

***Regulatory Developments Related to  
Innovation, Technology, and the Practice of Law<sup>1</sup>***

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**I. Introduction**

This Article discusses regulatory developments related to technology and innovation in the practice of law. As a preliminary matter, it is worth noting that technology and innovation aren’t new topics for lawyers. Nineteenth Century lawyers had to adapt to technology developments such as the telephone. During the mid-20<sup>th</sup> Century, lawyers had to adapt to technology developments such as copy machines, which replaced the carbon paper that had limited the number of copies that could be produced. Later 20<sup>th</sup> Century lawyers had to adapt to new technology that included email, fax, laptop computers, and cell phones.”<sup>2</sup> Current

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<sup>1</sup> In order to ensure that the links in this paper remain useful, this document uses “permalinks” which are archived copies of the cited webpages. To get to the current version of the webpage (and activate the website’s internal links), click on the “View the Live Page” tab in the upper right-hand corner of the permalink page. If the permalink is for a pdf, Word, or Excel document, that document will sometimes appear at the bottom of your computer screen, rather than in the permalink window. You can click on that document in order to view it or click the “View the Live Page” tab.

<sup>2</sup> See, e.g., Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 Northwestern J. Int’l L. & Bus. 527 (2008) (explaining explained how lawyers and law practice had been affected by the technology and social developments that Thomas Friedman identified in his book entitled “The World is Flat.”). Some of the technology developments discussed in *The Legal World is Flat* included: (1) work flow software and other developments, such as the development of html and TCP/IP protocols

technology developments and legal services innovations, many of which are set forth in a November 2019 report from the Law Society of Ontario’s Technology Task Force,<sup>3</sup> are simply the newest iterations of a phenomenon that the legal profession has long had to address. Whenever these kinds of changes happen, regulators and their stakeholders must evaluate whether the current regulatory system is adequate and appropriate.

As the title of this Session suggests, technology developments can give rise to challenging regulatory issues. This Article does not strive to provide *the* answer or even *an* answer to the question of how the Law Society of Ontario or other regulators should respond to current or future developments. The goals of this Article include: 1) identifying resources related to technology and innovation in the practice of law; 2) sharing information about regulatory discussions in the United States and elsewhere; and 3) offering suggestions of steps that might help regulators better manage the regulatory challenges that are likely to arise.

## **II. Background Information**

### **A. Technology and Innovation in the Delivery of Legal Services**

The November 2019 Law Society of Ontario Technology Task Force Report did an excellent job surveying the “Technological Landscape for Legal Services.” Rather than repeat the information contained in that report, this section will highlight some of the information that I have found useful in order to learn more about the changing landscape of legal services and the ways in which technology is being used to help deliver legal services.

As a preliminary matter, it is worth noting that the amount of money invested in U.S. legal services start-up companies is significant. In 2014, the ABA Journal published an article that included a statement that there had been \$66 million invested in legal startups in 2012 and roughly \$458 million invested in 2013.<sup>4</sup> In 2019, the ABA Journal published a story that stated:

*There was a surge in investments in legal tech companies—from \$233 million in 2017 to \$1.6 billion in 2018 (albeit about one-third was raised by LegalZoom), according to Forbes. Megafirms such as Dentons and Foley & Lardner both have venture funds. In February, Axiom, an alternative legal services provider, began the application process to*

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that allowed lawyers in different locations to work on different tasks and that allowed lawyers working in different locations to effectively and in real time communicate with one another; (2) uploading and open-sourcing, which allowed individuals to send their thoughts and products into the world (e.g., via blogs or open source websites); (3) outsourcing, which is made possible by the disaggregation of the work flow tools mentioned above; (4) supply-chaining, which is a method of collaborating horizontally and which has been made possible by the Internet and other developments; (5) informing, which refers to the ability of individuals to search the world’s knowledge base; and (6) the rapid advancement in the speed and capacity of digital, mobile, personal, and virtual technologies. *Id.* at 533–45. As *The Legal World is Flat*, *supra*, explains, these technology developments, along with developments such as more affordable and more prevalent air transportation, have had a significant impact on lawyers.

<sup>3</sup> Law Soc’y of Ontario, *Technology Task Force Update Report* (Nov. 29, 2019), <https://perma.cc/2TGD-ERZ5>.

The November 2019 Technology Task Force Report is included in the *Special Topics 2019* conference materials.

<sup>4</sup> Susanna Ray, *These Venture Capitalists Skip Law Firms for Legal Services Startups*, ABA Journal (May 1, 2014), <https://perma.cc/H33F-VDT9>.

*go public. It follows DocuSign, which went public last year, raising \$629 million in an April 2018 IPO.*<sup>5</sup>

It is clear that at least some of these non-law firm legal services companies conduct significant business. For example, in 2012 Legal Zoom filed initial public offering documents with the U.S. Securities and Exchange Commission in which it stated that it had “served approximately two million customers over the last 10 years. In 2011, nine out of ten of our surveyed customers said they would recommend LegalZoom to their friends and family, our customers placed approximately 490,000 orders and **more than 20 percent of new California limited liability companies were formed** using our online legal platform.”<sup>6</sup> (emphasis added). The CorporationCentre.ca website in Canada appears to offer services similar to LegalZoom.<sup>7</sup>

One useful way to understand the scope of innovation in the “legal services space”<sup>8</sup> is to look at two websites that list legal services start-up companies. These two websites are <https://angel.co/legal> and Robert Ambrogi’s legal tech startups page, which is <https://www.lawsitesblog.com/legal-tech-startups>. At the time I wrote this Article, the <https://angel.co/legal> website listed more than 3,600 companies and said they had an average valuation of \$4 million; the Ambrogi page, which probably has more accurate data, listed more than 700 companies.<sup>9</sup> The November 2019 Law Society Technology Task Force report stated that as of August 2019, there were 88 direct-to-public legal tech tools that had been identified as

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<sup>5</sup> Jason Tashea, *The Legal Tech Market Is Soaring, And Nowhere Is This More Apparent Than Y Combinator*, ABA Journal (May 1, 2019), <https://perma.cc/WS7U-2L9A>.

<sup>6</sup> See FORM S-1 REGISTRATION STATEMENT Under the Securities Act of 1933 for LegalZoom.com, Inc, (May 10, 2012), <https://perma.cc/D6ZK-Y4C8>. Legal Zoom did not complete the public offering and is still privately-held. See Neil Rose, *LegalZoom Secures “Largest Ever Investment in Law,”* Legal Futures (Aug. 2, 2018), <https://perma.cc/P66Q-Y2GE>.

<sup>7</sup> See CorporationCentre.ca, <https://perma.cc/L644-FE4F>. Two articles written by the CEO of CorporationCentre.ca have appeared on a LegalZoom webpage. See Lionel Perez, *Canada: The New Silicon Valley?*, (Aug 2011), <https://perma.cc/Y6WH-BTGU>; Lionel Perez, *Doing Business in Canada 101* (July 2011), available at <https://perma.cc/U5WU-G2BU>.

<sup>8</sup> I first heard the term “legal services space” during a 2011 conference when speaking with individuals involved with venture capital firms and legal services start-ups. I was surprised by this terminology and even more surprised by the content of the conversation that talked about the size of the legal services “market,” the degree to which the market was fractured without any dominant players, and the opportunities that were available to new entrants.

<sup>9</sup> See Robert Ambrogi, *Towards A More Accurate Listing of Legal Tech Startups* (April 28, 2016), <https://perma.cc/3U87-MTNE>, which explained why he started his list:

A recent post of mine drew a lot of attention for stating that the number of legal startups had nearly tripled in two years. Relying on the Angel List roster of legal startups, I observed that the number had grown from 412 two years ago to 1,094 as of the date of my post, reflecting nearly threefold growth. (Just since my post, another nine companies were added to the list.) Over at Associate’s Mind, Keith Lee did what I should have done. He took a closer look at the Angel List roster. He found that it includes some companies that no longer exist. Worse, it includes entities that clearly are not startups, such as law firms, private investigators and notaries. Prompted by Keith’s post, I conducted my own review of the Angel List. It confirmed that the list contains many entities that shouldn’t be there. In fact, after I removed the junk from the list, I had whittled it down to just 375 actual startups. At the same time, however, the Angel List omits companies that should be there. Just off the top of my head, I added some companies that I noticed were missing, bringing the list up to 408 companies. Keith’s conclusion was that there is not an explosion in legal technology. The fact of the matter is, his conclusion is no more valid than its opposite. All we really know is that the Angel List is not a reliable data set on which to base any conclusion. It is not reliable today and it most likely was not two years ago when I took the baseline number.

operating in Canada and described some of these companies.<sup>10</sup> I require my first year law students to write a brief summary regarding two of the companies on the Angel.co/legal list (and predict whether they think the company will survive). The variety of companies they have written about is impressive - there were companies to help with airline claims (Airhelp and Claim Compass), parking tickets (Fixed), start-up company documents (Clerky), immigration (Teleborder), contract creation via mobile phone (Shake), and end-of-life documents (After I Go), to name just a few of the companies my students have described.

In addition to the sources cited above, there are several other sources that one can consult in order to better understand legal services technology developments. Professor Bill Henderson's 2016 *Legal Market Landscape Report*, which was prepared for the State Bar of California and is cited in the Law Society's November 2019 Technology Task Force report, divides the world of legal technology companies into those that provide services directly to individual consumers (PeopleLaw) and those that provide services to corporations (Organizational Clients).<sup>11</sup> Appendix A to Professor Henderson's *Legal Market Landscape Report* is a Thomson Reuters graphic that shows the logos of legal services companies, organized in columns according to the kinds of services they provide. The categories (and numbers of companies in each category) include: Business Development-Marketplaces (19), Litigation Funding (6), Legal Education (13), E-Discovery (11), Practice Management (20), Legal Research (17), Case Management Analytics (10), Document Automation (17), Contract Management-Analysis (12), Consumer (11), and Online Dispute Resolution (11).<sup>12</sup>

Canadian consultant Jordan Furlong has also drawn this distinction between legal services companies that serve individual consumers and those that serve entities or businesses. His 2015 slides for the International Conference of Legal Regulators meeting held in Toronto include logos and information about companies that serve both "PeopleLaw" and organizational clients in the legal services space.<sup>13</sup> Another useful source to learn about legal services innovation is the 5-year old (but still excellent) Russ Pearce/John McGinnis article entitled "*The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services.*" These authors identified five ways in which machine intelligence is likely to

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<sup>10</sup> See the Law Society's Technology Task Force Report (Nov. 2019), *supra* note 2. This Report cites the *TechLaw Directory* prepared by Amy Salzyn, William Burke and Angela Lee for the University of Ottawa's Centre for Law, Technology and Society. This Directory is available at <https://perma.cc/6DQ5-RCKF> [<https://techlaw.uottawa.ca/direct-public-legal-digital-tools-canada>] and <https://perma.cc/9D32-R7N9>. See also Scott Neilson, *The State of Legal Tech*, Canadian Lawyer (Feb. 4, 2019), <https://perma.cc/4AAV-AXST>.

<sup>11</sup> William D. Henderson, *Legal Market Landscape Report* (July 2018) (Commissioned by the State Bar of California, <https://perma.cc/X2KM-UTL5>. Professor Henderson's Report was Attachment A to the July 2019 agenda for the State Bar of California Board of Trustees. Professor Henderson's report begins on page 5 of the pdf cited above at <https://perma.cc/X2KM-UTL5>. The distinction between PeopleLaw and Organizational Clients is discussed in more detail on pp. 12-17 of Professor Henderson's Report. (His report also refers to technology used by lawyers and law firms, as well as organizational clients.)

<sup>12</sup> *Id.* at 10 and Appendix A. For additional information about the "PeopleLaw" or consumer market, see Rebecca Sandefur, *Legal Tech For Non-Lawyers: Report of the Survey of US Legal Technologies, Executive Summary* (2019), The Executive Summary of Professor Sandefur's report is attached to, and starts on pdf p. 3, of a California Task Force memo that is available at <https://perma.cc/KK8V-J7PN>.

<sup>13</sup> See, e.g., Jordan Furlong, *Outside the Castle: Innovation in the Legal Marketplace* (July 28, 2015), <https://perma.cc/N7X2-L2GP>. These were his presentation slides for the 2015 International Conference of Legal Regulators meeting in Toronto and they are available on the conference webpage at <https://perma.cc/ADE8-SDXX>.

be deployed: (1) discovery; (2) legal search; (3) document generation; (4) brief and memoranda generation; and (5) prediction of case outcomes.<sup>14</sup>

Professors Pearce and McGinnis described five ways in which machine intelligence is likely to affect the practice of law. Most of us can look around at the devices we use in our personal lives, such as our phones, TVs, and computers, and see how the use of artificial intelligence has grown. But we also have surveys that will confirm these impressions. For example, a company that surveys U.S. business leaders about technology found that in 2018, 48% said their businesses were using artificial intelligence; by 2019, this number had grown to 72%.<sup>15</sup> This 2019 survey also found that 93% of the surveyed business leaders believed that AI technologies have had a completely or mostly positive impact within their industry and 93% said that emerging technologies, including deep learning, machine learning and AI, help their businesses to be more competitive.<sup>16</sup> If this data accurately reflects current trends, lawyers increasingly will encounter AI in connection with their representation of clients, which makes it more likely that lawyers (and others) will see ways in which they can use artificial intelligence in connection with the practice of law.

The closing observation in this section concerns blockchain. Although few of us probably fully grasp the likely impact of blockchain, commentators have noted that blockchain is likely to dramatically change the ways in which clients use lawyers and lawyers practice law.<sup>17</sup> Thus, as the November 2019 Technology Task Force report noted, blockchain is one of the recent innovations that regulators such as the Law Society will have to address.

## **B. An Overview of U.S. Lawyer Regulation and Regulatory Initiatives**

Because Section III, *infra*, focuses on U.S. regulatory discussions, it seemed useful to begin with a brief review of U.S. lawyer regulation and regulatory initiatives. U.S. lawyers are primarily regulated by the state Supreme Courts, rather than the federal government. The Supreme Courts of all U.S. states use the ABA Model Rules of Professional Conduct as the basis for their mandatory state ethics rules. ABA Model Rule 5.4. prohibits lawyers from being

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<sup>14</sup> John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 Fordham L. Rev. 3041 (2014).

