state's trial courts held video-powered hearings in more than 160,000 civil and criminal cases from late March to mid-June" of 2020, a feat that Texas Supreme Court Chief Justice Nathan L. Hecht observed "would have been unimaginable prior to the COVID-19 outbreak."[250] The overwhelming majority of states "had responded to in-person arguments being canceled by holding remote hearings" by that same time.[251] Federal courts were, notably, slower to respond; though the United States Supreme Court audio-livestreamed oral arguments (it refused, however, to join the Michigan Supreme Court, the Supreme Court of Texas, and others in permitting videos or cameras).

F. Two Cautionary Tales of Legal Services Innovation

Another objection to this proposal may be grounded in fear of the unknown. What, exactly, does ethical innovation look like? Two cautionary tales of legal services innovation offer some clarity.

Consider this first example. While traveling on public transportation, an officer approaches and requests your fare card. You hand it over, only to learn that it is invalid through no fault of your own. Would you rather pay the officer $75 on-the-spot or dispute the fine in court with the risk that if you lose, the sanction more than triples to $229? From 2014–17, riders of Melbourne, Australia's trams and buses faced this dilemma. Most (maybe even all?) of those who could afford to pay the on-the-spot-fine did so, even when they had a lawful defense.[252] The on-the-spot payment option was intended by lawmakers to improve the sanctions process, allowing violators to avoid the inconvenience and expense of a formal appeal. Benefits touted by the Public Transport of Victoria included speed of penalty issuance (enabling more ticketing of fare evaders) and confidentiality (passengers were not required to provide identification if they paid on-the-spot).

Some might have even called the penalty system innovative—and it was, if the only measures were efficiency and fine-revenue. But it also compromised justice. Perhaps a reasonable idea in the abstract, the system turned out to be

249. Tom Dreyfus, *How the Legal Industry, Law Firms, and Josef Are Adapting to the New World*, JOSEF BLOG (Apr. 14, 2020), https://joseflegal.com/blog/how-the-legal-industry-law-firms-and-josef-are-adapting-to-the-new-world/.

250. Lyle Moran, *Will the COVID-19 Pandemic Fundamentally Remake the Legal Industry?*, A.B.A. J. (Aug. 1, 2020), https://www.abajournal.com/magazine/article/will-the-covid-19-pandemic-fundamentally-remake-the-legal-industry.

251. *Id.*

252. *See* Adam Carey, *End of the Line for $75 On-the-Spot Myki Penalty Fares*, AGE (May 26, 2016), https://www.theage.com.au/national/victoria/onthespot-myki-fines-to-be-scrapped-from-next-year-20160526-gp434m.html.

hugely unpopular and one that bizarrely rewarded the savvy fare evader, who "could pay 20 on-the-spot penalty fares in a year and still cough up less than a traveler with a full-fare, yearly zone one-and-two pass. They would also have no record kept of their serial fare dodging."[253] Even worse, the fine scheme created two tiers of justice—one for commuters who could easily afford the $75 fine and had access to a credit card for paying it and one for those who did not enjoy these privileges. As Victorian Ombudsman Deborah Glass lamented in issuing a report for reform: "While the intent of a quicker and cheaper penalty fare option is laudable, it has created a parallel track for those who can afford it, rather than a single, cohesive and well targeted system."[254]

The ombudsman's two-tiered critique reflects many of the world's legal systems where formal justice is dispensed only to those who recognize, and can afford help with, legal problems. The rest go without recourse. In 2016, the Australian government launched a formal inquiry into the scandal, but meanwhile commuters continued to be subjected to unfair fines. Frustrated by this injustice, a newly practicing lawyer named Sam Flynn created an interactive website, Mykifines.org, to inform individuals about their rights about the myki fines. The website received 35,000 individual views on its April 2016 launch,[255] and 60,000 users within a month.[256] Mykifines.org has been credited with being the lynchpin in bringing on-the-spot fines to a halt. January 1, 2017 marked the end of these penalties for Melbourne commuters. But it was only the start for Flynn in continuing to innovate, though of course he was under no formal ethical obligation to do so at the time. His motivation to innovate with technology and process-improvement and user-engagement was driven purely by his own interest in what he calls "a passion project."[257]

After the success of mykifines.org, Flynn and his co-founders started their next venture, Josef Legal, a software-as-a-service company that helps lawyers build bots to solve legal problems, whether improving lawyers' lives by streamlining repetitive work or expanding access to legal help to the public.[258] Examples of bots created by Josef include automating lawyer-client conversations, drafting documents, and, as of mid-2019, over 600 bots had been

253. *Id.*

254. DEBORAH GLASS, VICTORIAN OMBUDSMAN, INVESTIGATION INTO PUBLIC TRANSPORT FARE EVASION ENFORCEMENT 3 (2016), https://www.parliament.vic.gov.au/file_uploads/Ombudsman_-_Fare_Evasion_Enforcement_WVvPKYJG.pdf.

