

# Transformative Change: Outsourcing the Practice of Law

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Already challenged by economic conditions, lawyers are increasingly facing new competitors who are providing legal services at lower rates than traditional lawyers. Cost drivers and technological advancements are motivating clients to seek their legal needs from offshore service providers, non-lawyers, and smaller domestic markets (collectively “outsourcing”). This paper examines how outsourcing is shifting the geographic and professional boundaries of the legal profession and considers its ethical consequences. Despite the uncertainty that these changes may bring, this paper argues that outsourcing ultimately will have a positive effect on the legal profession. Outsourcing will allow: (1) increased access to legal services; (2) a level of standardization that may lead to lower costs and decreased litigation; and (3) the possibility of better outcomes through specialization and collaboration. Nevertheless, in order to realize these benefits, lawyers will need to avoid any conflicts with the ethical rules and advocate for changes in the rules themselves.

This paper proceeds in three parts. Part I will discuss technology’s impact on outsourcing as well as the different kinds of outsourcing that affect the legal profession, such as outsourcing abroad, nearsourcing, and outsourcing to non-lawyers. Part II will examine ethical shortcomings that outsourcing may cause, what changes the ABA has made to address these shortcomings, and point to specific areas where lawyers should be especially cautious. Part III will explore how outsourcing could affect lawyers’ obligations positively under the Model Rules of Professional Conduct (the “Rules”) and propose changes to the Rules that will better reflect the ethical considerations of legal outsourcing.

## I. TECHNOLOGY'S CONTRIBUTION AND THE OTHER FORMS OF OUTSOURCING

### *A. Technology*

Advanced technology enables legal outsourcing by allowing lawyers and clients to transmit work over long distances, and it is increasingly a form of outsourcing in itself, as would-be clients can seek legal services through online platforms. This section will discuss three broad categories of technology that are transforming the traditional legal market: (1) advanced telecommunications, (2) Internet-based consumer legal services, (3) computer-aided legal work for attorneys.

The first category of transformative technology is advanced telecommunications, namely the Internet. The Internet's most important aspect is its ability to make geographic distance, whether from clients, courts, or libraries, irrelevant. Today, lawyers do the bulk of their research online and rely on e-mail to communicate with clients, courts, and each other. The Internet also allows clients and firms to transmit work easily across large distances, enabling clients to engage lower-cost legal service providers both domestically and globally.

The Internet is also the engine behind the second category of transformative technology—Internet-based consumer legal services. Online legal document preparation and online dispute resolution are two technological tools that consumers are increasingly using instead of lawyers. One example is LegalZoom, a well-known online document preparation service that helps consumers create basic, yet customized legal documents.<sup>1</sup> Consumers answer questionnaires on the LegalZoom site, which then creates a document based on the questionnaire.<sup>2</sup> Another way consumers are turning to online technology instead of lawyers is through online dispute resolution (“ODR”). ODR refers to alternative dispute resolution

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<sup>1</sup> [www.legalzoom.com](http://www.legalzoom.com). LegalZoom charges flat fees for its documents, starting at \$35. *Id.* Its offerings include wills, LLC formation documents, and other low- to medium-complexity documents. *Id.*

<sup>2</sup> <http://www.legalzoom.com/about-us/how-it-works>

processes that use the Internet instead of lawyers. For example, Cybersettle allows parties such as health providers and insurance companies to settle contested amounts with individuals.<sup>3</sup> The parties submit offers to Cybersettle; then, if two competing offers fall within a certain range, Cybersettle settles the claim for an average of the offers.<sup>4</sup>

A third category of transformative technology involves services within the legal industry. This kind of technology automates “grunt work” that attorneys (especially new attorneys) have historically performed. Predictive coding, for instance, is the use of computer algorithms and machine learning to review electronically stored information.<sup>5</sup> Predictive coding replaces labor-intensive document review, and is typically as effective, yet less expensive than, attorney-performed document review.<sup>6</sup> Other than predictive coding, there are growing technologies that help lawyers perform their jobs more efficiently. For example, Brightleaf is a cloud-based application that allows lawyers to upload their own form documents and create client questionnaires.<sup>7</sup> Instead of taking time to fill in blanks and format documents, lawyers can automatically create documents based on client questionnaire answers.<sup>8</sup>

In sum, technology is transforming the practice of law in three ways: (1) Internet-based communication collapses distances between attorneys and clients; (2) consumers are turning to online legal services instead of seeking help from lawyers; and (3) lawyers themselves are using technologies like predictive coding and document automation to save time and expenses.

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<sup>3</sup> [www.Cybersettle.com](http://www.Cybersettle.com)

<sup>4</sup> Robert J. Ambrogi, *Virtual Justice: Resolving Disputes Online*, 62 BENCH & B. MINN. 13 (2005).

<sup>5</sup> Bill Henderson, *Predictive Coding is a Disruptive Innovation that will Change how Law is Practiced*, available at <http://lawprofessors.typepad.com/legalwhiteboard/2012/12/predictive-coding-is-a-disruptive-innovation-that-will-change-how-law-is-practice.html> (hereinafter “*Predictive Coding*”).