<sup>15</sup> See RELX, *2019 RELX Emerging Tech Executive Report – Executive Summary*, <https://perma.cc/M88Y-688T>. RELX is a global provider of information-based analytics and decision tools for professional and business customers: <https://perma.cc/KNX5-J9QL>.

<sup>16</sup> See 2019 RELX Report, *supra* note 14 (noting that 93% responded yes to each of these two survey questions).

<sup>17</sup> See, e.g., Jason Tashea, *Some States Are Allowing People and Companies to Use Blockchain to Authenticate Documents*, ABA J. (Sept. 2, 2019) (“Arizona and Ohio both passed laws verifying that signatures, documents and contracts stored on a blockchain are valid legal instruments. In 2017, Delaware amended its corporation law to allow businesses to maintain records on a blockchain.”), <https://perma.cc/HSX9-R2CG>; Michael Cross, *Time to Embrace Blockchain*, [UK] *Super-regulator Tells Legal Sector*, Law Gazette (Oct. 22, 2019), <https://perma.cc/HYU3-B6CY>; ABA Continuing Legal Education Session Oct.23, 2019, *Blockchain Opportunities for Healthcare*, <https://perma.cc/3MSJ-R4K3> (“What do cryptocurrencies have to do with healthcare law? From health data to revenue cycle management, the impact of blockchain technology upon healthcare is immense (and getting bigger). This program will help you learn the ins and outs of the various legal issues that are raised when blockchain meets healthcare.”); John A. Flood and Lachlan Robb, *Professions and Expertise: How Machine Learning and Blockchain are Redesigning the Landscape of Professional Knowledge and Organisation* (Jan. 15, 2019), <https://ssrn.com/abstract=3228950>.



partners with, or sharing fees with, nonlawyers.<sup>18</sup> Until very recently, all jurisdictions except the District of Columbia followed the ABA's lead and banned fee-sharing and partnerships between lawyers and non-lawyers except in very limited circumstances.<sup>19</sup> (The recent state variations include Washington's rule that allows fee-sharing with Limited License Legal Technicians, who are analogous to Ontario's paralegals, and Georgia's rule that would allow fee-sharing with lawyers who are lawfully practicing in firms that share fees with nonlawyers, such as lawyers in UK alternative business structures or ABS firms.<sup>20</sup>)

Although most U.S. states prohibit lawyer/nonlawyer fee-sharing and partnerships, there have been several ABA initiatives that have discussed whether this rule should be changed. For example, the ABA Kutak Commission that was responsible for developing the ABA Model Rules originally proposed that the fee-sharing ban be dropped; when the issue reached the ABA House of Delegates in 1983, however, the ABA House of Delegates voted to retain the fee-sharing ban that had been contained in the ABA Code of Professional Responsibility which the ABA Model Rules replaced.<sup>21</sup>

Approximately fifteen years after the Kutak Commission unsuccessfully proposed a rule that would allow lawyer/nonlawyer fee sharing, the ABA established the *ABA Commission on Multidisciplinary Practice* (MDP).<sup>22</sup> During the August 1999 and July 2000 ABA Annual Meetings, this Commission recommended that Rule 5.4 be changed in order to allow lawyer/nonlawyer fee-sharing and partnerships.<sup>23</sup> During each of these meetings, the ABA House of Delegates voted in favor of a substitute resolution, rather than the Commission's proposed resolution: the August 1999 substitute resolution asked the Commission to study the

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<sup>18</sup> See Rule 5.4 of the ABA Model Rules of Professional Conduct, <https://perma.cc/GB2C-3C65>.

<sup>19</sup> See ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct, Rule 5.4* (As of Aug. 2, 2019), <https://perma.cc/YZ65-4Z9G>; compare *District of Columbia, Rules of Professional Conduct: Rule 5.4--Professional Independence of a Lawyer*, <https://perma.cc/GBJ4-5EWM>. In contrast to the situation with ABA Model Rule 5.4, there is significant variation among U.S. states with respect to other ABA Model Rules, such as those that involve confidentiality, conflicts of interest, and advertising.

<sup>20</sup> See *infra* notes 93-94 which cite Georgia's fee-splitting rule, which would allow fee-splitting with lawyers in UK ABS firms, and Washington's version of Rule 5.4 which allows fee-splitting between lawyers and LLLTs [limited license legal technicians].

<sup>21</sup> See Thomas Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *Hastings L.J.* 577, 594-596 (1989), <https://perma.cc/E2WP-5QXX> (describing the Kutak Commission Rule 5.4 proposal and subsequent events). The ABA House of Delegates is the ABA's primary policy-making body.

<sup>22</sup> At the time this Article was prepared, the homepage of the ABA Commission on Multidisciplinary Practice did not contain any links: <https://perma.cc/AU45-XRBP>. However, a google search that uses the Commission's name will return many of the Commission's documents. See also Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, Ch. 2 in Stephen J. McGarry, *MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS* (Law Journal Press 2002) (summarizing the ABA MDP Commission's work and public reaction), [https://works.bepress.com/laurel\\_terry/76/](https://works.bepress.com/laurel_terry/76/).

<sup>23</sup> The details in the Commission's two proposed resolutions differed. Compare the ABA MDP Commission's unsuccessful August 1999 Annual Meeting proposed resolution, available at <https://perma.cc/8AS7-LNY2> (includes links to the Recommendation, Report, and Appendices A-C), with the ABA MDP Commission's unsuccessful July 2000 Annual Meeting resolution, available at <https://perma.cc/9ZE3-29BV>. See also Terry, *The Work of the ABA Commission*, *supra* note 21.

issue further and the July 2000 substitute resolution rejected the Commission's proposed resolution and affirmed the ABA fee-sharing ban found in Model Rule 5.4.<sup>24</sup>

In 2009, less than ten years after the ABA MDP Commission concluded its work, the *ABA Commission on Ethics 20/20* was established in order to examine the impact of technology and globalization on lawyer regulation. As part of its mandate, the Ethics 20/20 Commission initiated efforts to revisit the Rule 5.4 fee-sharing issues.<sup>25</sup> As the Commission noted in its work discussion documents, there had been significant regulatory changes outside the United States that included the 2007 UK Legal Services Act that created a framework for alternative business structures and changes in Australia that allowed the first publicly-traded law firm.<sup>26</sup> The ABA Ethics 20/20 Commission encountered strong resistance, however, and in 2012, it issued a statement indicating that it did not plan to pursue the Rule 5.4/MDP issue.<sup>27</sup>

Approximately one and a half years after the ABA Ethics 20/20 Commission concluded its work, the *ABA Commission on the Future of Legal Services* was established and began addressing Rule 5.4 issues, as well as other issues. As Section III, *infra*, recounts in greater detail, the ABA "Futures" Commission issued a report that recommended changing Rule 5.4, but it did not introduce a resolution that would have required an ABA House of Delegates vote.<sup>28</sup> This history is relevant because many of the *current* U.S. regulatory initiatives involve proposed changes to Rule 5.4 and reference these prior developments.

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<sup>24</sup> The August 1999 ABA Annual Meeting successful substitute motion stated as follows:

Resolved, that the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

See <https://perma.cc/9ZE3-29BV> (this August 1999 successful substitute motion was quoted in the ABA MDP Commission's July 2000 rejected resolution, cited *supra* in note 22). The successful July 2000 substitute motion, which was Resolution 10F, is available at <https://perma.cc/QJ8B-6SF7>. It contained four "Resolved" paragraphs, the first of which set forth the "core values" of the legal profession and contained eight numbered items. Paragraphs 7 and 8 in this first "Resolved" clause stated:

7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

*Id.* See also Terry, *The Work of the ABA MDP Commission*, *supra* note 22, at pp. 2-5 to 2-7 (quoting this motion and discussing the lopsided nature of the ABA House of Delegates vote).

<sup>25</sup> See ABA Commission on Ethics 20/20, *Work Product of the Alternative Law Practice Structures [ALPS] Working Group*, <https://perma.cc/FH3U-EGW5> (includes three lengthy documents papers on this topic: an ABS Issues Paper released on April 5, 2011 [<https://perma.cc/PBE3-2555>]; an ALPS Discussion Draft released on December 2, 2011 [<https://perma.cc/J8TX-RWKZ>]; and a Choice of Law & Alternative Law Practice Structures initial proposal released for comments on December 2, 2011 [<https://perma.cc/W992-UACA>]).

<sup>26</sup> See generally *supra* note 24 (the three ALPS Working Group documents cited on this webpage refer to UK and Australian developments).

<sup>27</sup> See ABA Commission on Ethics 20/20, *For immediate release: ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms* (April 16, 2012), <https://perma.cc/UKU8-3YFZ>.

<sup>28</sup> See *infra* notes 63-66 and accompanying text.

### C. Current Drivers of Change:

Sections III and IV, *infra*, summarize some of the regulatory discussions that have arisen in response to technology changes and innovation in the practice of law. Before this Article reviews those regulatory discussions and initiatives, it is useful to understand some of the “drivers of change” behind these regulatory discussions. The International Bar Association’s *Task Force on the Future of Legal Services* issued a lengthy “Phase 1” report devoted to the topic of who and what are the drivers of change with respect to the future of legal services. In the report and accompanying slide show (which has cool graphics!), technology was listed as the #3 “driver of change.”<sup>29</sup>

Although the IBA report cited multiple factors that will affect the *future* of legal services, from my perspective, the two factors that are likely to lead to *regulatory changes* are increased intolerance by regulators of the public’s lack of access to affordable legal services and pressure from those, including legal services providers, who believe that the current regulatory structures inhibit innovation. When combined with the current landscape of lawyer regulation, which is described *infra* in Section II(D), these two factors - access to legal services and market pressure – might lead to different regulatory outcomes than in the past. This section briefly examines these potential “drivers of change.”

The issue of access to legal services has been a significant part of recent regulatory discussions about how to respond to legal services technology developments. There can be no debate that in the United States, there are severe access to legal services problems. For example, a 2019 “Justice Gap” survey conducted for the State Bar of California found that low-income Californians only sought and received legal help for about 3 in 10 of the problems they experienced, even though all of the problems listed in the survey could have been legally actionable.<sup>30</sup> Utah Supreme Court Justice Himonas has provided statistics that illustrate the access to legal services gap:

In Utah, in the Third District, in which I served as a trial court judge for ten years, for example, 99 percent of the respondents in debt collection cases, which make up the bulk of cases that are filed, are unrepresented, 98 percent of the respondents in landlord/tenant cases, and in family law cases in around 60 percent of those cases either one or both of the parties are unrepresented.<sup>31</sup>

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<sup>29</sup> See, e.g., International Bar Association, *Presidential Task Force on the Future of Legal Services, Presentation Slides* at pdf p. 18, <https://perma.cc/4X6N-APMP>; IBA Presidential Task Force on the Future of Legal Services, *Phase I: Drivers of Change for Legal Services of the Task Force Detailed Report* (Oct. 9, 2017), <https://perma.cc/W7SS-CAHU> (pdf report); see also IBA Presidential Task Force on the Future of Legal Services webpage, <https://perma.cc/89LJ-Z75V> (includes multiple links of interest). The Chair of this IBA Task Force is Canadian lawyer James M. Klotz.

<sup>30</sup> See 2019 *California Justice Gap Study*, <https://perma.cc/924L-93J8> at 2.

<sup>31</sup> Deno Himonas, *Utah’s Online Dispute Resolution Program*, 122 Dick. L. Rev. 875, 877 (2018), available at <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/6>.



Numerous other studies have noted that the United States has a significant access to legal services problem.<sup>32</sup>

Although Canada performed better than the United States with respect to access and affordability of civil legal services in the World Justice Project's 2019 "Rule of Law" index,<sup>33</sup> it too has significant access to legal services issues. In this survey, Canada ranked 62<sup>nd</sup> out of the 126 surveyed countries with respect to whether "people can access & afford civil justice."<sup>34</sup> As is true in the United States, access to legal services issues have arisen in Canadian lawyer regulation discussions.<sup>35</sup>

The current drivers of regulatory change include a range of market forces, as well as concerns about access to legal services. As noted in Section II(A), *supra*, investors and entrepreneurs – and the lawyers who represent them – believe that there is significant financial opportunity in the "legal services space." Big firms, including some law firms, are also interested in innovation and using technology to expand legal services. The Big 4 firms, which were a focus of attention twenty years ago during the ABA MDP Commission hearings,<sup>36</sup> apparently remain quite interested in increasing their legal services market share.<sup>37</sup> Another

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<sup>32</sup> See, e.g., Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), <https://perma.cc/UZB7-3ZX8>; Executive Summary, *Report of the ABA Commission on the Future of Legal Services* (2016), <https://perma.cc/8AE3-8C7D>; Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 S. Cal. L. Rev. 443 (2016) (summarizes several studies including her Am. Bar Foundation study), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2949010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949010); Gillian Hadfield & Deborah Rhode, *How to Regulate Legal Services to Promote Access, Innovation, & the Quality of Lawyering*, 67 Hastings L.J. 1191 (2016), <https://perma.cc/99PA-RZJJ>.

<sup>33</sup> See, e.g., World Justice Project Rule of Law Index, *Current & Historical Data* <https://perma.cc/42EA-SVKE> linked from <https://perma.cc/6UZH-Q846> (page links to an excel sheet that includes current and historical sortable data for Factor 7.1: People can access & afford civil justice; this excel data can be sorted to generate the cited numbers). See also World Justice Project, *Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World* (2019), <https://perma.cc/BUA7-CZSJ>; Himonas, *supra* note 30, at 876-877 (noting that the United States was ranked 94th out of 113 countries with respect to access in the World Justice Project's Rule of Law index).

<sup>34</sup> See World Justice Project, *Current & Historical Data*, *supra* note 32 (showing that in 2019, Canada received a score of 0.57 for Factor 7.1: People can access & afford civil justice, whereas the United States received a score of 0.49, which means that they ranked 62<sup>nd</sup> and 103<sup>rd</sup>, respectively, out of the 126 surveyed countries).

<sup>35</sup> See, e.g., Trevor CW Farrow, *What Is Access to Justice?*, 51 Osgoode Hall L. J. 957 (2014) (summarizing study results); Brent Cotter, *Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada*, 63 U.N.B.L.J. 54, 59-63 (2012) (discussing potential solutions, including those by the legal profession) Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 Saskatchewan L. Rev. 145 (2013) at nn. 97-103, 116, 142, 157, 168, 187-88 and accompanying text (citing lawyer regulation discussions and access issues).

