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## Back to the Future (Again) regarding the Regulation of Legal Services

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## Back to the Future (Again) Regarding the Regulation of Legal Services

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William D. Henderson, *[Legal Market Landscape Report Commissioned by the State Bar of California](#)* (July 2018).

In July 2018, the State Bar of California authorized the formation of a [Task Force on Access Through Innovation of Legal Services](#). This Task Force has been asked to identify possible regulatory changes to enhance the delivery of, and access to, legal services. It will address three broad topics: 1) the definition of unauthorized practice of law; 2) lawyer marketing, advertising, partnership, and fee-splitting rules; and 3) non-lawyer ownership and investment. The first sentence of the [Task Force Fact Sheet](#) states that “Too many Californians needing legal services cannot afford an attorney or don’t have meaningful access.” The second sentence of the Fact Sheet cites a 2018 [Legal Market Landscape Report](#) that was commissioned by the [State Bar of California](#) and written by Professor [Bill Henderson](#).

Professor Henderson’s 2018 *Legal Market Landscape Report* is a document that all lawyers should read. It is jam-packed with data, and it provides the grounding for California’s ongoing conversations regarding the proper scope of lawyer regulation. Moreover, much of the information in the *Report* is not California-specific and thus is of interest to anyone who is concerned about access to legal services and the proper scope of lawyer regulation.

One of the things that I like about Professor Henderson’s work is that I usually encounter sources and perspectives that I am not familiar with. This is true of Professor Henderson’s *Legal Market Landscape Report*, just as it has been true of other Henderson publications such as his recent article, [Innovation Diffusion in the Legal Industry](#).<sup>1</sup> The first section of the *Report* is entitled “Size and Composition of the U.S. Legal Market.” In addition to citing U.S. Census Bureau and U.S. Bureau of Labor Statistics data, which has become relatively common, this section includes an interesting discussion of “Lawyers Working in the Gig Economy” and the data sources that one might use to track these developments. There is increasing scholarly interest in the [gig economy](#), and it is useful to have data sources that one can use as a proxy for tracking the increase in “gig lawyers.”

Section 1 of the *Report* also includes a review of alternative legal service providers. The *Report* asserts that “it is hard to overstate the tremendous economic and technological ferment of the legal ecosystem growing up within and around the traditional legal services market.” This section describes the services offered by some of these alternative legal services providers and provides links to legal tech maps produced by others. The *Report’s* descriptions and classifications are useful given the thousands of start-up companies that are active in the “legal services space” (see, e.g., [here](#) and [here](#)). Figure 4 in this section is a useful graphic entitled “Legal AI Landscape 2018” that has the logos of more than sixty AI companies arranged around an “X” axis that lists eleven different categories of services. Towards the end of this section, Professor Henderson observes that:

As momentum grows, more pressure will be placed on a regulatory framework premised on one-to-one legal services. This raises very difficult questions for regulators, as paradigm shifts are rare events that are difficult to recognize. Rather than amend an ethics framework built for a bygone era, the public interest may be better served by a new regulatory structure that includes traditional lawyering side by side with one-to-many legal services, products and solutions created by a wide range of professionals from multiple disciplines.

The second section of the *Report* focuses on “Individual versus Organizational Clients.” This section’s introductory paragraph states that there are two legal markets that need to be analyzed separately because they involve different

economic drivers that are evolving in very different ways. The first subsection cites the conclusions from the classic 1975 and 1995 *Chicago Lawyers* studies, which found that lawyers tend to work in one of two “hemispheres,” serving either organizational clients, on the one hand, or individual clients, which Henderson here refers to as “PeopleLaw,” on the other hand.<sup>2</sup> This section explains why Professor Henderson believes that the *Chicago Lawyers* hemisphere framework is a useful lens for understanding current changes within the legal profession. This section contains data about the economics of large organizational clients and the economics of PeopleLaw, as well as other interesting charts, tables, and information. For example, one figure shows that, between 2007 and 2012, there was a decrease in both the absolute dollar amount and the percentage of total dollars that were spent on legal services for individuals. During the same time period, there was an increase in both the absolute dollar amount and the percentage of total dollars that were spent on legal services for organizational clients. The *Report* observes that this data “suggests we are in the midst of an irreversible structural shift” and that “it is reasonable to ask whether the public interest would be better served by a regulatory structure that is sensitive to the challenges that exist within these two very different parts of parts of the market.”