<sup>6</sup> Henderson, *Predictive Coding*. A recent study showed that on average, predictive coding reduces review costs by 45 percent, but that judicial acceptance of predictive coding stands in the way of widespread adoption of the technology. Hon. Craig B. Shaffer, “*Defensible*” by what Standard?, 13 SEDONA CONF. J. 217 n. 43. Recently, however, a New York federal district court upheld the technology against procedural and evidentiary challenges. *Id.*

<sup>7</sup> [www.brightleaf.com](http://www.brightleaf.com)

<sup>8</sup> Brightleaf CEO Luke O’Brien estimates that Brightleaf helps lawyers draft documents in 60 percent of the time that it would take them to draft documents manually, so that lawyers can avoid minutia and spend more time counseling. Presentation from Luke O’Brien to Colorado Law’s Entrepreneurial Law Clinic, April 8, 2013.

## *B. Offshore*

Three trends have converged in recent years, increasing the pressure for corporations and law firms to outsource legal processes abroad. Rapid advances in technology have coincided with increasing pressure to contain costs. In response, many firms have looked to international markets as a source of easily accessible, low-cost labor. The offshoring trend has allowed firms to operate around the clock, further increasing efficiencies and lowering costs.

International areas are rich with technological and legal talent. For example, in India—the site of the overwhelming majority of legal process offshoring—there are millions of engineers and attorneys trained in the common-law tradition. And with up to 80 percent lower salary rates than the U.S., India is transitioning from a location known for low-skill, labor-intensive work to an area excelling in value-added services.<sup>9</sup> This has led to a visible trend in the legal industry where over the past decade, the nature of processes outsourced has transitioned from primarily document review and back-office work to highly skilled tasks such as appellate brief writing and patent prosecution.<sup>10</sup>

## *C. Nearsourcing*

Technology also allows many legal services to be “nearsourced” to domestic areas outside of expensive metropolitan cities. As corporate clients push law firms to be more price conscious, nearsourcing is an effective way to provide quality legal services at a lower cost.<sup>11</sup>

Nearsourcing is happening in two main ways. First, lawyers or law firms are moving outside of expensive metropolitan areas to other domestic locations that have a lower cost of

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<sup>9</sup> *Why Offshore Outsourcing*, Aeren LPO, [aerenlpo.com/why\\_outsourcing.php](http://aerenlpo.com/why_outsourcing.php) (last visited Apr. 23, 2013).

<sup>10</sup> *See generally Solutions*, Pangea3.com, <http://www.pangea3.com/solutions/legal-outsourcing-services.html>. (last visited Apr. 23, 2013).

<sup>11</sup> *See, e.g.*, Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. TIMES (Jan. 13, 2006), [http://www.nytimes.com/2006/01/13/business/13law.html?\\_r=2&](http://www.nytimes.com/2006/01/13/business/13law.html?_r=2&). Honeywell estimates that its spending on legal services has fallen by at least 25 percent as a result of using LRN, a company that provides targeted research conducted by legal experts, many of whom are law professors.

living. Lawyers can pass on to clients cost savings of cheaper rent, reduced salaries, and lower taxes.<sup>12</sup> As some U.S. firms are already sending business operations, such as IT, finance, and human resources, to lower-cost areas, some predict that the trend will continue and include moving legal work.<sup>13</sup> In the U.K., large firms like Allen & Overy hired lawyers in Belfast to do the legal work once done by highly paid junior lawyers in pricy London.<sup>14</sup> In the U.S., destinations such as Charlotte, Columbus, and West Virginia are becoming attractive options for law firms as the billable rates are lower than areas like the East and West Coasts, but the quality of work is high.<sup>15</sup>

Second, businesses are forgoing hiring in-house counsel and instead are relying on non-traditional law firms with lower fees and specialized services.<sup>16</sup> For example, technology enables law firms like VLP Law Group to offer lower fees because it has no central office or expensive overhead—instead its lawyers live all over the country.<sup>17</sup> These lower-cost models allow non-traditional legal service providers to offer reduced rates compared to metropolitan law firms.

#### *D. Non-lawyers*

Increasingly, lawyers are relying on non-lawyers to handle legal tasks. As clients continually pressure law firms to control cost, lawyers will increasingly look to have non-lawyers perform work at lower rates. The three most common traditional uses of non-lawyers are: 1) paralegals, 2) law clerks or law school graduates that are waiting for state licensing, and

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<sup>12</sup> See Ameet Sachdev, *Growth of legal outsourcing may herald era of cheaper lawyering*, LOS ANGELES TIMES (Jan. 1, 2011), available at <http://articles.latimes.com/2011/jan/01/business/la-fi-legal-outsourcing-20110101>.