<sup>36</sup> See, e.g., ABA Commission on Multidisciplinary Practice, *Updated Background and Informational Report and Request For Comments* (Dec. 1999) (citing Big 6 and Big 5 developments), <https://perma.cc/E9Y7-A6UB>.

<sup>37</sup> See, e.g., David B. Wilkins & María J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43(3) Law & Social Inquiry 981 (2017) and the shorter summary found in David B. Wilkins & María J. Esteban Ferrer, *Big Law's Trojan Horse: Are the Big Four Preparing an Invasion?*, Law.com (Nov. 2018), <https://perma.cc/B38V-W9NR>; Sam Skolnik and Amanda Iacone, *Big Four May Gain Legal Market Foothold With State Rule Change*, Bloomberg Law (April 11, 2019), <https://perma.cc/D6V4-MLNK>.

noteworthy market force is the increased role of lawyers in the gig economy and the potential growth of these types of platforms.<sup>38</sup>

In sum, even if these market forces don't rise to the level of "creative disruption," as some have predicted,<sup>39</sup> they can still present regulatory challenges and may act as a driver of change. One of the interesting things I have observed during the recent initiatives is the convergence of discussions among stakeholders who focus on access to legal services issues (e.g. state Supreme Court Justices) and stakeholders who want greater regulatory space to operate (e.g. entrepreneurs and innovators). Although both kinds of conversations have happened for many years, what seems different this time around is that more of these conversations are happening simultaneously and in the same location.

#### **D. The "Landscape" of Lawyer Regulation**

In addition to developments described above, it is worth noting the "landscape" of lawyer regulation. This "landscape" includes significant activity around the world with respect to questions of *who-what-when-where-why-and-how* legal services should be regulated.<sup>40</sup> This section highlights three "landscape" developments that may affect regulatory decisions regarding legal services technology and innovation.

The first of these "landscape" developments is the "who regulates" question and the interest in the legal profession by nontraditional regulators.<sup>41</sup> Nontraditional regulators who

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<sup>38</sup> See Henderson, *Legal Market Landscape Report*, *supra* note 9, at pp 6-10 [<https://perma.cc/X2KM-UTL5>]. In Section 1.4 of that report, which was entitled "Lawyers in the Gig Economy," Professor Henderson concluded that: These trend lines suggest that traditional law firm employment is slowly giving way to a workforce that is more contingent. \*\*\*\* The fact that these marketplaces are springing up in such numbers, often backed by professional investors, is a telling sign that buyers and sellers need better pathways to find each other."

*Id.* at 10. See also Margaret Thornton, *Towards the Uberisation of Legal Practice*, 1(1) Law, Technology and Humans (2019), <https://lthj.qut.edu.au/article/view/1277/800>. Professor Thornton offered the following observations: "The gig economy entails the traditional employment relationship being fragmented into 'short term, intermittent work for multiple engagers ('gigs')'. Tasks are usually performed through digital platforms by individuals as independent contractors. The ride-sharing service, Uber, which is changing the nature of work, is the best known of these. While 'gigging' is popularly depicted as the preserve of low-skilled and low-paid workers, white-collar professionals, including lawyers are allegedly the fastest growing sector in the United States (US), a scenario that is emerging in other parts of the world." *Id.* at p. 1.

<sup>39</sup> See, e.g., Ray Worthy Campbell, *Rethinking Regulation and Innovation in The U.S. Legal Services Market*, 9 N.Y.U. J.L. & Bus. 1 (Fall 2012), <https://bit.ly/32TLGyn> (applying to the legal services and legal education markets Professor Clayton Christensen's influential creative destruction theory.) Creative disruption, which has also been called creative destruction, describes the situation in which new market entrants try to find a niche in which they can serve previously "unserved" or "underserved" clients or, alternatively, provide "overserved" clients with more efficient or more pared-down and less expensive services. *Id.*

<sup>40</sup> Laurel S. Terry, *International Developments and their Impact on U.S. Lawyer Regulation*, Miller Becker Lecture CLE Handout (April 2019), [https://works.bepress.com/laurel\\_terry/96/](https://works.bepress.com/laurel_terry/96/). This 8-page CLE handout is an updated version of the *who-what-when--where-why-and-how* regulation issues documented in Terry, *Global and Canadian Trends*, *supra* note 34.

<sup>41</sup> See, e.g., Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as 'Service Providers'*, 2008 J. of Professional Lawyer 89 (2008), available at: [http://works.bepress.com/laurel\\_terry/33/](http://works.bepress.com/laurel_terry/33/) (discussing the increasing trend of having lawyers regulated by nontraditional regulators, along with other "service providers"). For additional examples of the "who regulates"

have a direct or indirect impact on lawyer regulation include entities such as the World Trade Organization, the Financial Action Task Force, and the Organisation for Economic Co-operation and Development (OECD), as well as provincial Canadian legislative bodies when they enact laws that apply to lawyers, but are not specific to the legal profession.<sup>42</sup> One recent example dates from 2018. After receiving a report about regulation in fields related to natural resources, British Columbia adopted a Professional Governance Act and created a new regulator called the Office of the Superintendent of Professional Governance.<sup>43</sup> The Act that created this new regulator is broadly worded and leaves room for additional areas of supervision. Thus, the “landscape” in which Ontario stakeholders will evaluate how the Law Society should respond to technology-based regulatory challenges increasingly includes nontraditional regulators.

A second “landscape” issue that will affect Ontario regulatory discussions is the difficult question of “what” [or whom] should be regulated. Determining whether the Law Society should be trying to regulate *providers* (e.g., lawyers, paralegals, firms) or *legal services* is an important and challenging issue.<sup>44</sup> Indeed, given the advances in artificial intelligence, this threshold issue is even more important now than it has been in the past. This issue of *what – or whom – should be regulated* is one of the regulatory challenges identified in the Law Society’s November 2019 Technology Task Force Report.

A third *who-what-when-where-why-and-how* “landscape” issue is the “how to regulate” question. As the Law Society of Ontario contemplates the regulatory challenges it faces, it does so against a background of heightened interest in the regulatory process. Professor Elizabeth

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issue, see Terry, *Global and Canadian Trends*, *supra* note 34; The White House, *Occupational Licensing: A Framework for Policymakers* (July 2015), <https://perma.cc/8F8U-RALQ>. To illustrate that this is not just a U.S.-issue, see Darrel Pink’s introduction of the article he wrote for the “Big Ideas” issue of the ABA’s Law Practice magazine:

As I look back over the past decade, on the eve of our 2030 long-range planning meeting, I am astounded and proud of what the legal profession has accomplished. Ten years ago, the doomsayers had the legal profession on the verge of extinction. Our professional associations at both the state and national levels resisted change. Lawyers flocked away from membership in bar associations that did not cater directly to their practice areas. Technology in general, and artificial intelligence in particular, was painted as more threatening than it had been in the earlier years of the century. We lived with an access-to-justice crisis that saw millions of citizens left with inadequate legal services or none at all.

Darrel Pink, *Looking Back on the 2020s: What a Decade!*, Law Practice (July 1, 2019), <https://perma.cc/7EYY-QD6W>.

<sup>42</sup> See Terry, *Global and Canadian Trends*, *supra* note 34 at 155-164; see also Jonathan Goldsmith, *Two important opinions from the CJEU*, Law Gazette (May 7, 2019), <https://perma.cc/62B6-7V25> (discussing the impact of the EU’s Uber & Airbnb decisions on the issue of who regulates lawyers).

<sup>43</sup> See Mark Haddock, *Professional Reliance Review: The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making* (May 19, 2018), <https://perma.cc/TZ5M-W458>; British Columbia, Bill 49 – 2018: Professional Governance Act (adopted Nov. 22, 2018), <https://perma.cc/GYJ3-LCUH>; British Columbia Government News, *Superintendent chosen for professional governance office [the Office of the Superintendent of Professional Governance]*, <https://perma.cc/6HKV-PZ86>. For additional background, see *Regulatory Oversight Bodies Proliferating in British Columbia*, <https://perma.cc/RNW2-HS5C>. I want to thank Darrel Pink, the former Executive Director of the Nova Scotia Barristers’ Society, for calling my attention to the implications of this report and the subsequent legislation.

<sup>44</sup> Jordan Furlong’s remarks during his keynote speech at the 2010 Annual Meeting of the Federation of Law Societies of Canada helped me see more clearly the importance of the “services” v. “providers” distinction.

Chambliss recently observed that we are entering an era of evidence-based lawyer regulation.<sup>45</sup> Although her article relies heavily on U.S. Supreme Court cases and other U.S. sources, because of ongoing discussions in the OECD and elsewhere, the trend of asking regulators to use “evidence-based” decisionmaking is one that is likely to affect lawyer regulation around the world, including in Canada.<sup>46</sup> Another aspect of the “how to regulate” landscape is the increasing expectation that regulators will engage in cross-country and cross-profession benchmarking.<sup>47</sup> This benchmarking is likely to include initiatives such as British Columbia’s “natural resources” report and subsequent Professional Governance Act, as well as the dramatic lawyer regulatory changes that have taken place in jurisdictions such as Australia and England and Wales.<sup>48</sup>

In sum, the “landscape” factors discussed in this section, as well as the technology developments discussed in Section II(A) and the drivers of change discussed in Section II(B), are part of the background against which Ontario’s regulatory discussions must be understood. The sections that follow highlight some of the regulatory discussions in the United States and elsewhere regarding legal services technology and innovation.

### **III. Selected Regulatory Discussions in the United States**

Similar to the situation in Canada, regulatory bodies in the United States have considered issues related to innovation, technology, artificial intelligence, and the practice of law. In the author’s view, the most significant recent activities include the 2009-2013 ABA Commission on Ethics 20/20; the 2014-2016 ABA Commission on the Future of Legal Services; ongoing regulatory initiatives in California, Arizona, and Utah; the current work of the Association of Professional Responsibility Lawyers [APRL] Committee of the Future of Lawyering and the work of the Institute for the Advancement of the American Legal System [IAALS], which is a national, independent research center. Each of these developments is discussed below.

#### **A. The ABA Ethics 20/20 Commission (2009-2013)**

The ABA Commission on Ethics 20/20 was established in 2009 in order to study the impact of technology and globalization on legal practice and regulation. The Commission’s work has previously been summarized as follows:

The [ABA Ethics 20/20] Commission was an active one: it held hearings; considered a wide range of issues; had representatives from a range of ABA and outside entities participate in the development of its work product; circulated discussion papers; and

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<sup>45</sup> Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 Wash. U. L. Rev. \_\_\_\_ (2019) (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3343786](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343786)

<sup>46</sup> See also Terry, *Global and Canadian Trends*, *supra* note 34, at 178-182 (cites OECD and Canadian examples of “how to regulate” issues).

<sup>47</sup> See, e.g., Terry, *Service Providers*, *supra* note 40, at 206-209 (discusses the growth of cross-country and cross-profession benchmarking), [https://works.bepress.com/laurel\\_terry/33/](https://works.bepress.com/laurel_terry/33/).

<sup>48</sup> See *supra* note 42 (discussing British Columbia developments) and Terry, *Global and Canadian Trends*, *supra* note 34 (citing regulatory changes in Australia and England and Wales). For a recent Canadian example of this type of comparative analysis, see Amy Salyzyn, *See No Evil? Could “Innovation Waivers” [Similar to those in the UK] Help Break Roadblocks to Reforming Legal Service Delivery?*, Slaw.ca (June 13, 2018), <https://perma.cc/TXD9-D4X4>.

participated in a number of “outreach” events. At the outset, it envisioned its work taking three years. It stayed relatively on track, and completed its work within three and a half years. In August 2012, it presented six resolutions to the ABA House of Delegates for consideration. The topics addressed in these six resolutions were: Technology and Confidentiality; Technology and Client Development; Outsourcing; Practice Pending Admission (by lawyers who move from one state to another); Admission by Motion (reducing the recommended time in practice); and Model Rule 1.6 Detection of Conflicts of Interest (when a lawyer is considering a change of law firms). The ABA House of Delegates adopted all of these resolutions, although some of the resolutions were amended after they originally were circulated by the Commission but before their ABA adoption. While all six of these resolutions might be viewed as primarily affecting “domestic practice,” the Information Report that accompanied these resolutions explicitly noted that globalization of legal practice was one of the driving forces behind the resolutions. In November 2012, the Commission filed with the ABA House of Delegates an additional four resolutions for consideration at the February 2013 ABA Midyear Meeting; the first three of these have been referred to as the “inbound foreign lawyer proposals.” The adopted versions of the first three resolutions were different than the versions originally filed with the ABA House of Delegates. Ultimately, however, all four proposals were approved by the ABA House of Delegates in February 2013.<sup>49</sup>

In keeping with its mission to examine the impact of globalization and technology on lawyer regulation, the ABA Ethics 20/20 Commission circulated discussion papers and solicited feedback on a range of topics. The Commission’s papers addressed topics that included alternative law practice structures, alternative litigation finance, outsourcing, uniformity/choice of law, and inbound foreign lawyers.<sup>50</sup> As one scholar has noted, the Ethics 20/20 Commission arguably was more successful with its technology mission than its globalization mission:

In my view, a major reason why the Commission’s work on technology will have a greater impact is because it provided structural responses to issues related to technology and law practice, in addition to addressing specific issues. In contrast, the overwhelming majority of the Commission’s work with respect to globalization focused on specific issues, rather than structural issues.<sup>51</sup>

The Ethics 20/20 Commission Resolutions 105A and 105B illustrate the difference between its “structural” approach and its “specific issue” approach. Resolution 105B addressed

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<sup>49</sup> Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 Hofstra L. Rev. 95 (2014), [https://works.bepress.com/laurel\\_terry/25/](https://works.bepress.com/laurel_terry/25/). This article includes additional information and citations about the Commission’s work.

<sup>50</sup> See ABA Commission on Ethics 20/20, *Work Product*, <https://perma.cc/FH3U-EGW5>. Although it is no longer possible to obtain the Ethics 20/20 Commission’s *Work Product* or other webpages by consulting the Commission’s homepage, it is possible to get access to its webpages and work product by other means. If a google search does not return the relevant webpage, one can use the Internet’s Wayback machine provided one has the URL of the webpage or document. See, e.g., ABA Commission on Ethics 20/20, *Work Product* page using the internet’s Wayback machine: <https://perma.cc/M4XV-2XH8>. One can often get the URL to insert into the internet’s Wayback machine by hovering over the document’s name on either a live webpage or an archived webpage.