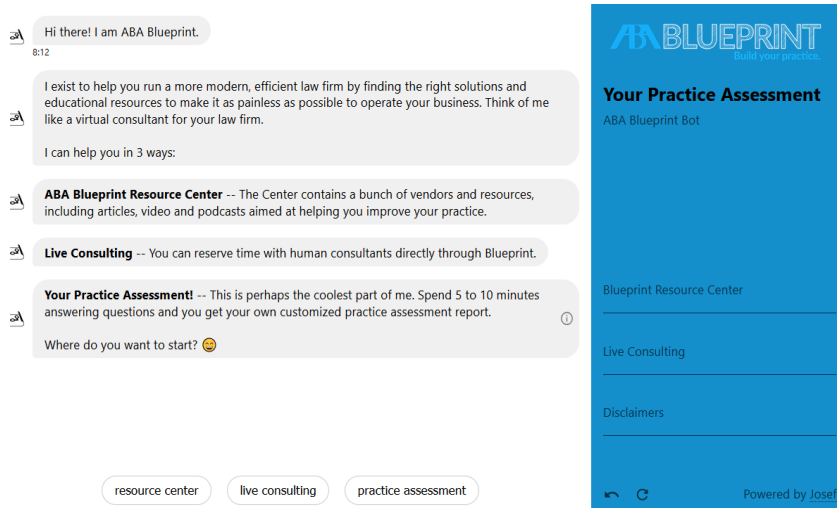
255. *Myki Fines and Confident Commuter*, RTS. ADVOC. PROJECT, http://libertyvic.rightsadvocacy.org.au/equality-accountability/myki-fines/ (last visited July 24, 2019).

256. Stephanie Palmer-Derrien, *Legaltech Josef Partners with Fellow Startup Luna to Bring Lawyer-Bot to the Ecosystem*, SMART CO. (Feb. 14, 2019), https://www.smartcompany.com.au/startupsmart/news/legaltech-josef-luna-lawyer-bot/.

257. *Id.*

258. *See About*, JOSEF LEGAL, https://joseflegal.com/about (last visited July 24, 2019) ("Josef was . . . founded by three young lawyers and developers who believe that the law needs to work for everyone . . . ." "The majority of people who face a legal problem [in the US, the UK, and Australia] don't get legal assistance . . . ." "Josef was created to solve that problem . . . .").

built to address more than 30,000 legal problems for clients based in Australia, Europe and the United States.[259] One example is the Blueprint Bot created in partnership with the American Bar Association.[260] The bot takes lawyers through a series of questions designed to help improve their practice or, in the Blueprint Bot's own words:



In May 2019, Josef announced it had secured a venture capital investment of $1 million.[261] This story of legal services innovation is not unique and not limited to lawyers. At the same time mykifines.org flourished in Australia and evolved into Josef Legal, on the other side of the globe Joshua Browder, not a licensed lawyer, introduced DoNotPay to the UK, the first bot designed to help users challenge parking tickets.[262] It, too, has grown, now offering bots to help sue and claim awards from class actions, among other things.[263] In 2019, the company raised $4.6 million.[264]

259. *See* Stephanie Palmer-Derrien, *Why Legaltech Josef's $1 Million Raise Was More About Securing Experts Than Cash*, SMART CO. (May 22, 2019), https://www.smartcompany.com.au/startupsmart/news/legaltech-josef-investors/ (last visited May 30, 2019).

260. *See Your Practice Assessment*, A.B.A. BLUEPRINT, https://abablueprint.com/ (last visited July 24, 2019).

261. *See* Palmer-Derrien, *supra* note 256.

262. *See* Jerry Bowles, *Who Needs Lawyers? DoNotPay Lets You 'Sue Anyone' Free via a Chatbot*, DIGINOMICA (Oct. 16, 2018), https://diginomica.com/who-needs-lawyers-donotpay-lets-you-sue-anyone-free-via-a-chatbot.

263. *See id.*

264. *See* Ambrogi, *supra* note 39.

Not all innovations stories go so smoothly. During my time as Reporter for the ABA Presidential Commission on the Future of Legal Services, we participated in a 2016 site visit to learn "best practices" from what was then heralded as a leading innovator in legal services—UpRight Law. Based in Chicago, it was founded in 2013 as a "technology-enabled" bankruptcy firm.[265] Initial client intake was handled, not by lawyers, but trained salespeople, with clients later paired with a lawyer based locally in the jurisdiction where the client was located.