<sup>13</sup> See Jason Mendelson, *Law Firm 2.0—Re-architecting the Law Firm—Outsourcing*, Mendelson’s Musings, Law <http://www.jasonmendelson.com/wp/archives/2009/03/law-firm-20-re-architecting-the-law-firm-outsourcing.php>; see also Leigh Kamping-Carder, *Firms Look To 'In-Sourcing' To Slash Costs*, LAW 360 (April 28, 2010), available at <http://www.law360.com/legalindustry/articles/164915>.

<sup>14</sup> Alex Aldrige, *Legal 'near-sourcing' threatens to widen status gap between London and regions*, THE GUARDIAN (June 16, 2011), available at <http://www.guardian.co.uk/law/2011/jun/16/two-tiers-lawyers-alex-aldrige>.

<sup>15</sup> Kamping-Carder, *supra* note 13.

<sup>16</sup> Glater, *supra* note 11.

<sup>17</sup> See VLP Law Group, <http://www.vlplawgroup.com/Default.aspx>.

3) clinical student-attorneys.<sup>18</sup> However, applications such as LegalZoom specify that they are not providing legal advice; thus they are non-lawyers performing traditional legal processes as well.<sup>19</sup>

While the various categories of non-lawyers may have different skills, all three are unable to practice law under Rule 5.5. However, comment 2 declares that Rule 5.5's ban on the unauthorized practice of law “does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”

The U.S. Department of Labor reports that “[e]mployment for paralegals and legal assistants is expected to grow much faster than the average for all other occupations through 2014. Employers are trying to reduce costs and increase the availability and efficiency of legal services by hiring paralegals to perform tasks formerly carried out by lawyers.”<sup>20</sup> Additionally, LegalZoom served more than two million customers over the last ten years.<sup>21</sup> Non-lawyers are increasingly performing legal processes.

## II. OUTSOURCING AND ETHICAL SHORTCOMINGS

Although this paper argues that there are ethical advantages to outsourcing in the legal profession, it is worth acknowledging outsourcing’s drawbacks and examining a few ways the Model Rules have been updated in light of outsourcing and technological change.

### *A. Scope of the Rules*

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<sup>18</sup> Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653, 659 (2010)

<sup>19</sup> <http://www.legalzoom.com/about-us/how-it-works>.

<sup>20</sup> <http://Collegegrad.com/careers/proft61.shtml>, citing Bureau of Labor Statistics, U.S. Department of Labor.

<sup>21</sup> <http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm>.

Given the language and source of the Rules, it is clear that they apply only to lawyers practicing in the United States.<sup>22</sup> Furthermore, the ABA's status as an American organization suggests that it cannot regulate the ethical conduct of lawyers in foreign jurisdictions.<sup>23</sup> The problem of the Rules' limited scope implicates both non-lawyers practicing law and lawyers in foreign jurisdictions contracting with American firms. While the problem might seem daunting, it is important to remember that a lawyer working in the United States must comply with the Rules when consulting with lawyers working abroad or domestic non-lawyers.<sup>24</sup> Therefore, even if these two groups are not directly bound by the Rules, the lawyer serving as an intermediary would have to ensure that nothing they do violates her obligation under the Rules.

With outsourcing, there is a risk attorneys may exploit the discrepancies between various ethical codes and disagree over the best form of regulation. Moving toward a code that focuses not on the professional status of the person providing the legal services, but on the duties owed to the client, is one possible solution. Lawyers and paralegals could collaborate in developing such standards, and legislation could make those standards binding in "legal representation." This solution is one possible way to deal with the problem of the Rules' scope, and it may not be a perfect fix.<sup>25</sup> It may still not cover lawyers practicing abroad, and its application to computerized legal services would doubtlessly raise some issues. Still, it is important to emphasize that a major weakness of the current Rules is their exclusive focus on lawyers.

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<sup>22</sup> See generally MODEL RULES OF PROF'L CONDUCT R. (written by the American Bar Association and referring duties of lawyers); see also ABA Opinion 08-451 (again discussing the duties of American lawyers under Rules when outsourcing).

<sup>23</sup> But see MODEL RULES OF PROF'L CONDUCT R. 5.5 (providing method for foreign lawyers to practice temporarily in American jurisdictions).

<sup>24</sup> Still, there may still be situations where outsourcing would mean the Rules do not apply. For example, if non-lawyers or lawyers practicing abroad can represent clients without the involvement of a licensed American lawyer, the Rules would not apply. Of course, both American professionals who are not lawyers and foreign lawyers have their own codes of professional conduct, such as the NALA Code of Ethics & Professional Responsibility and Rules on Professional Standards, Bar Council of India, that would likely adequately serve some of the same ethical goals as the Rules.

<sup>25</sup> See ABA Opinion 08-451 (stating outsourcing is appropriate so long as it complies with Rule 1.1 and Rules 5.1 and 5.3 governing a lawyer's supervision of other lawyers and non-lawyers).

### *B. Issues with Key Specific Rules*

In addition to the problem of the Rules' scope, outsourcing may create difficulties for American lawyers that are trying to comply with several Rules. For example, an American lawyer would still have to make sure that non-lawyers and foreign lawyers practicing under her supervision do not jeopardize the lawyer's obligations under Rule 1.1 or other Rules.<sup>26</sup>

Accordingly, any decisions to give assignments to non-lawyers or lawyers practicing abroad would have to fall under the rubric of competency as defined in Rule 1.1.<sup>27</sup> As a result, lawyers must pay particular attention to the meaning of competency in the outsourcing context.