<sup>51</sup> Terry, *Ethics 20/20*, *supra* note 48, at 105.



the propriety of lawyer “pay per click” webpage advertising.<sup>52</sup> Resolution 105A, on the other hand, proposed changes to ABA Model Rule 1.1 regarding competence that created “*structural change*.” Resolution 105A (as amended) added to Rule 1.1 the language that is underlined below. As amended, Rule 1.1’s comment states that 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>53</sup> This new comment language has had a significant impact: many states have adopted this language and technology continuing education programs are now common.<sup>54</sup>

None of the ten resolutions the ABA adopted addressed the issue of fee sharing or partnerships among lawyers and nonlawyers. The ABA Ethics 20/20 Commission had circulated discussion papers that described these kinds of global developments in Australia and the UK and asked whether the U.S. should amend Rule 5.4.<sup>55</sup> After encountering strong resistance, however, the ABA Ethics 20/20 Commission issued a statement noting that it would not propose any changes to Rule 5.4.<sup>56</sup> Despite the lack of policy action, the research the Ethics 20/20 Commission conducted and the questions it posed undoubtedly was useful to the next ABA commission.

## **B. The ABA Commission on the Future of Legal Services (2014-16)**

In August 2014, approximately 1½ years after the ABA Ethics 20/20 Commission concluded its work, the ABA created the **ABA Commission on the Future of Legal Services [the ABA “Futures” Commission]**. As it noted in its Final Report, this ABA Commission “set out to improve the delivery of, and access to, legal services in the United States.”<sup>57</sup> The ABA Futures Commission initiated discussions about some of the same regulatory issues – such as

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<sup>52</sup> See ABA Resolution 105B (Adopted Aug. 2012), <https://perma.cc/YD3T-BU4D>. Resolution 105B was not limited to the issue of “pay per click” websites; it included a number of additional changes. For a list of all of the Commission’s resolutions, see <https://perma.cc/WJJ4-Z747>.

<sup>53</sup> ABA Revised Resolution 105A as amended (Adopted August 2012), <https://perma.cc/8FYF-VZRU>. For links to the current version of ABA Model Rules of Professional Conduct, Rule 1.1: Competence, as well as its comment, see <https://perma.cc/FN8R-HATR> and <https://perma.cc/CN6D-9GD9>.

<sup>54</sup> See Terry, *The Ethics 20/20 Commission*, *supra* note 48, at 103-105; see also ABA Center for Professional Responsibility, *[State Adoption of] Rule 1.1, Comment [8] technological competence* (Sept. 30, 2019), <https://perma.cc/M2JG-UFMF> (“Thirty-six (36) jurisdictions have adopted a statement on tech competence. They are [this document listed the 36 states]”).

<sup>55</sup> The Commission issued three papers on the topic of “Alternative Law Practice Structures.” See ABA Commission on Ethics 20/20, *Work Product* webpage, *supra* note 49. All three referred to Australia and the UK.

<sup>56</sup> See *[Ethics 20/20] Commission Co-Chairs’ Statement*, *supra* note 26; Terry, *The Ethics 20/20 Commission*, *supra* note 48, at 100, n.31.

<sup>57</sup> See ABA Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (2106) [hereinafter ABA Futures Commission Final Report], <https://perma.cc/GQH6-V396>, at 4: “In August 2014, the Commission on the Future of Legal Services set out to improve the delivery of, and access to, legal services in the United States.”) See also the archived Commission webpage which is found at <https://perma.cc/9JT7-JURD> and cited in endnote 1 of the Commission’s Final Report. The archived Commission webpage cites what is probably the Commission’s full mission statement.

lawyer/nonlawyer partnerships and joint ownership - that the ABA Ethics 20/20 Commission had initiated but not pursued.<sup>58</sup>

One of the differences between the two ABA commissions was the variety of input the ABA Futures Commission received. For example, in May 2015, the ABA Futures Commission held an invitation-only “National Summit on Innovation in Legal Services” at Stanford Law School, which is located in the heart of Silicon Valley.<sup>59</sup> Many of the attendees were individuals not typically seen at a lawyer regulation conference because they were legal services innovators, rather than regulators or academics.

During the course of its two-year life, the ABA Futures Commission produced a number of useful items, including discussion papers, grass roots toolkits, and webinars. The appendices in the Commission’s Final Report do an excellent job of documenting the Commission’s work product; the Appendices contain a number of permalinks which make the cited items easily accessible.<sup>60</sup> (Unfortunately, when the ABA updated its webpage in November 2018, most of the content on the ABA Futures Commission webpage disappeared. Much of the content still exists online, however, and can be accessed by using the permalinks found in the endnotes of the ABA Futures Commission’s Final Report or by using a search engine or the Internet’s “Wayback Machine” for those who have a document’s exact URL.<sup>61</sup>)

Although the ABA Futures Commission gathered a tremendous amount of information which it shared widely, its work led to relatively few ABA policy changes. It introduced only one resolution: in February 2016, the Commission submitted proposed Resolution 105 that set forth *ABA Model Regulatory Objectives for the Provision of Legal Services*.<sup>62</sup> The ABA House of Delegates approved Resolution 105, but only after it amended the proposed resolution by adding a paragraph that stated – in essence – that the Resolution did not change the ABA’s

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<sup>58</sup> Compare the ABA Futures Commission Final Report, *supra* note 56, with the April 2012 ABA Ethics 20/20 Commission statement, *supra* note 26, which said that the Commission would not pursue Rule 5.4 issues.

<sup>59</sup> See ABA Futures Commission Final Report [<https://perma.cc/GQH6-V396>], *supra* note 56, at Appendix 3, pp. 71-73. The Report states that “Additional information about the Summit, including the full agenda and list of speakers, can be found on the Commission’s website.” *Id.* at 73. As explained *supra* in note 56, there is an archived copy of the Commission’s webpage available at <https://perma.cc/9JT7-JURD>. It is possible to obtain document URLs from this archived page and then use the Internet’s “Wayback machine” to access these documents. See, e.g., the webpage regarding the Commission’s Summit, see <https://perma.cc/DF7P-PGEG> and click “view live page.” Because many of the Final Report’s endnotes and appendices contain permalink citations, however, it is not always necessary to use the Wayback machine. For example, for the Summit agenda, see <https://perma.cc/PC54-6NK8>.

<sup>60</sup> See ABA Futures Commission Final Report [<https://perma.cc/GQH6-V396>], *supra* note 56, at pp. 59-96.

<sup>61</sup> See *supra* note 58 (noting that the content has disappeared from the webpage of the ABA Futures Commission’s webpage, but an archived copy is available at <https://perma.cc/9JT7-JURD>). In addition to performing a google search or using the Wayback machine, some of the former content can be found on the webpages of other organizations. See, e.g., Responsive Law, *ABA Commission on the Future of Legal Services*, available at <https://perma.cc/JJ39-4NPC> (includes links to five of the papers this organization submitted in response to Commission Issue Papers on Alternative Business Structures, Unregulated Legal Service Providers, Legal Checkups, New Categories of Legal Service Providers, and on the Future of Legal Services).

<sup>62</sup> See Resolution 105 as proposed by the ABA Commission and others for the February 2016 ABA Midyear Meeting, <https://perma.cc/WNL7-VE2G> (found at pdf p. 147 of the February 2016 ABA resolutions).

negative position on nonlawyer ownership of law firms – i.e., the ABA’s resolution in response to the MDP Commission and its proposals regarding Rule 5.4 and MDP issues.<sup>63</sup>

In August 2016, the ABA Futures Commission concluded its work by issuing a Final Report that included twelve recommendations.<sup>64</sup> Recommendation 6 proposed the establishment of a Center for Innovation; during the Annual Meeting session at which the Final Report was released, the ABA announced that it had established a Center for Innovation.<sup>65</sup>

The ABA Futures Commission’s Final Report included approximately twenty-five pages of “Findings,” which were followed by its twelve recommendations, many of which had subparts. (Because this was a report rather than a resolution, the ABA House of Delegates did not vote on any of the Commission’s findings or recommendations.)

Recommendation 2 in the 2016 Final Report of the ABA Futures Commission stated that “Courts should consider regulatory innovations in the area of legal services delivery.”<sup>66</sup> Subpart 2.4 invoked Rule 5.4 when it stated that “*Continued exploration of alternative business structures (ABS) will be useful, and where ABS is allowed, evidence and data regarding the risks and benefits associated with these entities should be developed and assessed.*”<sup>67</sup> Although the ABA Futures Commission’s work did not lead to many ABA policy changes, it likely spurred some of the state activity that is described in the next section.

### C. State Regulatory Initiatives

Although the ABA now has a Center for Innovation, most of the **current** discussions and initiatives about technology, innovation, and legal services are taking place outside of the ABA, rather than inside the ABA.<sup>68</sup> For example, in August 2019, the ABA voted in favor of

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<sup>63</sup> Compare the adopted version of Resolution 105, which is reprinted in ABA Commission’s Final Report, *supra* note 56, with the version the Commission originally proposed, *supra* note 61. The paragraph that was added to the Commission’s proposal before Resolution 105’s final adoption by the ABA House of Delegates states: “FURTHER RESOLVED, That nothing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non lawyer ownership of law firms or the core values adopted by the House of Delegates.” For information about the ABA vote on Resolution 105, see Lorelei Laird, *ABA House Approves Model Regulatory Objectives for Nontraditional Legal Services*, ABA Journal (Feb. 8, 2016), <https://perma.cc/Z8JC-7CSZ>.

<sup>64</sup> See generally ABA Futures Commission Final Report, *supra* note 56.

<sup>65</sup> *Id.* at 48; see also ABA Center for Innovation, *About Us*, <https://perma.cc/FB8A-X4HT>; ABA News, *ABA announces creation of Center for Innovation to increase access to justice, improve legal services delivery* (Aug. 15, 2016), <https://perma.cc/9B7S-EMRV>.

<sup>66</sup> See ABA Futures Commission Final Report [<https://perma.cc/GQH6-V396>], *supra* note 56, at 39.

<sup>67</sup> *Id.* at 42-43.

<sup>68</sup> See ABA Center for Innovation, *Projects and Programs*, <https://perma.cc/U2YL-37MD> (lists ongoing projects). Although it was not listed on the Center’s *Projects and Programs* webpage at the time this Article was written, the ABA Center for Innovation apparently hosts a useful webpage that has a U.S. map with links to state-based innovation information. See ABA, *Legal Innovation Regulatory Survey*, <https://perma.cc/4M6J-398B>. This map does not capture all of the developments, however. Some quite interesting innovation-related collaborations are taking place at U.S. law schools. See, e.g., Georgetown’s Iron Tech Lawyer competitions [<https://perma.cc/WDF8-N3UX>] and Stanford’s Center for Legal Informatics: CODEX project [<https://perma.cc/7KVV-WKFV>]. The ABA Center for Innovation sponsored a resolution for the February 2020 ABA Midyear Meeting that would “encourages U.S. jurisdictions to consider innovative approaches to the access to justice . . . “. See Am. Bar Ass’n, [*Proposed*] *Resolution 115 – Encouraging Regulatory Innovation*, <https://perma.cc/7ZTR-DP7R>. In the weeks before the

Resolution 10A which adopted the *ABA Best Practice Guidelines for Online Legal Document Providers* dated August 2019 and urged online legal document providers to follow these guidelines.<sup>69</sup> (The *ABA Best Practice Guidelines* include fifteen recommendations, divided into three subtopics: 1) the utility of online legal documents and forms; 2) recommendation of attorneys to assist; and 3) dispute resolution. The ten-page report that accompanied this document and Resolution 10A contains useful information and citations.) Despite its name, however, Resolution 10A was not prepared by an ABA committee, but was submitted for consideration by the New York State Bar Association and the New York County Lawyers Association.<sup>70</sup> The sections that follow describe additional state initiatives.

## 1. The California Task Force on Access Through Innovation in Legal Services

In 2018, the Board of Trustees of the State Bar of California, which is a unified bar that has regulatory authority over lawyers, established a 23-person *State Bar of California Task Force on Access Through Innovation in Legal Services* [the CA ATILS Task Force].<sup>71</sup> The majority of the CA ATILS Task Force members are not lawyers and many have expertise in the use of technology in the delivery of legal services.<sup>72</sup> The Task Force was directed to “deliver its final report to the Board of Trustees no later than December 31, 2019. In keeping with the State Bar’s Strategic Plan goals and objectives, each recommendation is expected to balance the dual goals of public protection and increased access to justice.”<sup>73</sup> The CA ATILS Task Force has a webpage where it posts information about the Task Force and where one can sign up for its listserv, but at the time this Article was written, material from its upcoming and prior meetings had to be accessed through the State Bar’s *Committees and Commission’s* webpages.<sup>74</sup>

The CA ATILS Task Force created three subcommittees: Unauthorized Practice of Law/Artificial Intelligence; Rules and Ethics Opinions; and Alternative Business Structures/MultiDisciplinary Practice.<sup>75</sup> Although all three of these subcommittees were active,

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February 2020 meeting, however, emails were circulated on the Association of Professional Responsibility Lawyers Listserv by a number of lawyers who opposed Resolution 115 and encouraged APRL members to join their opposition. This development suggests to the author that regulatory innovation is likely to continue to happen outside the umbrella of the ABA, rather than within the ABA.

<sup>69</sup> ABA Resolution 10A, *Best Practice Guidelines for Online Legal Document Providers* (Adopted Aug. 2019), <https://perma.cc/5GMY-WG7L>.

<sup>70</sup> *Id.* at p. 13.

<sup>71</sup> See State Bar of California, *Task Force on Access Through Innovation of Legal Services*, <https://perma.cc/7GUR-LU74> (Task Force homepage, which includes basic information).

<sup>72</sup> See CA Task Force on Access Through Innovation of Legal Services, *Fact Sheet*, <https://perma.cc/MDX4-QKZQ>; CA ATILS Task Force, *Roster*, <https://perma.cc/MUZ6-MFAB>. Member Andrew Arruda, for example, is the chief executive officer and co-founder of the artificial intelligence company ROSS Intelligence, which is a legal technology company. He is a Canadian.