Fast forward to 2018. In February, a U.S. bankruptcy judge in Virginia imposed a $250,000 fine on UpRight Law and $50,000 fine on one of the founders for failure to adequately supervise the nonlawyers and for prioritizing "cash flow over professional responsibility."[266] That same month, the firm was sanctioned yet again for not following professional conduct rules. Three months later, a lawyer associated with UpRight was disciplined by the North Carolina State Bar over supervision of client funds. And, in June 2018, a Pennsylvania court again issued sanctions over petitions for bankruptcy that had been filed missing the signatures of the debtors.[267] In the wake of multiple sanctions and lawyer discipline, the firm changed leadership and—importantly—appointed a noted legal ethics professor to serve as an independent monitor.[268] UpRight Law remains in business and out of the headlines for such abuses, at least at the time of this writing.

Perhaps the lawyers would have avoided the sanctions had they been subject to the sort of formalized ethical obligation to innovate contemplated by this Article, one that mandates consideration of the risks and benefits involved not only in the technology adopted but also the employment of nonlawyers and other processes that seemed "innovative" in theory, but in practice violated various ethical duties.

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The examples of Josef and UpRight Law are two of many innovation stories sparked by the culture of legal services entrepreneurship. How their stories will end is not yet known, which is precisely the point. We cannot

265. Robert Ambrogi, *Troubled 'Tech-Enabled' Law Firm Names Ethics Prof as Independent Monitor*, LAW SITES (July 31, 2018), https://www.lawsitesblog.com/2018/07/troubled-tech-enabled-law-firm-names-ethics-prof-independent-monitor.html.

266. *National Consumer Bankruptcy Law Firm Sanctioned for Harming Financially Distressed Consumers and Auto Lenders*, U.S. DEP'T OF JUSTICE (Feb. 13, 2018), https://www.justice.gov/opa/pr/national-consumer-bankruptcy-law-firm-sanctioned-harming-financially-distressed-consumers-and.

267. *See* Ambrogi, *supra* note 265.

268. *See UpRight Law Announces Leadership Changes and Independent Monitor Appointment*, CISION PR NEWSWIRE (July 30, 2018), https://www.prnewswire.com/news-releases/upright-law-announces-leadership-changes-and-independent-monitor-appointment-300688388.html.

control how innovation evolves, but we can implement professional conduct rules that ensure the innovation will evolve ethically.

G. Beyond Lawyer Ethics

Occupations and trades are not necessarily professions, but the increasing layers of occupational-licensing allow for a similar sort of duty to innovate ethically to be included among other rules that delineate expertise and knowledge. While "[a]t one time the learned professions were those of theology, law, and medicine,"[269] many fields have become professionalized in recent years.[270] These surely include accountants, dentists, veterinarians, and likely also extends to health and wellness practitioners, financial planners, realtors, and others. (Even a spiritual counselor/fortune teller has been classified by at least one federal court as a member of a profession.)[271] This Article's purpose is not to offer a definitive answer on what constitutes a profession but simply to suggest that another role for licensing of various occupations is to consider the licensee's role in innovation and instill a duty similar to that proposed here for lawyers.

CONCLUSION

One mechanism to ensure that the rapid pace of change driven by consumer-demand, globalization, and technology does not compromise the integrity of the justice system is to formalize a duty to innovate within professional ethics codes. Lawyers, in particular, have a critical role to play both in assessing the benefits and risks of innovation and in adopting new tools to help solve legal problems. Two-thirds of American jurisdictions already mandate that lawyers "keep abreast of changes in the law and its practice."[272] This mandate is not yet fully appreciated as a broad duty to engage in ethical innovation, but it should be. Revising the language in American Bar Association Model Rule of Professional Conduct 1.1 and the Preamble to the Model Rules as proposed here would, as a first step, help clarify the ethical obligations surrounding innovation. Such a move also would justify expanded support for innovation-based law school curriculum, new roles for innovation counsel in law firms and legal departments, and continuing legal education for practicing lawyers. Most important, formalizing a lawyer's ethical obligation

269. Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 7 (1976).

270. *See* Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 1 (1998) ("The terms 'profession' and 'professionalism' have an incredibly large and vaguely bounded range of meanings . . . .").

271. *See* Moore-King v. County of Chesterfield, 708 F.3d 560 (4th Cir. 2013). *See also* PAUL HORWITZ, FIRST AMEND. INSTS. 247 (2012) (relying upon James Brundage's definition of a profession as "'a line of work that . . . claims to promote the interests of the whole community as well as the individual worker,' that 'requires mastery of a substantial body of esoteric knowledge,' and that is closely bounded by 'a body of ethical rules different from and more demanding than those incumbent on all respectable members' of society." (footnote omitted)).

272. *See supra* Part IV.

in innovation promises to protect individual rights of autonomy, identity, privacy, and security more robustly than industry borne pledges or policies.