Another serious risk is the damage outsourcing can do to client control. Rule 1.2 governs the relationship between clients and lawyers.<sup>28</sup> Heavy reliance on outsourcing can upset the balance this rule envisions. A client, who is one step removed from the process via outsourcing, may not have as much control over setting the objectives as he or she would have under a traditional client-to-firm relationship. Similarly, outsourcing can create tension with Rule 1.4, which provides lawyers with guidelines, including methods and frequency, on how to communicate with a client.<sup>29</sup> The more removed a client is from the person actually doing the work on a particular project, the more likely this rule will be violated.

Finally, outsourcing demands serious precautions in order to comply with Rule 1.6. A lawyer must be careful when considering what she can tell an out-of-firm lawyer without the client's consent.<sup>30</sup> There should be more guidance from state and national bar organizations over what efforts qualify as "reasonable efforts to prevent the inadvertent or unauthorized disclosure

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<sup>26</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1.

<sup>27</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2.

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4.

<sup>29</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4.

<sup>30</sup> See, e.g., Eli Wald, DISCLOSURE TO CLIENTS OF THE USE OF TEMPORARY LAWYERS AND OUTSOURCING, 41 COLO. LAW. 35 (emphasizing need to discuss use of out-of-firm legal help with clients).



of” client information.<sup>31</sup> Concerns over confidentiality will likely remain a substantial hurdle to increased reliance on outsourcing.

There are several ethical risks to law firms that outsource. First, while clients may have increased access to foreign lawyers and non-lawyers, it may be useful to consider reframing an ethical code that would ensure a consistent level of quality in representing clients regardless of what type of professional is representing them.<sup>32</sup> Under the current regime, lawyers who outsource must be especially cautious of complying with competency, confidentiality, and client control requirements under the Rules. Better guidance on how lawyers could comply with Rule 1.1 in particular from bar associations and state ethics committees would be especially useful.<sup>33</sup>

### *C. Updates to the Rules that Reflect Technological Changes*

Fortunately, several recent updates to the Model Rules account for the digitization of the legal services industry. In 2012, the ABA Commission on Ethics 20/20 proposed several technology-related changes to the Model Rules, many of which the ABA House of Delegates approved.<sup>34</sup> These “much-needed” changes finally recognize the technological transformation that the legal industry has undergone as more attorneys use laptops and mobile devices to communicate with clients and provide legal services remotely.<sup>35</sup> The categories of changes include:<sup>36</sup> (1) addressing online marketing tools for lawyers;<sup>37</sup> (2) clarifying lawyers’ duties

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<sup>31</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(c).

<sup>32</sup> See NALA Code of Ethics & Professional Responsibility, available at <http://www.nala.org/code.aspx>; see also, e.g., Rules on Professional Standards, Bar Council of India, available at <http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/>.

<sup>33</sup> ABA Opinion 08-451 does discuss the need for lawyers to comply with Rule 1.1 in outsourcing. However, that Rule’s broad language does not provide obvious standards in the outsourcing context.

<sup>34</sup> Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology’s Risks and Benefits*, *New Model Ethics Comment Says*, ABA J. (Aug. 6, 2012), available at [http://www.abajournal.com/news/article/lawyers\\_have\\_duty\\_to\\_stay\\_current\\_on\\_technologys\\_risks\\_and\\_benefits](http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits).

<sup>35</sup> The last technology-related changes to the MPRC were in 2002 to address issues presented by e-mail. Michele Lange, *Next-generation ethics: computers, competence, and electric communications*, INSIDE COUNSEL (Mar. 1, 2013), available at <http://www.krollontrack.com/publications/nextgenethics.pdf>; Weiss, *supra* note 33.

<sup>36</sup> For detailed changes see August 2012 Amendments to ABA Model Rules of Professional Conduct, [http://www.abajournal.com/files/20120808\\_house\\_action\\_compilation\\_redline\\_105a-f.pdf](http://www.abajournal.com/files/20120808_house_action_compilation_redline_105a-f.pdf).

<sup>37</sup> MODEL RULES OF PROF’L CONDUCT R. 1.18, 7.2, and 7.3.

regarding outsourcing;<sup>38</sup> (3) requiring lawyers to stay current on technology changes as a part of providing competent representation;<sup>39</sup> (4) giving lawyers some flexibility by allowing them to practice in a new state for up to a year while waiting for admission;<sup>40</sup> (5) addressing how lawyers should deal with client information;<sup>41</sup> and (6) acknowledging e-mail and electronic communications as common ways to communicate.<sup>42</sup>

These changes were needed not only to expand the scope of the Model Rules to include changes in technology and electronic communications, but also to provide lawyers guidance on how to navigate technological changes and the increased use of outsourcing. As more lawyers use technology and outsourcing to provide legal services, it is necessary to address some of the associated risks such as security, privacy, and confidentiality. Now, lawyers cannot remain ignorant of the technological changes, and the Model Rules mandate that they adapt and learn how to use these technologies effectively.<sup>43</sup>

One of the most significant rule changes is to a lawyer's duty of competency, requiring a lawyer to stay current with changes in the law and its practice, including relevant technology issues. There are questions about the degree of technological competency that is required, and the scope of the Rule.<sup>44</sup> For example, it may be difficult to balance technological proficiency and a lawyer's duty of competence for complex technological issues.<sup>45</sup>

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<sup>38</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3.