<sup>73</sup> See CA ATILS Task Force *Fact Sheet*, *supra* note 71.

<sup>74</sup> State Bar of California, *Task Force on Access Through Innovation of Legal Services*, <https://perma.cc/7GUR-LU74>. The CA ATILS Task Force Webpage, *supra*, contains links that lead to the *State Bar Committees and Commissions*, <https://perma.cc/SDV7-TZER> (for upcoming meetings) and the State Bar of California, *State Bar Committee and Commissions Meeting Archive*, <https://perma.cc/P8U5-5G6N> (for past meetings).

<sup>75</sup> See State Bar of California, *Task Force on Access Through Innovation of Legal Services*, *Notice and Agenda* for: Dec. 5, 2018 [<https://perma.cc/Q7V4-XJWH>] (includes an embedded document that sets forth the Work Plan).

this Article focuses on the work of the UPL/AI subcommittee because of its relevance to the topic of regulatory developments related to technology and innovation and because this subcommittee addressed issues that differed from those addressed by the prior ABA commissions.<sup>76</sup> The agendas, minutes, and background materials for all three CA ATILS subcommittees, however, are available online.<sup>77</sup>

In June 2019, the CA ATILS Task Force approved for public comment a number of recommendations, including recommendations developed by its UPL/AI subcommittee.<sup>78</sup> In July 2019, after approval by the State Bar of California's Board of Trustees, the Bar posted these recommendations for public comment; this public comment notice was entitled *Options for Regulatory Reforms to Promote Access to Justice* and the deadline for comments was September 23, 2019.<sup>79</sup> The posted recommendations included the following:

Recommendation 1.0: The Task Force does not recommend defining the practice of law.

Recommendation 2.2: Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

Recommendation 2.3: State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of "artificial intelligence." Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

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<sup>76</sup> See Sections II(B) and III(A-B), *supra*, for a discussion of these prior ABA initiatives and links to their materials.

<sup>77</sup> See State Bar of California, *Task Force on Access Through Innovation of Legal Services Subcommittee on Unauthorized Practice of Law / Artificial Intelligence*, **Notice and Agenda** documents for UPL/AI subcommittee meetings held on: Dec. 5, 2018 (as well as the Task Force meeting) [<https://perma.cc/Q7V4-XJWH>]; Jan. 18, 2019 [<https://perma.cc/F3XA-64WK>]; February 28, 2019 [<https://perma.cc/3NAS-7P4K>]; April 8, 2019 [<https://perma.cc/5MX6-D3U7>]; May 13, 2019 [<https://perma.cc/M3EV-U6FB>]; June 7, 2019 [<https://perma.cc/JV3R-DR2E>]; and June 28, 2019 [<https://perma.cc/38TQ-MCKC>]; and the **ACTION SUMMARY** documents (or minutes) related to the UPL/AI subcommittee meetings held on Dec. 5, 2018 [<https://perma.cc/FN7N-6LX7>]; Jan. 18, 2019 [<https://perma.cc/2ZQD-44VS>]; Feb. 28, 2019 [<https://perma.cc/GG8A-WDNK>]; April 8, 2019 [<https://perma.cc/4ABN-DZYL>]; May 13, 2019 [<https://perma.cc/78TL-DT4N>]; and June 7, 2019 [<https://perma.cc/82ZJ-VJW7>]. At the time this Article was written there wasn't an Action Summary for the June 28, 2019 AI/UPL subcommittee meeting because there hadn't been any subsequent subcommittee meetings. However, the Action Summary from the June 28, 2019 Task Force meeting shows some of what happened during the UPL/AI subcommittee meeting. See *supra* note 68 for a link to the Action Summary for the June 28, 2019 meeting of the entire Task Force [<https://perma.cc/E682-34NX>].

<sup>78</sup> See California Task Force on Access Through Innovation of Legal Services Meeting on June 28, 2019, *Action Summary*, [<https://perma.cc/E682-34NX>].

<sup>79</sup> See State Bar of California, *Options for Regulatory Reforms to Promote Access to Justice*, [<https://perma.cc/86BK-PH4D>]. The supporting documents that were available as links included: 1) an Infographic on Paving the Future for Access [<https://perma.cc/47H5-YWC6>]; 2) Overview Memo and Full List of Concepts for Regulatory Changes Under Consideration [<https://perma.cc/9D8A-JHLW>]; and 3) the Board of Trustees Agenda Item 701 JULY 2019: State Bar Task Force on Access Through Innovation of Legal Services [July 11, 2019] Report: Request to Circulate Tentative Recommendations for Public Comment [<https://perma.cc/G2RS-8FTM>]; and 4) [the Webpage of the] Task Force on Access Through Innovation of Legal Services [<https://perma.cc/PA6B-CDYJ>]. *Id.*



Recommendation 2.4: The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.

Recommendation 2.5: Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality.

Recommendation 2.6: The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.<sup>80</sup>

During its October 2019 meeting, the CA ATILS Task Force considered the public comments it had received, including the public reactions to the recommendations listed above.<sup>81</sup> The agenda for this meeting includes links to embedded documents that summarize the public comments regarding each recommendation.

Relatively few Californians responded with public comments. Of those who responded, the reaction to the Task Force's UPL/AI recommendations was mixed, but largely negative.<sup>82</sup> For example, the Task Force received 189 comments to **Recommendation 2.2** regarding adding a UPL exception: 171 opposed this idea, 15 supported it and 3 had no stated position. Fewer people commented on **Recommendation 2.3** but the majority opposed it. (Of the 83 comments, 14 supported, 59 opposed, and 10 had no stated position with respect to the idea that state approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of "artificial intelligence.") Thirty-two (32) of 89 comments supported **Recommendation 2.4**, which would require the regulator to develop adequate ethical standards for the provider and the technology, but 56 comments opposed this recommendation and 1 took no position. There were 80 comments submitted in response to **Recommendation 2.5** regarding privilege. Of these, 49 opposed the recommendation, 29 supported it, and 2 had no stated position. **Recommendation 2.6**, which concerned funding, received 67 comments: 24 supported the recommendation, 40 opposed it, and 3 had no stated position.

This Article has focused on the public comments submitted in response to the recommendations developed by the UPL/AI subcommittee of the CA ATILS Task Force. Most

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<sup>80</sup> See *supra* note 78 (citing the public comment notice and supporting documents that contained these recommendations).

<sup>81</sup> See State Bar of California, *Task Force on Access Through Innovation of Legal Services (ATILS) Notice and Agenda for Monday, October 7, 2019*, <https://perma.cc/F7XJ-RC2H>. In November 2019, the Board of Trustees of the State Bar of California extended the deadline and gave the California ATILS Task Force until March 31, 2020 to submit its final report and recommendations. See State Bar of California, *Task Force on Access Through Innovation of Legal Services (ATILS) Homepage* (as of Feb. 20, 2020), <https://perma.cc/K222-VL3D>.

<sup>82</sup> The October 7, 2019 CA ATILS Task Force online agenda, *supra* note 80, includes links to the public comment summaries cited in this paragraph. This footnote omits the full names of these documents, but the summaries related to the UPL/AI subcommittee's recommendations can be found at these URLs: <https://perma.cc/LP74-6S3B> (Rec. 1.0); <https://perma.cc/WJ6P-7SLG> (Rec. 2.2); <https://perma.cc/9A7T-UVAD> (Rec. 2.3); <https://perma.cc/6GGV-KJAX> (Rec. 2.4); <https://perma.cc/F8VS-96EL> (Rec. 2.5); and <https://perma.cc/5L6E-UAZ8> (Rec. 2.6).

of the public comments about the other recommendations were also negative.<sup>83</sup> This is true even in situations in which one might not expect to see negative reactions to a recommendation. For example, I was surprised that 72 of 107 comments opposed Recommendation 1.2 which stated that “Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.”<sup>84</sup>

At the time this Article was prepared, the CA ATILS Task Force was still digesting the public comments it had received, considering new proposals, and had not taken any final action with respect to its recommendations. Regardless of whether it proceeds with its recommendations, other regulators, as well as lawyers who use technology, may find useful ideas in some of the recommendations of the Task Force and in Task Force documents.<sup>85</sup>

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<sup>83</sup> See generally the documents linked from the Oct. 7, 2019 ATILS Agenda, *supra* note 80, at <https://perma.cc/F7XJ-RC2H>. For example, 102 of 116 comments opposed Recommendation 1.1, which was developed by the ABAs/MDP subcommittee and recommended that “the models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

<sup>84</sup> See Memo to the ATILS Task Force from Mark Tuft (Oct. 7, 2019), <https://perma.cc/P9HT-5DR8> (memo embedded in the Oct. 7, 2019 Task Force agenda *cited supra* note 80 that summarized the public comments in response to Recommendation 1.2). I did not expect that it would be controversial to recommend that traditional law practices strive to expand access to justice through innovation and technology.

<sup>85</sup> See, e.g., *supra* note 76 for links to the UPL/AI subcommittee’s agendas and minutes. The UPL/AI subcommittee items that are embedded within these agendas and minutes include the following: a link to the proposed but not adopted federal legislation that included a definition of artificial intelligence (this link is found in the Nov. 30, 2018 memo about the CA ATILS Task Force Subcommittee Organization and Meeting Management Process that was attached to the Dec. 5, 2018 meeting) [<https://perma.cc/84WD-JJWK>]; a Jan. 7, 2019 memo from Judge Wendy Chang that included two sections by Daniel Rubins on artificial intelligence and a section by Joyce Raby on Regulation of Law and Tech Companies [<https://perma.cc/447J-BM2C>]; a Jan. 15, 2019 memo from Prof. Kevin Mohr on various UPL and AI issues, including points in the Jan. 7, 2019 Chang et. al. memo [<https://perma.cc/R5RS-FL3E>]; a Feb. 19, 2019 memo by Dan Rubins and Joshua Walker regarding standards and certification process for legal technology providers [<https://perma.cc/VU5V-3HWY>]; a February 25, 2019 memo from Professor Kevin Mohr responding to the Rubins/Walker memo regarding standards and certification for legal technology providers [<https://perma.cc/HGX7-AARZ>]; a Feb. 25, 2019 memo on Legal Advice Device Regulation by Randall Difuntorum, ATILS Staff [<https://perma.cc/CC4S-29TH>]; a March 25, 2019 memo by Abhijeet Chavan summarizing the pros and cons of having the committee recommend use of the Legal Cloud Computing Association’s (LCCA) standards [<https://perma.cc/UEW9-AND2>]; a March 25, 2019 memo by Heather Morse summarizing feedback from law firms about security standards they are implementing and/or have been asked by clients to implement [<https://perma.cc/A3S6-JU9Q>]; a March 26, 2019 memo by Wendy Chang regarding “Provider regulation vs. “Legal Advice Device” regulation” [<https://perma.cc/V5CR-V2EM>]; a March 26, 2019 memo from Randall Difuntorum with staff recommendations that included several attachments, including malpractice data and the Executive Summary from Prof. Rebecca Sandefur’s *Legal Tech For Non-Lawyers: Report of the Survey of US Legal Technologies* [<https://perma.cc/KK8V-J7PN>]; an undated memo from Joshua Walker related to defining AI, which is the issue that became Recommendation 2.3 [<https://perma.cc/7VTQ-4ZV4>]; a May 2, 2019 memo from Simon Boehme and Daniel Rubins that was related to data security [<https://perma.cc/A2MJ-EVTY>] and a May 2, 2019 memo from Simon Boehme and Daniel Rubins related to what became Recommendation 2.4 about ethical standards for providers and technology [<https://perma.cc/PM9R-L3CE>], including proposed rules for technology providers based, with a comparison to the corresponding rules of professional conduct [<https://perma.cc/2FYE-3YZL>]; a May 8, 2019 memo from Abhijeet Chavan related to defining AI and what became Recommendation 2.3 [<https://perma.cc/F4YH-UCM6>]; a June 16, 2019 memo by Joshua Walker summarizing the pros/cons of a recommendation that AI not be defined, which is related to recommendation 2.3 [<https://perma.cc/2C7A-ZWXX>]; an undated memo from Joshua Walker regarding the proposed recommendation about privilege

## 2. The Arizona Task Force on the Delivery of Legal Services

Arizona is another jurisdiction that has considered or proposed regulatory changes in response to access to legal services issues and legal services technology developments and innovation. On October 8, 2019, the *Arizona Task Force on the Delivery of Legal Services* issued its report and recommendations.<sup>86</sup> This Report, which exceeded 150 pages with appendices, included ten recommendations. The first recommendation was to eliminate the lawyer/nonlawyer fee sharing and partnership ban found in Rule 5.4 in order “to remove the explicit barrier to lawyers and nonlawyers co-owning businesses that engage in the practice of law while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public.” In addition to the radical change contained in Recommendation #1, the Arizona report recommended expanded information about, and utilization of, unbundled legal services, recommended improvements in Arizona’s certified Legal Document Preparers program, recommended court navigators similar to those found in New York and elsewhere, and recommended adopting rules to allow licensed independent paralegals, similar to the *Limited License Legal Technician* (LLLT) program in Washington and Utah’s *Legal Paralegal Practitioner* (LPP) program and the licensed paralegals found in Ontario.<sup>87</sup> At the time this Article was written, the status of these recommendations was not clear since the Arizona Supreme Court had not yet ruled on its Administrative Director’s January 30, 2020 petition to implement these changes; regardless of whether the petition is granted or the recommendations are circulated for further public comment the Arizona Task Force webpage, (which is linked from the *IAALS Unlocking Regulation Knowledge Center* webpage) contains extensive information about the work of the Task Force.<sup>88</sup>

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[<https://perma.cc/5P8S-LAT7>]; and June 5, 2019 memos from Wendy Chang regarding the pros/cons of what became Recommendation 2.2 regarding ethical standards [<https://perma.cc/67F7-YELW>] and Recommendation 1.0 regarding defining UPL [<https://perma.cc/8XTU-WGZU>]; and a June 16, 2019 memo by Joshua Walker summarizing the pros/cons of what became Recommendation 2.3 that AI not be defined [<https://perma.cc/3PYW-AQUF>].

<sup>86</sup> Arizona Task Force on the Delivery of Legal Services, *Report and Recommendations* (Oct. 4, 2019), <https://perma.cc/KP8B-9UUA>.