The *Report*'s third section addresses “The Problem of Lagging Legal Productivity” and the impact of “cost disease” on legal education and legal practice and its impact on the courts and access to justice. (Relying on work done by economists, Henderson explains that “cost disease” occurs in situations in which prices tend to go up much faster than worker income due to the lack of productivity gains). He concludes that the legal sector has experienced all three symptoms of “cost disease,” including higher relative cost, shrinking demand, and substitution. The final segment of this section, which is entitled “courts and access to justice,” observes that “Courts are on the front line of the legal sector’s cost disease problem. Yet, as explained below, courts are also partially responsible for cost disease.” After providing examples of some of the ways in which courts increase the cost of legal services, the *Report* notes that some courts are starting to respond. The *Report* quotes [Richard Susskind](#) who asked, “Is court a service or a place?” and then cites several jurisdictions that have begun to offer or require online dispute resolution.<sup>3</sup>

The final section of the 2018 *Legal Market Landscape Report* is entitled “Ethics Rules and Market Regulation.” As its name indicates, this section identifies the regulatory architecture that affects the delivery of legal services to individuals (“PeopleLaw”) and to organizational clients. Professor Henderson highlights the impact of these rules on the legal services market:

The key point of this section is that the ethics rules, particularly those pertaining to the prohibition on nonlawyer ownership ([Rule 5.4](#)) and the unauthorized practice of law ([Rule 5.5](#)), are the primary determinants of how the current legal market is structured. Without these rules, the market would look very different, as private businesses would be free to offer legal-oriented goods and services to both clients and lawyers....[P]rivate investors see ample opportunity in the current legal market. The best way to orient the Trustees to the issues at hand is to describe how the current ethics rules [such as [Rules 5.4](#), [5.5](#), [7.2](#), and [7.3](#)] are shaping the U.S. legal market....The ethics rules affect [the organization client sector and the PeopleLaw sector] in different ways.

The reason why this jot is entitled “Back to the Future (Again)” is so that the title can signal the fact that the *Legal Market Landscape Report* addresses issues similar to those that have been addressed in prior and current initiatives. The [ABA Commission on the Future of Legal Services](#), the [ABA Commission on Ethics 20/20](#), and the proposed but then withdrawn 2019 resolution on [Guidelines for Online Document Providers](#) previously addressed related issues. The [Association of Professional Responsibility Lawyers “Future of Lawyering” Committee](#) currently is studying issues similar to those that the California Task Force is examining. Moreover, these kinds of discussions are not limited to the United States. Similar issues have been discussed in the [International Bar Association President’s Task Force on the Future of Legal Services](#), International Conference of Legal Regulators conferences (see, e.g., [here](#), [here](#), and [here](#)), the [Future of the Legal Profession and Legal Services Committee](#) of the Council of Bars and Law Societies of Europe (CCBE),<sup>4</sup> the 2017 Report on the Future of Law and Innovation in the Profession [the FLIP report] from the [Law Society of New South Wales](#) [Australia], [Stephen Mayson’s “Independent Review of \[UK\] Legal Services Regulation](#), in the Compliance-Based Entity Regulation Task Force of the Law Society of Ontario [Canada], and in initiatives by Canadian regulators in [Nova Scotia](#), [British Columbia](#), and the [Prairie Provinces](#).

These prior initiatives suggest that not everyone who reads Professor Henderson's *Report* will agree with his conclusion that "the law should not be regulated to protect the 10 percent of consumers who can afford legal services while ignoring the 90 percent who lack the ability to pay. This is too big a gap to fill through a renewed commitment to pro bono. This is a structural problem rooted in lagging legal productivity that requires changes in how the market is regulated." But regardless of whether you agree with the *Report's* conclusions, it is important to be aware of the data and issues that frame the contemporary debate and discussion about legal services regulation. The *2018 Legal Market Landscape Report* is an invaluable resource for those who are familiar with these initiatives and for those who are new to these debates.

1. William D. Henderson, *Innovation Diffusion in the Legal Industry*, 122 **Dickinson L. Rev.** 395 (2017). The *Innovation Diffusion* article is based on the first few posts in Professor Henderson's "[Legal Evolution](#)" blog, which includes information and data that many lawyers do not regularly encounter.
2. See John P. Heinz and Edward O. Laumann, **Chicago Lawyers: The Social Structure of the Bar** (1982); John P. Heinz, Edward O. Laumann, Robert L. Nelson & Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 **Law & Society Review** 751 (1998).
3. Because the *Legal Market Landscape Report* was issued in July 2018, it does not discuss the Utah Courts' [online dispute resolution](#) system, which was launched in September 2018 and was the topic of my previous Jotwell post. See 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)). For additional Utah efforts, see Utah Supreme Court, *A Move Toward Equal Access to Justice* (March 4, 2019) (noting that by June 30, 2019, a work group will "make recommendations to the Court about optimizing the regulatory structure for legal services in the Age of Disruption in a manner that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services.").
4. This CCBE Committee webpage is unusually empty, but one can find relevant information [here](#) (2018 conference on AI and Justice); [here](#) (2016 conference agenda); and [here](#) (guide on lawyers' use of online legal platforms).

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