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1.

<sup>40</sup> Rule on Practice Pending Admission and Rule on Admission by Motion.

<sup>41</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6, 4.4.

<sup>42</sup> MODEL RULES OF PROF'L CONDUCT R. 1.0, 1.4.

<sup>43</sup> Despite the positive changes to the Model Rules, there is some concern that the changes are not enough, too vague, or come too late. One critic notes that these changes are "hardly a 'bewildering' change of pace, unless you have stayed in a cave and remained a Luddite." Michael Arkfeld and Stephanie Loquvam, *Are Proposed Changes to ABA Ethics Rules Too Little, Too Late?*, LAW TECHNOLOGY NEWS (Aug. 6, 2012), available at [http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202566460116&Are\\_Proposed\\_Changes\\_to\\_ABA\\_Ethics\\_Rules\\_Too\\_Little\\_Too\\_Late&slreturn=20130324022136](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202566460116&Are_Proposed_Changes_to_ABA_Ethics_Rules_Too_Little_Too_Late&slreturn=20130324022136).

<sup>44</sup> See Lange, *supra* note 35; Matt Nelson, *New changes to Model Rules a wake-up call for technologically challenged lawyers*, INSIDECOUNSEL.COM (Mar. 28, 2013), available at [www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech](http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech).

<sup>45</sup> Nelson, *supra* note 44.

As the Comments to Rule 1.1 do not outline the parameters of technological competency, lawyers may struggle to comply with this rule. While lawyers are not excused from remaining clueless about modest technological changes, some may be concerned about their sincere, yet unsuccessful attempts to comply with the Rule. Especially given the continuing changes to technology, there should be more structure and standards, such as through ABA ethics opinions, as to how to comply with Rule 1.1's technological competency requirement and for other rules that implicate technology issues.<sup>46</sup> Modifying the Model Rules is an involved process that may not be able to keep up with the rapid pace of technological changes. Thus relying on ethics opinions is a more flexible approach that can keep lawyers informed about technological changes and the standards for rule compliance.

### III: OUTSOURCING AND ITS EFFECTS ON ETHICAL RULES; CURRENT AND PROSPECTIVE

Part III explains that outsourcing ultimately will change the legal profession for the better, as it will improve access to legal services, lead to the standardization of legal processes, and increase attorney specialization.

#### *A. Increased Access*

Legal services have come at a premium for many years. Between 2000 and 2012, the price of legal services increased 30 percent more than other consumer prices.<sup>47</sup> The recent economic downturn and the rise of legal outsourcing are disrupting the high-cost model, however, as clients can be more selective about how and where to spend their limited legal budgets. Legal outsourcers are succeeding in today's economic climate either because they are meeting client needs for lower-cost legal services, or because their price structures allow them to reach previously untapped markets. Outsourcing is a positive development because it not only

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<sup>46</sup> For example, several ABA ethics opinions issued this year address technology issues such as e-mail communication and the use of social media.

<sup>47</sup> *America's legal industry: The case against clones*, THE ECONOMIST 51 (Feb. 2, 2013) (graph).

increases client access to legal services by allowing traditional clients to meet their needs on a smaller budget, but it also helps reach a new category of clients who could not afford legal services previously.

Clients, especially large corporations, were once beholden to law firms for legal services because firms were able to ensure competent legal work in a way that in-house lawyers could not.<sup>48</sup> The cost pressures created by the recent economic downturn led corporations to seek out the best value for the legal dollar. Corporate executives are pressuring in-house lawyers to reduce the amount they spend on external law firms by as much as 30 to 50 percent, even as increased regulation creates more legal work than ever before.<sup>49</sup> Faced with what scholar Richard Susskind calls the “more-for-less challenge,” corporate clients are increasingly turning to alternative legal service providers.

Alternative legal service providers, such as contract attorney suppliers, offshore legal process outsourcers (“LPO”), and e-discovery firms, are proving to be formidable competitors to traditional law firms. LPOs, such as Axiom and Pangea3, are claiming a growing percentage of lower-tier, but highly profitable work.<sup>50</sup> Since alternative legal service providers offer a solution to the “more-for-less” problem by specializing in streamlining routinized legal work, law firms must become more competitive. More law firms are experimenting with alternative fee arrangements and work-at-home attorney structures,<sup>51</sup> while others are bidding for client work in “reverse auctions.”<sup>52</sup>

The availability of more legal service providers means that clients have more choices in where to spend their legal dollar. When legal service providers compete for client business, the

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<sup>48</sup> Larry E. Ribstein, *Delawyerizing the Corporation*, 2012 WIS. L. REV. 305, 306 (2012).