<sup>87</sup> See *id.* at Recommendations 3, 7-10. For information about these kinds of developments, see *infra* note 92 for links to the Washington and Utah initiatives. See also the 2018 Dickinson Law Review Symposium entitled *Access to Justice: Innovations and Challenges in Providing Assistance to Pro Se Litigants*, <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/>. This Symposium includes an article about unbundling written by Forrest Mosten, who has been called the “father of unbundling;” an article about New York’s Court Navigator program written by Judge Fern Fisher, who was its first administrator; an article about the establishment and implementation of Washington’s LLLT program written by the State Bar of Washington’s former Executive Director Paula Littlewood and Steve Crossland; an article by Utah Justice Deno Himonas about Utah’s online dispute resolution system, and an article by Minnesota’s State Law Librarian about its *pro se* appellate clinic.

<sup>88</sup> See Dave Byers [Administrative Director, Administrative Office of Courts and Member, Task Force on the Delivery of Legal Services], *In the Matter of PETITION TO AMEND [Various Rules]* (Jan. 31, 2020), <https://perma.cc/6RT7-TR9J>.

For information about the Arizona Task Force, see Arizona Judicial Branch, *Legal Services Task Force Webpage*, <https://perma.cc/C4GF-BUQ6>. This webpage includes a “resources” tab, a “meeting information” tab, and an “archive” tab. The “meeting information” tab includes the meeting agendas and supporting documents; the archive includes the 2019 Task Force minutes. The “Resources” tab includes general items, as well as items related to unbundling of legal services, non-lawyers and legal services, and alternative business structures. *Id.* Some of the

### 3. The Utah Work Group on Regulatory Reform

As noted above, the October 2019 Arizona Task Force report cited developments in Utah and Utah has reciprocated by citing Arizona developments. In August 2019, the ***Utah Work Group on Regulatory Reform***, which is co-chaired by Utah Supreme Court Justice Deno Himonas, issued a report that recommended significant changes in Utah’s regulation of legal services.<sup>89</sup> After citing the Arizona Task Force’s July 2019 vote to eliminate Rule 5.4 banning lawyer/nonlawyer partnerships, the Utah report stated the following:

#### ***Track A: Freeing Up Lawyers to Compete by Easing the Rules of Professional Conduct***

*... We believe the Arizona approach has much to offer. Indeed, we view the elimination or substantial relaxation of Rule 5.4 as key to allowing lawyers to fully and comfortably participate in the technological revolution. Without such a change, lawyers will be at risk of not being able to engage with entrepreneurs across a wide swath of platforms. ...*

#### ***Track B: The Creation of a New Regulatory Body***

*Alongside the proposed revisions set forth in Track A, we propose developing a new regulatory body for legal services in the State of Utah. Rule revisions are necessary to propel any change, but our position is that wide-reaching and impactful change will only follow reimagining the regulatory approach. Therefore, as the Supreme Court moves forward with revising the rules of practice, we endorse the simultaneous creation of a new regulator, operating under the supervision and direction of the Supreme Court, for the provision of legal services.*

*The proposed regulator will implement a regulatory system:*

- 1. Driven by clearly articulated policy objectives and regulatory principles (objectives-based regulation);*
- 2. Using appropriate and state-of-the-art regulatory tools (licensing, data gathering, monitoring, enforcement, etc.); and*

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documents that might be of particular interest include the court order that created the Task Force [In the Matter of: Establishment of the Task Force on Delivery of Legal Service and Appointment of Members, Administrative Order No. 2018 – 111 (Nov 21, 2018), <https://perma.cc/WRS3-7698>]; the January 2019 Electronic Briefing Book that the Task Force used at the outset of its work, <https://perma.cc/DR5R-WBH3>; a consolidated set of minutes, <https://perma.cc/H56S-VQ8D>; and the April 25, 2019 “Team Cruz Workgroup Proposals & Discussion” presentation slides that show the Rule 5.4 options the Task Force considered, <https://perma.cc/39CZ-XFR3>. The key documents from Arizona are also available as links from IAALS’ Unlocking Regulation Knowledge Center webpage. See Institute for the Advancement of the Am. Legal System [IAALS], *Unlocking Legal Regulation Knowledge Center*, <https://perma.cc/PWJ5-SXV2> (consolidating information from various U.S. states and from other countries about regulatory developments related to legal services innovation and access).

<sup>89</sup> See *Narrowing the Access-to-Justice Gap by Reimagining Regulation, Report and Recommendations from THE UTAH WORK GROUP ON REGULATORY REFORM* (Aug. 2019), <https://perma.cc/VRY5-3UXE>

3. Guided by the assessment, analysis, and mitigation of consumer risk (risk-based regulation).

*We suggest the following core policy objective for the new system: To ensure **consumers access to a well-developed, high-quality, innovative, and competitive market for legal services.***<sup>90</sup>

The Utah report recommended a two-phase implementation process. Phase 1 would be a pilot stage, similar to what the Utah Supreme Court used when developing its online dispute resolution system.<sup>91</sup> The Report stated that in Phase 2, the Work Group anticipated some form of an independent, non-profit regulator with delegated regulatory authority over some or all legal services. Although the Utah Work Group did not have a dedicated webpage, which makes it difficult to compare how the Utah group's work compared to the work undertaken in California and Arizona, the Utah Supreme Court has now established an implementation task force which has a webpage where one can follow current Utah developments.<sup>92</sup>

#### **D. Additional U.S. Regulatory Developments and Discussions**

Although I consider the California, Arizona, and Utah developments described above to be the most significant ones by state regulators, there are other noteworthy developments. *Washington* regulates Limited License Legal Technicians or LLLTs; this program provided a

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<sup>90</sup> *Id.* at 15-16.

<sup>91</sup> *Id.* For information about the development of Utah courts' groundbreaking online dispute resolution system, including screenshots of its program, see Deno Himonas, *Utah's Online Dispute Resolution Program*, 122 Dick. L. Rev. 875 (2018), <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/6>; see also Laurel Terry, *Look What's New! Utah's Groundbreaking Efforts to Use Online Dispute Resolution (ODR) to Increase Access to Justice*, JOTWELL (October 5, 2018) (reviewing Justice Deno Himonas, *Utah's Online Dispute Resolution Program*, 122 Dickinson L. Rev. 875 (2018)), [https://works.bepress.com/laurel\\_terry/91/](https://works.bepress.com/laurel_terry/91/) (3 page summary of ODR developments in Utah and elsewhere).

Utah consulted British Columbia when developing its ODR program. See comments by Shannon Salter, Chair of the British Columbia Civil Resolution Tribunal made during the first plenary session at the May 2019 ABA 45<sup>th</sup> National Conference on Professional Responsibility held in Vancouver, Canada, <https://perma.cc/GU85-7D9P>.

<sup>92</sup> Utah Implementation Task Force on Regulatory Reform, <https://perma.cc/3B4D-W5Q4> (includes information on the regulatory sandbox, a timetable, and forms to submit proposals, among other items). This Implementation Task Force was established quite quickly after the Work Group issued its August 2019 report. See, e.g., Administrative Office of the [Utah] Courts, Press Release: Utah Supreme Court Adopts Groundbreaking Changes To Legal Service Regulation (Aug. 29, 2019), <https://perma.cc/9WFR-THYZ> (announcing the Utah Supreme Court's unanimous adoption of the Work Group's report); Utah Supreme Court, Standing Order No. 14 (regarding Creation of the Task Force on Regulatory Reform), Effective September 9, 2019, <https://perma.cc/5KV6-7VMC> (establishing the Implementation Task Force).

Although the Utah Work Group that prepared the August 2019 report did not establish a dedicated webpage, some of the documents that led to the August 2019 Report are available online. See, e.g., Utah Supreme Court, *A Move Toward Equal Access to Justice* (March 2019), <https://perma.cc/5JBC-TLUH> (announcing the new task force); Agenda, Supreme Court's Advisory Committee on the Rules of Professional Conduct (April 15, 2019), <https://perma.cc/ZUS6-7PUA> (select "view live page;" pp.7-9 summarize some of the ongoing regulatory reform work, including "OWNERSHIP OF LAW FIRMS" issues); Draft Work Group on the Regulatory Structure for Legal Services Statement of Purpose, (Supplement to the Utah Rules of Professional Conduct Committee April 15, 2019 Agenda) <https://perma.cc/G2GT-62YL>



model for related developments in Utah and Arizona.<sup>93</sup> (Until Washington adopted its LLLT program, the District of Columbia was the only U.S. jurisdiction that allowed lawyers and nonlawyers to partner and share fees.<sup>94</sup>) By July 2016, **Georgia** had amended its rules so that Georgia lawyers could share fees with lawyers in another law firm, even if the law firm had nonlawyer owners, provided that law firm was operating legally in its jurisdiction.<sup>95</sup> In 2019, **New York** circulated for public comment a proposal that would amend Rule 5.4 to add a similar exception.<sup>96</sup> Other noteworthy developments have taken place in **Illinois**: it has issued a study and request for comments about client-lawyer matching services and the Chicago Bar Foundation and Chicago Bar Association have launched a reform initiative that looks similar to the initiatives in Arizona, California, and Utah.<sup>97</sup>

There are other important initiatives that touch on the topics of innovation and technology. In 2018, the Association of Professional Responsibility Lawyers [APRL] created an **APRL Committee on the Future of Lawyering** that conducts regular meetings and is working to

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<sup>93</sup> See Washington State Bar Association, *Limited License Legal Technicians*, <https://perma.cc/WJ4C-4S5Y>; Stephen R. Crossland & Paula C. Littlewood, *Washington's Limited License Legal Technician Rule and Pathway to Expanded Access for Consumers*, 122 Dick. L. Rev. 859 (2018), <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/5>. See *supra* notes 85 and 88 for links to the Arizona and Utah reports that cited Washington's LLLT developments; Utah Court Rules Ch. 12, Art. 15 and <https://perma.cc/KUD3-Y2JZ> (Licensed Paralegal Practitioner webpage) and <https://perma.cc/7CCK-7BVZ> (Utah State Bar LPP webpage).

<sup>94</sup> District of Columbia Rules of Professional Conduct, Rule 5.4 (allows partnerships and fee sharing among lawyers and nonlawyers in connection with the delivery of legal services), <https://perma.cc/GBJ4-5EWM>.

<sup>95</sup> See, e.g., Georgia Rules of Professional Conduct, Rule 5.4(e) (allows fee sharing with ABS firms that are legal in their jurisdiction), <https://perma.cc/ZCQ2-296G>; see also State Bar of Georgia, 2016 Report of the Office of General Counsel (June 16-19, 2016), <https://perma.cc/7UEY-73G2> at 18 (shows that Georgia's rule change took place after the UK allowed alternative business structures and after the ABA Ethics 20/20 Commission recommended that the ethics rules be interpreted to allow fee sharing in this situation). Although the ABA did not propose a rule change, it did adopt a Formal Ethics Opinion that reached this conclusion. See ABA Commission Ethics 20/20, *Co-Chairs' Statement re: ABA Model Rule 1.5(e) Fee Division Issues* (October 29, 2012) (referring to the Standing Committee on Ethics and Professional Responsibility the Rule 1.5(e) issue of fee-splitting lawyers in different law firms), <https://perma.cc/CW5T-SDXR>; ABA, *Formal Opinion 464: Division of Legal Fees with Other Lawyers Who May Lawfully Share Fees with Nonlawyers* (Aug. 19, 2013), <https://perma.cc/7GUE-2ZAY>.

<sup>96</sup> New York State Bar Association, Committee on Standards of Attorney Conduct ("COSAC"), COSAC Proposals to Amend Rules 1.0, 2.4, 4.1, 5.2, 5.4, 5.5, and 7.1-7.5 of the New York Rules of Professional Conduct (June 6, 2019 – For Public Comment), <https://perma.cc/8WTR-LEV8>;

<sup>97</sup> See CBA/CBF Task Force on the Sustainable Practice of Law & Innovation, <https://perma.cc/8P98-PRQZ> (providing links to the Task Force's members, areas of focus, and resources); Chicago Bar Foundation, *Proposal to Amend Illinois Rules Relating to Marketing and Communications to Improve Access to Justice—Rule 5.4 and Rule 7 Series* (April, 2019), <https://perma.cc/23VN-P9CS>; *Client-Lawyer Matching Services Study of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Released for Comments, Version 2, Released on June 25, 2018 (includes a framework for regulating for-profit lawyer-client matching services), <https://perma.cc/S7BF-HNRY>. Illinois' other noteworthy actions serving as a leader in the United States on proactive regulation, which is the "when to regulate" question in the "who-what-when-where-why-and-how" set of lawyer regulation questions. Illinois requires lawyers who do not carry malpractice insurance to complete several self-assessment modules. See Illinois Attorney Registration and Disciplinary Commission, *PMBR*, <https://perma.cc/UBX6-HEFB>. Illinois has also sponsored several "futures" conferences. See, e.g., Illinois Supreme Court Commission on Professionalism, *The Future is Now*, <https://perma.cc/2PMF-B56S> (includes links to the 2016-2020 conferences).

develop regulatory proposals that will promote legal services innovation.<sup>98</sup> This committee includes members from around the world, as well as individuals who serve on some of the regulatory initiatives described above. The Institute for the Advancement of the American Legal System [IAALS] has also served as a catalyst for discussions about legal services regulation. For example, in addition to the “Unlocking Legal Regulation Knowledge Center” cited earlier, in April 2019, IAALS hosted a gathering in Denver to discuss models of regulatory reform; although the IAALS webpage does not contain much detail about this initiative, publicly available information shows that it was a high-level and potentially influential gathering.<sup>99</sup> The National Organization of Bar Counsel [NOBC], which is an organization of regulators, has also played a useful role in promoting knowledge of global regulatory developments. The NOBC hosts a *Global Resources* webpage that includes, *inter alia*, FAQ documents on the topics of Alternative Business Structures and Proactive Regulation.<sup>100</sup>

In sum, although there have not yet been many concrete changes in U.S. lawyer regulation in response to legal services technology developments and innovation, there have been significant regulatory discussions during the past decade. Regardless of whether regulatory changes take place, the initiatives described in this section contain resources that might be useful to the Law Society of Ontario and other legal services stakeholders.

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<sup>98</sup> APRL [Association of Professional Responsibility Lawyers], *The Future of Lawyering Special Committee*, <https://perma.cc/2J8U-CCSL>. Despite what this webpage says, the Alternative Business Structures/Multidisciplinary Practice/RPC 5.4 Subcommittee is co-chaired by Art Lachman and Jayne Reardon, <https://aprl.net/aprl-alternative-business-structures-multidisciplinary-practice-rpc-5-4-subcommittee/>. Although the Committee’s webpage is currently relatively empty, it is an active committee. The work product it has considered includes a memo prepared by APRL Committee Co-chair Art Lachman for the June 2019 ABA National Conference on Professional Responsibility held in Vancouver, Canada. This memo reviews the history and rationale of ABA Model Rule 5.4 and is a useful resource. See *Lawyer Professional Independence & Rule 5.4: An Overview Compiled by Art Lachman* (May 2019). The memo begins on pdf p. 4 of the Breakout Session #9 Materials pdf found here: <https://perma.cc/VM3M-NTH7>.

<sup>99</sup> See *supra* note 88 and accompanying text for the link to the IAALS Knowledge Center. Although this webpage does not contain much information from the April 2019 conference, some of the materials from the IAALS-sponsored April 2019 Denver meeting are available in the Breakout #9 session materials from the ABA Center for Professional Responsibility’s 45<sup>th</sup> National Conference on Professional Responsibility, which was held in May 2019 in Vancouver, Canada. The IAALS materials start on pdf p. 245 of the Vancouver conference Breakout session #9 materials found at <https://perma.cc/VM3M-NTH7>. See IAALS [Institute for the Advancement of the American Legal System], *Making History: Unlocking Legal Regulation*, April 16-17, 2019 IAALS Workshop, its Agenda, and Attendees bios. (All of the materials from the May 2019 Vancouver conference are available at <https://perma.cc/GU85-7D9P>.) See also IAALS, *How do we ensure that the delivery of legal services meets the needs of legal consumers?*, <https://perma.cc/QM9G-DUGU>.

<sup>100</sup> Nat’l Organization of Bar Counsel, *Global Resources*, <https://perma.cc/GH9W-QG7X>. The NOBC is a primary U.S. organization for regulators who are responsible for lawyer discipline and – increasingly – the middle stage of lawyer regulation, which includes proactive regulation. The NOBC’s ABS FAQ document was prepared with the assistance of regulators from Australia, Canada, and the UK: <https://perma.cc/6V29-JVMM>.

#### IV. Selected Regulatory Discussions in the International Bar Association and Elsewhere

The *International Bar Association* (IBA) is another organization that has produced resources that might be useful to the Law Society of Ontario and its stakeholders.<sup>101</sup> As noted previously, the Phase 1 report of the IBA *Presidential Task Force on the Future of Legal Services* listed “technology” as the #3 “driver of change.”<sup>102</sup> In 2017, the IBA Bar Issues Commission asked a working group to examine a number of issues, one of which was the impact of the growth of non-lawyer providers on the delivery of legal services, particularly through electronic platforms.<sup>103</sup> In 2018, after this working group had completed its work on other issues, it turned to the issue of guidelines for unregulated providers. The IBA working group considered several draft documents, but ultimately was unable to reach a consensus, including whether its work product should be called “Principles” or “Guidelines” or something else and whether its document should be limited to currently “unregulated” providers.<sup>104</sup> The working group’s report to the IBA Bar Issues Commission summarized the disagreements within the working group and the range of views among its members.

During an IBA meeting held in Seoul, Korea in September 2019, the Chair of the IBA Bar Issues Commission suggested that given the differences of opinion reflected in the paper, the next step was for the paper to go out for consultation to IBA member bars. At the time this Article was prepared, the IBA consultation paper had been circulated to IBA Member Bars, but the results had not been disclosed. Regardless of whether the IBA ultimately adopts the recommended principles, the consultation paper is useful because it flags potential disagreements and cites potentially useful resources. The consultation paper that will be circulated to IBA Member Bars asked them to comment on the following principles that are relevant to this Article:

***IBA principles on the provision of legal services [NOT ADOPTED; FOR CONSULTATION ONLY]***

• *The aim of this document is to assist bars and other regulators of lawyers who are engaged in discussions with decision-makers in their jurisdictions regarding the standards which should apply to the delivery of legal services by whomever provided (i.e. whether by lawyers or others). Of course, the principles which apply to the practice of law by lawyers have become much more detailed and refined over centuries of legal practice. The document’s purpose is to propose a check-list of public purpose aims. For the avoidance of doubt, these are guidelines only, and their target is those bars and other*

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<sup>101</sup> See International Bar Association, *About Us*, <https://perma.cc/P5KG-5XL2>. This webpage states the IBA is “comprised of more than 80,000 individual international lawyers from most of the world’s leading law firms and some 190 bar associations and law societies spanning more than 170 countries.” The IBA’s logo and motto is “global voice of the legal profession” and it claims to be the foremost organization for international legal practitioners, bar associations and law societies. *Id.*

<sup>102</sup> See *supra* note 28 (citing the IBA Task Force slides about the “drivers of change,” <https://perma.cc/4X6N-APMP>, as well as Phase 1 of the Task Force Report, <https://perma.cc/4VWQ-5BPH>).

<sup>103</sup> See generally the webpage of the IBA Bar Issues Commission, which lists as one of its current projects “Guidelines on unregulated legal services:” <https://perma.cc/AN7D-E6MP>.

<sup>104</sup> The author has personal knowledge regarding this project. The Federation of Law Societies of Canada is an IBA Member Bar and thus received the IBA Consultation Paper.

*regulators of lawyers involved in such discussions. These bars and other regulators may make such use of them as they wish.*

- The principles are not intended to give encouragement to the provision of legal services by unregulated providers in jurisdictions where such provision is unlawful, nor to be used by unregulated providers for branding purposes. On the other hand, they are not intended to prevent or inhibit appropriate competition in the provision of legal services.*
- The IBA continues to believe that the public interest and the interests of clients are best advanced when legal services are delivered by lawyers who are licensed or otherwise authorised, with the protections that usually attach to a lawyer's licence: high standards of preliminary and continuing training; an ethical code which is enforced; discipline and removal from the right to practise where appropriate; professional indemnity insurance; and other guarantees.*
- Given that there is an evident increase in the provision of unregulated legal services through the use of legal technology, separate principles have been developed where such technology is used.*
- The areas both of provision of legal services by unregulated providers and of the impact of technology on the provision of legal services are developing rapidly, and so these principles are provisional in nature, being subject to review as their development becomes clearer.*

*The IBA urges governments to ensure that the provision of legal services meets the following aims:*

- A. Protection of the public*
- B. Advancement of the administration of justice and the rule of law*
- C. Meaningful access to justice for all, regardless of economic situation, and information about the law, legal issues, and the civil and criminal justice systems*
- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections*
- E. Delivery of affordable and accessible legal services, with the means suiting the needs*
- F. Efficient, competent, and ethical delivery of legal services*
- G. Protection of confidential information and, where applicable to the provider-client relationship, privileged information*
- H. Independence of professional judgment*

- I. *Accessible civil remedies for negligence and breach of other duties owed by providers of legal services, and sanctions for misconduct*
- J. *Appropriate controls for money held on behalf of customers*
- K. *Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system*

*Where legal technology is used in the delivery of legal services, the following additional aims are included in the list:*

- L. *Accountability and appropriate levels of supervision in the form of a named legal person to be responsible for the product, with contact details given*
- M. *Human agency and oversight in the form of one or more suitably qualified people (not necessarily legally qualified, but qualified to understand and handle the technology and its consequences) to be identified to manage the technology*
- N. *Respect for human rights, including non-discrimination, diversity, fairness, environmental rights, and the right to privacy and data protection*
- O. *Transparency in the way the technology is built and operates so that it can be meaningfully explained, including both which data were used to create an algorithm, and also the legal basis for the use of the technology, to facilitate access to remedies where an outcome is challenged*
- P. *Agreed minimum standards on the quality of data to be used in the delivery of legal services*

The **IBA Consultation Paper** cites several documents, including some that are specific to legal systems. For example, the **IBA Consultation Paper** cites the *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment*, which was published in December 2018 and prepared by a working group of the European Council body called the European Commission for the Efficiency of Justice (CEPEJ).<sup>105</sup> The **IBA Consultation Paper**

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<sup>105</sup> See European Commission for the Efficiency of Justice (CEPEJ), *European Ethical Charter on the use of Artificial Intelligence in Judicial Systems and their Environment* (Dec. 2018), <https://perma.cc/K2LY-DC4X>.

The **IBA Consultation Paper** explains that the CEPEJ Working Group's Charter had identified the following as important principles: respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights; non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals; quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models conceived in a multi-disciplinary manner, in a secure technological environment; transparency, impartiality and fairness: make data processing methods accessible and understandable, authorise external audits; and "under user control": preclude a prescriptive approach and ensure that users are informed actors and in control of their choices. (Line breaks omitted and underlining added).



also cites a June 2019 Law Society of England and Wales report regarding “*The Use of Algorithms in the Criminal Justice system*.”<sup>106</sup>

The **IBA Consultation Paper** also cites some resources that are not specific to legal services, including an April 2019 document prepared for the European Commission entitled “*Ethics Guidelines for Trustworthy AI*”<sup>107</sup> and a May 2018 report by the EU Fundamental Rights Agency (FRA) on the topic of “BigData” and discrimination in data-supported decision

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<sup>106</sup> See Law Society of England and Wales, *Algorithm Use in the Criminal Justice System: A Report by the Law Society Commission on the Use of Algorithms in the Justice System* (June 2019), <https://perma.cc/WJ6G-8W2S> and the explanatory webpage at <https://perma.cc/Q5PJ-EX3N>. The Law Society’s two-page summary of this report states that the “Technology and Law Public Policy Commission was created to explore the role of, and concerns about, the use of algorithms in the justice system. It held four public evidentiary sessions, interviewed over 75 experts, and read over 82 submissions of evidence and many more supplementary studies, reports and documents on the topic.” See <https://perma.cc/4HVD-Y64H>. This document summarized the Report’s recommendations as follows:

“Our report makes specific and actionable recommendations. We believe the following are the areas of greatest importance. Oversight – A range of new mechanisms and institutional arrangements should be created and enhanced to improve oversight of algorithms in the criminal justice system. Strengthening Algorithmic Protections in Data Protection – The protections concerning algorithmic systems in Part 3 of the Data Protection Act 2018 should be clarified and strengthened. Protection beyond Data Protection – Existing regulations concerning fairness and transparency of activities in the justice sector should be strengthened in relation to algorithmic systems. Procurement – Algorithmic systems in the criminal justice system must allow for maximal control, amendment and public-facing transparency, and be tested and monitored for relevant human rights considerations. Lawfulness – The lawful basis of all algorithmic systems in the criminal justice system must be clear and explicitly declared in advance. Analytical Capacity and Capability – Significant investment must be carried out to support the ability of public bodies to understand the appropriateness of algorithmic systems and, where appropriate, how to deploy them responsibly.”

*Id.* at 2 (paragraph breaks omitted and underlining added). The **IBA Consultation Report** used slightly different words when it referred to the important principles in this UK report:

Oversight: a legal framework for the use of complex algorithms in the justice system: The lawful basis for the use of any algorithmic systems must be clear and explicitly declared; Transparency: a national register of algorithmic systems used by public bodies; Equality: the public sector equality duty is applied to the use of algorithms in the justice system; Human rights: public bodies must be able to explain what human rights are affected by any complex algorithm they use; Human judgement: there must always be human management of complex algorithmic systems; Accountability: public bodies must be able to explain how specific algorithms reach specific decisions; and Ownership: public bodies should own software rather than renting it from tech companies and should manage all political design decisions. (Paragraph breaks omitted and underlining added).

<sup>107</sup> See Independent High-Level Expert Group on Artificial Intelligence Set Up By The European Commission, *Ethics Guidelines For Trustworthy AI* (April 8, 2019), <https://perma.cc/36QF-CYTE>; see also European Commission, *News: Ethics guidelines for trustworthy AI* (April 8, 2019), <https://perma.cc/8VDB-KX4C>.

The **IBA Consultation Paper** notes that this document identified seven key requirements including human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; environmental and societal well-being; and accountability.

making.<sup>108</sup> The *IBA Consultation Report* notes, however, that the documents it cited did not represent a comprehensive list.<sup>109</sup>

Two additional multinational groups that might have information that is useful to the Law Society of Ontario are the *International Conference of Legal Regulators* or *ICLR* and the *Conference of Bars and Law Societies of Europe* or *CCBE*. The ICLR is a global organization that consists primarily of “day job” legal regulators. Although the ICLR is still a fledgling organization, having held its first meeting in 2012,<sup>110</sup> it has a webpage and listserv where members can find documents from prior conferences and solicit ideas and benchmarking data from other regulators.<sup>111</sup> The CCBE is also worth consulting on issues related to legal technology and innovation. Although the CCBE does not currently have any materials posted on the webpage of its committee on the “Future of the Legal Profession and Legal Services,” it undoubtedly has documents on this topic because it held a 2016 conference that focused on innovation and the future of the legal profession.<sup>112</sup> In sum, there are international initiatives, as well as country-specific initiatives, that have addressed the regulatory challenges related to legal services technology developments and innovation.

## V. Observations Regarding Regulatory Developments Related to Innovation, Technology, and the Practice of Law

The experiences summarized above demonstrate the lack of consensus regarding how regulators should respond to technology developments and innovation in the practice of law.

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<sup>108</sup> See European Union Agency for Fundamental Rights, *FRA Focus: #BigData: Discrimination in data-supported decision making* (2018), <https://perma.cc/7AA4-JTMQ>. For a link to the FRA webpage announcement and links to additional papers, including a June 2019 paper on *Data quality and artificial intelligence – mitigating bias and error to protect fundamental rights*, see European Union Agency for Fundamental Rights, *#BigData: Discrimination in data-supported decision making* (May 2019), <https://perma.cc/Y5Z9-MGRB>.

The *IBA Consultation Paper* explains that the 2018 FRA report drew attention to the fact that when algorithms are used for decision-making, there is potential for a breach of the principle of non-discrimination enshrined in Article 21 of the EU Charter of Fundamental Rights, explained how such discrimination occurs and suggested possible solutions including the following steps: authorities should be as transparent as possible about how algorithms are built; fundamental rights impact assessments should be conducted to identify potential biases and abuses in the application of, and output from, algorithms; the quality of data should be checked, including collecting metadata, *i.e.*, information, about the data itself; authorities should ensure that the way the algorithm is built and operates can be meaningfully explained – including, most importantly, which data were used to create the algorithm - to facilitate access to remedies for people who challenge data-supported decisions.