<sup>49</sup> Richard Susskind, TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 4 (2013).

<sup>50</sup> Drew Combs, *Disruptive Innovation*, THE AM. LAWYER (2012).

<sup>51</sup> *See id.*

<sup>52</sup> Ribstein, *Delawyerizing the Corporation* at 323–24.

client wins. The service providers who can provide the best service at the lowest rates ultimately will succeed. In order to be players in this new market, lawyers will have to cut costs without compromising quality. By being flexible with fees and using efficient technologies and firm structures, lawyers can maintain an edge in competence and client-service. In the end, cost-efficient lawyers will be able to serve clients better in the new reality of small legal budgets.

Outsourcing is also expanding access to legal services to individuals and small businesses that have previously been unable to afford lawyers. For instance, Richard Susskind predicts that online legal services will help realize a “latent legal market” of individuals who would benefit from legal help, but up until now could not access it.<sup>53</sup> A prime example of this development is LegalZoom. LegalZoom has served more than two million customers in the last ten years, and the company’s revenue grew by 50 percent between 2009 and 2011.<sup>54</sup> According to the company’s 2012 S-1 filing, LegalZoom appeals to individuals and small businesses because attorneys are often unable to predict how much their services will cost, and LegalZoom’s documents are enough to satisfy their needs.<sup>55</sup>

Another example is ODR because it often helps consumers avoid high travel costs associated with choice of venue clauses in consumer contracts.<sup>56</sup> ODR is often an attractive alternative for consumers because it permits an inexpensive and convenient way to file case submissions and records in one virtual location.<sup>57</sup> Consumers often choose not to file claims in traditional court venues due the inconvenience of having to take time off of work, travel to the courthouse or away from home, and pay extra child care costs.<sup>58</sup>

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<sup>53</sup> Susskind, *TOMORROW’S LAWYERS* at 91.

<sup>54</sup> See <http://www.elawyringredux.com/2012/05/articles/legalzoom/legalzoom-the-good-enough-legal-solution/>.

<sup>55</sup> *Id.*

<sup>56</sup> Amy Schmitz, “Drive-Thru” Arbitration in the Digital Age, 62 *BAYLOR L. REV.* 178, 200–201.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

While neither LegalZoom nor ODR can match the competency traditionally provided by lawyers, for many consumers these online services are “good enough.”<sup>59</sup> Enabled by legal outsourcing, even low-competency legal services provide greater access to the law and meet the legal needs of previously unserved or underserved consumers. Without providers like LegalZoom, low- to middle-income consumers and small businesses might otherwise go without legal services entirely because they cannot afford attorneys’ fees.<sup>60</sup> Attorneys can serve this emerging client base in two ways: they can compete with online providers by lowering prices and creating their own web-based services, or they can add value on top of what online legal services provide. For instance, a small firm or a solo practitioner could specialize in tailoring LegalZoom contracts or fixing mistakes in wills. By providing “alterations” instead of bespoke legal services, these lawyers could ensure that low-income clients benefit from competent legal work at a price they can afford.

In sum, legal outsourcing provides greater access to legal services than the traditional model. Alternative service providers give client consumers more choice, and they force traditional lawyers and firms to innovate and provide more value for the client’s dollar. Online legal service providers like LegalZoom reach a previously unserved market of consumers and small businesses to provide them with legal services that are convenient, affordable, and competent enough to meet their needs.

### *B. Standardization of Legal Processes*

Standardization rests on the assumption that legal knowledge can be disaggregated into a set of processes or key elements.<sup>61</sup> Legal service providers, including non-lawyers, can then

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<sup>59</sup> See <http://www.elawyeringredux.com/2012/05/articles/legalzoom/legalzoom-the-good-enough-legal-solution/>.

<sup>60</sup> Brock Rutter, *Preparing for the Increasing Pace of Technological Change*, 28 VT. B.J. 35 (2012).

<sup>61</sup> Peter Sanderson & Hilary Sommerlad, *Exploring the Limits to the Standardization of the Expert Knowledge of Lawyers: Quality and Legal Aid Reforms in the United Kingdom*, 52 SYRACUSE L. REV. 987, 997–98 (2002).

establish a mechanized system based on those key elements to address an individual's legal needs. Companies such as Brightleaf<sup>62</sup> and LegalZoom<sup>63</sup> already utilize standardization as documents are automatically created through completing a pre-determined questionnaire. Standardization leads to reduced transaction costs thereby decreasing the total cost of legal services.<sup>64</sup>

Standardized legal processes are primed for outsourcing; they can be more easily handled by lawyers in different jurisdictions as well as by non-lawyers.<sup>65</sup> There is not as much of a need to understand jurisdiction-specific law when dealing with standardized processes, nor is there a need to understand complex legal concepts. For example, LegalZoom states that "LegalZoom is not a law firm and is not a substitute for an attorney or law firm."<sup>66</sup> LegalZoom is an example of an effective marriage between standardization and outsourcing. Further, processes such as document review, which are heavily standardized, are already being effectively outsourced. A rise in outsourcing likely will result in a proportional increase in standardization because as more legal service providers turn to outsourcing, the need to develop the technology to effectuate standardized legal processes will increase. While not all processes can be standardized and certain attorneys are likely to be affected more than others, standardization has and will continue to lead to greater access to basic legal services and reduce the amount of litigation.