The *IBA Consultation Report* notes that the FRA report was based on the Council of Europe’s previous work entitled “Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data” and on the European Parliament’s resolution on the fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement. These two documents can be found at <https://perma.cc/R6EC-4DHS> and <https://perma.cc/QYY5-2CYS>.

<sup>109</sup> See *IBA Consultation Report*, *supra* note 103. Although the IBA Consultation Paper cites the ABA’s August 2019 *Best Practice Guidelines for Online Document Providers*, which was cited *supra* note 68, the ABA *Guidelines* were approved after the IBA working group members already had agreed on the principles that would be circulated.

<sup>110</sup> See generally Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, 82(2) Bar Examiner 18 (June 2013), [https://works.bepress.com/laurel\\_terry/26/](https://works.bepress.com/laurel_terry/26/).

<sup>111</sup> See International Conference of Legal Regulators, <https://iclr.net>.

<sup>112</sup> Compare CCBE, Committees & Working Groups, *Future of the Legal Profession and Legal Services*, <https://bit.ly/31BtRTj> with CCBE Info Special Edition, *Innovation & Future of the Legal Profession*, Paris - 21.10.2016, <https://perma.cc/GXF3-JTGV> (summarizing the 2016 CCBE *Innovation & Future* conference).

This section offers observations about things that might make it easier for a jurisdiction to manage the regulatory challenges that exist in this time of change and disruption.

Sections III and IV highlighted a number of resources relevant to this Article's topics. Thus, my first observation is that regulators such as the Law Society of Ontario should remember that they don't need to start from scratch. For example, as artificial intelligence becomes more embedded in the delivery of legal services, regulators may want to decide whether they should regulate AI and if so, whether the term "artificial intelligence" should be defined. If and when the Law Society considers this issue, it can consult resources such as the California Task Force memos recommending against a definition of artificial intelligence,<sup>113</sup> the proposed, but not adopted, U.S. legislation that included a definition of artificial intelligence,<sup>114</sup> and the Law Society of England and Wales report discussing the use of algorithms in the legal system.<sup>115</sup>

My second observation is that it is useful to recognize that regulatory discussions about legal services technology and innovation are challenging.<sup>116</sup> Inertia is a powerful force and it is often difficult to decide how best to respond to change, especially disruptive change. The U.S. regulatory history suggests that the legal profession may be slow to make dramatic regulatory changes. Moreover, in those jurisdictions where dramatic regulatory changes *have* occurred, they have generally been imposed from the outside, rather than adopted by the practicing bar.<sup>117</sup> Thus, in my view, one of the issues confronting those legal professions that still exercise some measure of self-regulation is the degree to which they want to be involved in regulating these new markets and whether they can adapt quickly enough to do so.

My third observation is that the best regulatory changes will be those that are "structural" changes that will outlast particular technology developments. As Section III explained, this is why I believe the ABA's amendment to Rule 1.1, which is the "competence" ethics rule, was an excellent approach. (Rule 1.1's amended language requires lawyers to be aware of the "benefits and risks associated with relevant technology."<sup>118</sup>) In thinking about what kind of additional regulation related to technology developments would be "structural," the Law Society is not starting from scratch. There already are examples of what "structural" changes might – or might not – look like. For example, although the UPL/AI subcommittee of the California ATILS Task Force was briefed about cloud computing and other technical standards and reviewed quite

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<sup>113</sup> See *supra* note 84 (citing a May 8, 2019 memo from Abhijeet Chavan related to defining AI [<https://perma.cc/F4YH-UCM6>], an undated memo from Joshua Walker on this issue [<https://perma.cc/7VTQ-4ZV4>], and a June 16, 2019 memo by Joshua Walker summarizing the pros/cons of a recommendation that AI not be defined [<https://perma.cc/3PYW-AQUF>]). The European memos about AI and technology are cited *supra* in notes 106-107.

<sup>114</sup> See *supra* note 84 (citing the proposed but not adopted federal legislation that had a definition of artificial intelligence cited in a Nov. 30, 2018 California Task Force memo [<https://perma.cc/84WD-JJWK>]).

<sup>115</sup> See *supra* note 105.

<sup>116</sup> See generally Sections III(A-B) and IV of this Article, which discuss ABA and IBA initiatives. See also Law Society of Ontario, *Compliance-Based Entity Regulation* webpage, <https://perma.cc/NF2V-WCVE>.

<sup>117</sup> During the last twenty years, several countries have changed their regulatory systems in order to allow fee sharing and partnership among lawyers and nonlawyers and, in some cases, nonlawyer ownership of legal services providers. Many of these changes were imposed by legislative bodies or were in response to threatened legislation. It is beyond the scope of this Article to discuss developments in jurisdictions such as Australia, England and Wales, Ireland, Scotland, and Singapore, but I am happy to send citations to anyone who contacts me

<sup>118</sup> See *supra* notes 52-53 and accompanying text. The Federation of Law Societies of Canada recently voted in favor of a similar requirement.

specific recommendations,<sup>119</sup> the subcommittee and full Task Force ultimately chose a more general approach. The version of Recommendation 2.4 that was circulated for public comment is quite general and simply says that the “Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.”<sup>120</sup> In my view, Recommendation 2.4 represents a “structural” approach that is analogous to the action the ABA took regarding Rule 1.1.

My fourth observation is that the Law Society should not underestimate the important education role it can play, even if its Benchers are not prepared to make any regulatory changes. The initiatives described in Sections III and IV already have produced knowledge that might be useful to others and that could be used in education efforts.<sup>121</sup> Regardless of whether regulatory changes occur in Ontario, lawyers and clients will have to adapt to a world with new technology and legal services innovations. Regulators can play an important role in spreading knowledge and facilitating discussions that will help lawyers avoid mistakes that hurt clients.<sup>122</sup> These conversations might also help lawyers develop a consensus regarding best practices. For example, one of the CA ATILS Task Force memos listed eighteen steps that legal services providers should consider with respect to data security.<sup>123</sup> Another memo identified fifteen requirements that the authors believed should be required of legal technology products.<sup>124</sup> The IBA, European Union, and Council of Europe, among others, have produced useful reports and

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<sup>119</sup> See *supra* note 84 (citing UPL/AI subcommittee documents that referred to quite specific technology standards such as those included a Feb. 19, 2019 memo by Dan Rubins and Joshua Walker regarding standards and certification process for legal technology providers; a March 25, 2019 memo by Abhijeet Chavan summarizing the pros and cons of having the committee recommend use of the Legal Cloud Computing Association’s (LCCA) standards; and a March 25, 2019 memo by Heather Morse summarizing feedback from law firms about security standards they are implementing and/or have been asked by clients to implement.)

Additional documents that might prove useful include a Jan. 7, 2019 memo from Judge Wendy Chang and others that included background information about AI; a Feb. 19, 2019 memo by Dan Rubins and Joshua Walker regarding standards and certification process for legal technology providers; a Feb. 25, 2019 memo entitled Legal Advice Device Regulation Summary; and a March 26, 2019 memo by Wendy Chang regarding “Provider regulation” vs. “Legal Advice Device” regulation. In addition to these documents, the agendas from the February 2019 and April 2019 UPL/AI subcommittee meetings are particularly useful to show the breadth and depth of the issues this subcommittee considered. These agendas are cited *supra* note 80 and are found at <https://perma.cc/3NAS-7P4K> and <https://perma.cc/GG8A-WDNK>.

<sup>120</sup> See Oct. 7, 2019 Memo summarizing comments regarding Recommendation 2.4, *supra* note 81.

<sup>121</sup> See *supra* notes 84 and 103-107 (citing, inter alia, IBA and European recommendations about the use of AI and a CA ATILS Task Force March 25, 2019 memo by Heather Morse summarizing feedback from law firms about security standards they are implementing and/or have been asked by clients to implement).

<sup>122</sup> For articles that argue that regulators have an obligation to act proactively to help lawyers avoid mistakes that hurt clients and the “when to regulate” question, including the degree to which the U.S. has been influenced by Canadian developments, see Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 Lewis & Clark L. Rev. 717 (2016). See also Susan Saab Fortney, *Promoting Public Protection through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation System*, 23 Prof. Law. 16 (2015).

<sup>123</sup> See May 2, 2019 Boehme/Rubins memo on data security, *supra* note 84 [<https://perma.cc/A2MJ-EVTY>].

<sup>124</sup> See May 2, 2019 Boehme/Rubins memo on certification standards, *supra* note 84 [<https://perma.cc/PM9R-L3CE>]. The fifteen items set forth in this memo were more specific and more tech-oriented than are found in existing lawyer regulation provisions with which the author is familiar. For example, the authors recommended requirements related to account deletion, multi-factor authentication, having a Data Protection officer, a 72 hour requirement for notifying the State Bar of data breaches, as well as other provisions

policy documents.<sup>125</sup> The Law Society of Ontario can help publicize documents such as these and facilitate discussions about whether their suggestions are appropriate. Thus, regardless of what happens with respect to the regulatory challenges, the Law Society should embrace the opportunity to educate its stakeholders about legal technology developments and innovation.

My fifth observation is that the Law Society and its stakeholders should expect to hear, and be prepared to respond to, questions based on cross-country and cross-profession comparisons. There are likely to be disagreements about the scope and significance of the benchmark data,<sup>126</sup> but regulatory debates are increasingly going to refer to developments in other professions and other countries.

My sixth observation is that regulators, as well as their stakeholders, should be prepared to respond to questions about who has the “burden of proof” and what kinds of data exists to support a proposed approach.<sup>127</sup> In the United States, there have been strong disagreements about whether those who want to change the status quo have the “burden of proof” or whether those who want to impose or retain market restriction rules have the burden to justify those rules.<sup>128</sup> Whichever way this “burden of proof” issue is resolved, regulators and other stakeholders are likely to be asked if there is data to support their position. The lack of robust data is one reason why it might make sense for a regulator to begin with pilot projects. This is

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<sup>125</sup> See generally Section IV, *supra*.

<sup>126</sup> See, e.g., Memo to the CA ATILS Task Force Regarding the Public Comments on Recommendation 1.1 The models being proposed would include individuals and entities working for profit and would not be limited to not for profits (Oct. 7, 2019), <https://perma.cc/6W6K-F6J6>. This included the following in the “recurring point” and “possible response” columns:

Recurring point: This proposal is premised on the idea that for profit tech companies, tech venture capitalist and other non-lawyer investors are the answer to protecting the public access to justice, particularly with respect to underserved and vulnerable populations. But that has not been proven nor shown. Greater study is needed. To date the most extensive empirical investigation on the effects of NLOs on access to justice was published by Nick Robinson, a research fellow at Harvard’s Centre on the Legal Profession. After an extensive review of the literature, field visits in the UK and Australia and interviews with lawyers and officials in both jurisdictions, Robinson concluded that NLOs in Australia made few inroads in anything but the personal injury, consumer, social welfare (disability) and mental health (malpractice) fields.

In those countries NLOs like Slater & Gordon earned very little market share in family law, landlord tenant or criminal law work. Based on the data, Robinson concluded that NLO investment in personal injury was largely driven by higher expected returns and not as much on access needs.

Possible Response: The experience of other jurisdictions is helpful but ultimately not determinative of how California might approach similar reform activities. For example, the U.K. has had ABS for several years but only recently is making a concerted effort to optimize use of technology. (See the “Legal Access Challenge” of SRA Innovate at: <https://www.sra.org.uk/solicitors/resources/innovate/sra-innovate/>).

<sup>127</sup> See, e.g., *supra* notes 40 (Terry Services Providers article) and 44 (citing Elizabeth Chambliss’ Evidence-Based Regulation article).

<sup>128</sup> See, e.g., *supra* note 23 (cites the August 1999 ABA resolution that was adopted in place of the ABA MDP Commission’s proposed resolution, assumed those seeking to change the status quo had the burden of proof and that they had not introduced sufficient evidence to justify their proposed changes); Laurel S. Terry, *An “Issue Checklist” for the ABA Commission on Multidisciplinary Practice* (1999) reprinted in Gary Munneke and Ann McNaughton, *MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE* (2001), <https://perma.cc/NHZ7-R4GL> (highlighting the burden of proof as a threshold issue). The burden of proof has been an important issue in the ongoing regulatory discussions.



what the Utah Working Group has proposed.<sup>129</sup> It is also one of the ideas found in the November 2019 report of the Law Society of Ontario's Technology Task Force.

My final observation is that in my view, stakeholders cannot meaningfully address the regulatory challenges and talk about what kinds of regulation would be appropriate unless they know *why* they are trying to regulate and what they are trying to achieve. This is the “*why regulate?*” question in the *who-what-when-where-why-and-how* series of questions cited earlier.<sup>130</sup> Members of the Law Society of Ontario are fortunate because Sections 4.1 and 4.2 of the Law Society Act address this issue:

### **Function of the Society**

**4.1** It is a function of the Society to ensure that,

- (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
- (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario

### **Principles to be applied by the Society**

**4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

- 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
- 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
- 3. The Society has a duty to protect the public interest.
- 4. The Society has a duty to act in a timely, open and efficient manner.
- 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.<sup>131</sup>

Unless the Law Society or its stakeholders believe that these regulatory goals should be changed, Sections 4.1 and 4.2 of the Law Society Act can provide a useful anchor for the

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<sup>129</sup> See *supra* note 89 and accompanying text.

<sup>130</sup> See *supra* note 39 for these “landscape” questions. For more information on the “why regulate?” question, see Laurel S. Terry, *Examples of Regulatory Objectives for the Legal Profession* (Updated March 2, 2019), [https://works.bepress.com/laurel\\_terry/89/](https://works.bepress.com/laurel_terry/89/) (lists the regulatory objectives adopted by the Supreme Courts of Colorado, Illinois, and Washington, as well as the ABA's Model Regulatory Objectives and those from Canadian and other non-U.S. jurisdiction).

<sup>131</sup> See Law Society Act, R.S.O. 1990, c. L.8, <https://www.ontario.ca/laws/statute/90l08>.

challenging discussions that lie ahead regarding whether and how to regulate legal services technology developments and innovations.