First, there are limits to the types of legal services that are susceptible to standardization. If a form of legal knowledge cannot be decomposed to process measures or key elements, then it will not be prone to standardization. Legal services that rely on adaptation and creativity are not easily standardized. For example, attorneys that find a way to structure an acquisition to

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<sup>62</sup> <http://www.brightleaf.com/>. See also discussion of Brightleaf above.

<sup>63</sup> <http://www.legalzoom.com/>. See also discussion of LegalZoom above.

<sup>64</sup> Harry Surden, *Computable Contracts*, 46 U.C. DAVIS L. REV. 629 (2012).

<sup>65</sup> [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013\\_corporate\\_counselcseminar/8\\_1\\_legal\\_outsourcing\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcseminar/8_1_legal_outsourcing_authcheckdam.pdf).

<sup>66</sup> <http://www.legalzoom.com/about-us/how-it-works>.

maximize regulatory arbitrage may have difficulty developing common standards. Rather, the attorneys rely on creativity in structuring the deal. Further, standardization remains most useful in the transactional context.<sup>67</sup> A skillful litigator's knowledge cannot be easily deconstructed into a series of steps for a layperson to re-create. The litigator must assess a situation in real-time and adjust accordingly. Thus, legal services are not uniformly susceptible to standardization.

Additionally, standardization allows individuals who cannot access traditional legal services the ability to address basic legal needs. Low-cost legal service providers, pro bono attorneys, and court-appointed attorneys should utilize standardization where customization and creativity can be sacrificed for cost savings. Certain legal consumers will not want to sacrifice customization and unique skill sets in all contexts, yet standardization will lead to a net benefit because a greater segment of the population will have access to legal services due to decreased cost. Cost is a significant barrier to entry for many people in need of legal assistance, and there is a segment of the population willing to sacrifice customization and creativity for access, as standardized access is better than no access at all.

Because millions of Americans must navigate the legal system without the legal representation they need,<sup>68</sup> standardization is a means to lower costs, and even provide laypersons the ability to represent themselves more effectively. Certain groups such as The Legal Services Corporation, LLC ("LSC"), The Insight Center for Community and Economic Development, and Lawyers Alliance for New York all look to provide pro bono or reduced-fee transactional legal services.<sup>69</sup> These non-profits can utilize outsourcing, such as allowing non-lawyers to assist legal service consumers, through using standardized processes. While there are already programs, such as BrightLeaf, that these non-profit service providers can use, other

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<sup>67</sup> See, e.g., applications such as BrightLeaf, which standardize many transactional processes but few litigation processes.

<sup>68</sup> According to the American Bar Association, 80 percent of low-income residents' legal needs are not being met.

<sup>69</sup> <http://apps.americanbar.org/buslaw/committees/CL746000pub/newsletter/200912/barbieri.pdf>.



developing technologies such as computable contracts can continue to reduce the justice gap.<sup>70</sup> Computable contracts are the representation of contractual obligations as data instead of the traditional written language form, and allows for the application of advanced computer processing abilities to substantive contractual obligations.<sup>71</sup> These contracts are already used in the financial services industry and lead to substantially lower transaction costs. Outsourcing coupled with standardization can substantially diminish the justice gap.<sup>72</sup>

Further, standardization will lead to less litigation. As parties and courts become familiar with standardized forms and typical provisions, there will likely be fewer disputes over their meaning and applicability. For example, Delaware is the most-common corporate domicile in large part because the law surrounding corporate legal issues is well defined. Parties know what they are expected to do and the law is well settled. Similarly, the use of computable contracts has led to decreased litigation in the financial services industry due to standardized terms.<sup>73</sup> Standardization leads to industry norms, and parties will be less likely to litigate novel interpretations.

For standardization to realize its full potential, certain Rules such as Rule 5.5, Unauthorized Practice of Law, will likely need modification. Currently, programs such as LegalZoom have to navigate through a grey area between providing forms with instructions, which is deemed “not practicing law”, and providing legal advice, which is considered “practicing law.”<sup>74</sup> LegalZoom must be careful not to customize client documents based on answers in questionnaires; they can only operate using mechanically created documents. A lack

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<sup>70</sup> Surden, *supra* note 64.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Janson et al. v Legal-Zoom.com, Inc.*, 271 F.R.D. 506 (W.D. Mo. 2010).

of customization limits the effectiveness of these programs, despite the willingness of certain legal service consumers to accept less than complete representation.

Similar to the exception provided in unbundled services, Rule 5.5 could allow certain non-lawyers who specialize in preparing specific documents to provide additional assistance as long as there is client consent. There can be a form of licensing and oversight for this hypothetical “document preparation” industry and it can be a low-cost alternative to hiring an attorney to draft standard forms. The Rules do not reflect the current trend of standardization of certain legal processes, and they exacerbate the gap between those with legal needs and those willing to provide the service.

### *C. Attorney Specialization and Improved Legal Outcomes*

Among the more subtle benefits of legal process outsourcing are a rise in attorney specialization and the quality of clients’ outcomes. Technology and international participation in the legal process has not only allowed workers to work from lower-cost locales, but has allowed skilled domestic attorneys to provide services easily to the world. As these advancements drive down transaction and agency costs while enhancing network effects, the benefits to the legal consumer are significant.

Specialization is rising in the legal industry.<sup>75</sup> Further, empirical evidence confirms the time-tested theory that the division of labor among individuals increases with the size of the market also holds true in the legal services market.<sup>76</sup> As outsourcing of all varieties ensures that more actors will be providing legal services, and given that the demand for legal services will continue to grow, specialization will be a defining element of the legal services market. The

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<sup>75</sup> Mark LeHocky, *A Generation of Left-Handed Spitball Throwers: A GC’s Take on the Changing Legal Scene*, available at <http://www.argylejournal.com/functions/general-counsel/session-transcript-mark-lehocky-senior-vice-president-general-counsel-and-corporate-secretary-ross-stores-inc/>.

<sup>76</sup> Luis Garicano, *Specialization, Firms & Markets: The Division of Labor Within & Between Law Firms*, KELLOGG SCHOOL OF MANAGEMENT (June 2007), available at <http://www.kellogg.northwestern.edu/faculty/hubbard/html/research/papers/boundaries%20061507.pdf>.

positive and negative effects of outsourcing-driven specialization are visible in two prominent, high-growth areas: online legal services and e-discovery. Both areas of growth promise strong consumer benefits, but under the current framework, ethical constraints artificially curtail those promises.

E-discovery is the process of using digital forensics to identify relevant documents in civil litigation. Discovery, once the province of entry-level attorneys and a large source of income for law firms, is increasingly moving into the hands of LPO providers and other specialists. The reasons for the shift are clear: (1) the costs of employing a big-firm's young talent quickly reaches tens, if not hundreds of thousands of dollars; (2) the skills required to operate the most sophisticated systems is outside the abilities of classically trained attorneys; and, (3) the supply of legal and non-legal specialists has risen to meet market demand. Not only is work moving out of large law firms, but some attorneys and providers report that the work product of software providers is completed both at a substantially lower cost and with greater accuracy than when performed by live attorneys.<sup>77</sup> However, if outside specialists and non-attorneys are, in fact, the best means of conducting large-scale discovery, the ethical rules should adapt to meet the challenge of providing a higher level of service with the same level of client protection.

The dispersion of specialists and increased access to clients has led to another related trend—the availability of specialized attorneys through low-cost online legal marketplaces. Marketplaces such as RocketLawyer allow attorneys to participate in the legal matters of individuals and business regardless of location, substantially reducing the transaction costs of dealing with a sophisticated attorney. The benefits to attorneys as well as consumers are

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<sup>77</sup> Joe Palazzolo, *Why Hire an Attorney? Computers are Cheaper*, WALL ST. J. (June 18, 2012), available at <http://online.wsj.com/article/SB10001424052702303379204577472633591769336.html>.

significant. As more specialists are able to ply their trade to growing markets, the value of their specialization increases.<sup>78</sup> Pressure to specialize increases as a result of market pressures while network effects work to drive up the level of competency of practicing attorneys. As more competent services are being provided, the quality of client outcomes will rise accordingly.

Effectively solving ethical issues provides a platform for the improvement of e-discovery and online legal services, but also sets the stage for strengthening client protections across the LPO industry. As the specialization trend increases the level of competency required to provide the results clients demand, more elements of the legal process will migrate into the hands of these specialists regardless of whether or not the specialist is a licensed attorney. Adapting to these changing models will invariably help reduce agency costs, specifically, the inefficiency encouraged by the dominant billable-hour model. As the legal services market continues to flatten, competition will drive down costs, increase attorney competency, and improve legal outcomes for clients.

#### CONCLUSION

As this Paper has demonstrated, technology has opened the door for outsourcing in the legal profession. Outsourcing has changed the territorial and professional limits of the legal profession. Although various types of outsourcing present some problems for the Model Rules, outsourcing ultimately comports with lawyers' ethical duties to provide effective representation to clients and to expand access to legal services to those that might otherwise be left behind. Altering the Rules to reflect the changes outsourcing has presented will help ensure that thoughtful ethical standards can keep pace with a changing profession.

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<sup>78</sup> See Gary A. Munneke, *Why Specialize*, LAW PRACTICE TODAY (Jan. 2009), available at <http://apps.americanbar.org/lpm/lpt/articles/bkr01091.shtml>.