WHAT'S A LAWYER FOR? ARTIFICIAL INTELLIGENCE AND THIRD-WAVE LAWYERING

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Your scientists were so preoccupied with whether or not they could that they didn't stop to think if they should.[1]

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1. JURASSIC PARK (Universal Pictures 1993).

INTRODUCTION

The American legal profession is at a critical inflection point, one that will likely result in dramatic changes in the ways that consumers access legal guidance and the manner in which lawyers and others deliver it.[2] A strategic inflection point has been described as a situation where "the balance of forces shifts from the old structure, from the old ways of doing business and the old ways of competing, to the new."[3] Chat-enabled artificial intelligence, algorithmic decisionmaking, digitization, and commoditization threaten "the old ways of doing business"[4] within the legal profession as it is currently constituted by making legal services and information easier to deliver, less expensive to provide, and less difficult for consumers to access.[5] New technologies could lower the cost of legal services generally and make many forms of legal information easier to disseminate, and, as a result, more widely distributed.[6] Because of this, more consumers are likely to gain access to some type or form of legal assistance, even if it does not mean

2. *See generally* Anthony E. Davis, *The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence*, 27 PRO. LAW., no. 1, 2020, https://www.americanbar.org/content/dam/aba/publications/professional_lawyer/27-1/pln-27-1-issue.pdf [https://perma.cc/L4DQ-DNQP] (describing the impact of artificial intelligence on the legal profession, lawyers, and the practice of law).

3. ANDREW S. GROVE, ONLY THE PARANOID SURVIVE: HOW TO EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY COMPANY AND CAREER 33 (1996).

4. *Id.*

5. For an overview of the ways in which technology can be utilized to improve access to justice, see LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE (2013) [hereinafter LSC SUMMIT REPORT], https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf [https://perma.cc/GRC9-85MM]. For a discussion of the use of chat-enabled search to generate legal documents, see Blair Chavis, *Does ChatGPT Produce Fishy Briefs?*, ABA J. (Feb. 21, 2023, 1:58 PM), https://www.abajournal.com/web/article/does-chatgpt-produce-fishy-briefs [https://perma.cc/J4S3-HUUD]. On algorithmic decisionmaking in legal systems, see Carla L. Reyes & Jeff Ward, *Digging into Algorithms: Legal Ethics and Legal Access*, 21 NEV. L.J. 325, 332-35 (2020).

6. *See* LSC SUMMIT REPORT, *supra* note 5.

they will necessarily receive the direct services of a lawyer.[7] It likely also means that the traditional methods by which legal services have been delivered will become obsolete in at least some contexts, and with them, many traditional legal services jobs and careers as well.[8] This will, of course, have a dramatic impact on what lawyers do, who delivers services that look like legal services, what law students learn, and what law schools teach.[9]

Putting aside the likely dramatic impacts of this transformation on practicing lawyers, the legal system, law schools and the law students of today and tomorrow, and for consumers, who may find themselves with greater access to some form of legal guidance at a fraction of the cost a lawyer might charge for the same or similar services, the changes that are afoot in the delivery of legal assistance are not unmitigated benefits.[10] Much could easily be lost as guidance to address legal problems is digitized, commoditized, and delivered in accessible and affordable ways, just not by lawyers.[11] Indeed, given that the American legal profession advances values essential to democracy and serves critical functions in society, are new models of service delivery, fueled by technology, able to supplant traditional legal services roles in ways that do not undermine these critical values and functions? An assessment of the potentially negative impacts of the coming technological transformation of the American legal profession is necessary to ensure that we do not, in the name of improving access to legal guidance through technological innovations, or simply in the name of disruption for disruption's sake,[12] undermine the core values the legal

7. Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance,* sans *Lawyers*, 31 GEO. J. LEGAL ETHICS 377, 382-85 (2018) (describing some technology-based legal services interventions that do not involve the delivery of services by a lawyer).

8. On the likely impact of technology on professional roles, see RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 110-18 (2013).

9. *See generally* Sarah R. Boonin & Luz E. Herrera, *From Pandemic to Pedagogy: Teaching the Technology of Lawyering in Law Clinics*, 68 WASH. U. J.L. & POL'Y 109 (2022) (describing ways in which technology has been incorporated into law school clinical program across the United States).

10. For a discussion of some of the risks associated with legal assistance provided through technology, even that which expands access to justice, see Raymond H. Brescia, *What We Know and Need to Know About Disruptive Innovation*, 67 S.C. L. REV. 203, 214-19 (2016). For a discussion of the risks associated with the delivery of legal services through technology when the technology has not yet matured to the point that it can fully meet demand adequately, see Brian Sheppard, *Incomplete Innovation and the Premature Disruption of Legal Services*, 2015 MICH. ST. L. REV. 1797, 1876-1907 (2015).

11. For a discussion of the interplay between the provision of legal services by nonlawyers, unauthorized practice of law rules, and access to justice, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 74-96 (1981).

12. *See, e.g.*, Jill Lepore, *The Disruption Machine: What the Gospel of Innovation Gets Wrong*, NEW YORKER (June 16, 2014), https://www.newyorker.com/magazine/2014/06/23/the-disruption-machine [https://perma.cc/PB7B-7RSH] (critiquing the theory of disruptive innovation).

profession is supposed to advance and displace the functions it is best suited to fill in ways that are not in the long-term interest of consumers, democratic institutions, and society at large.[13]

At critical inflection points in the American legal profession's history, it has responded to demands from within and outside the profession to address the ways in which the profession was not serving its appropriate functions in society and failing to uphold what should be its values.[14] At one of the more significant inflection points, which occurred at the turn of the twentieth century, the profession went through dramatic change: moving it from what I call the profession's "first wave," where a loosely organized bar made up almost exclusively of white men of Northern European descent faced few barriers to entry into the profession,[15] to its "second wave," when the profession erected significant barriers to entry and institutionalized such barriers in an effort to maintain greater control over the practice of law.[16] I argue here that we are on the cusp of what may be a new "third wave"—where technology impacts the practice of law and the ways in which consumers access legal assistance in dramatic ways.

But to change for the sake of change alone is not a good enough reason to applaud the coming disruptions in the delivery of legal services due to new technologies. There must be a need for change, and a logic behind it, that both justifies it and ensures that these disruptions leave American consumers better off than before the change took place. To assess the coming changes to the profession, and whether they will result in benefits to consumers, we must consider how such changes will advance, or undermine, the role the American legal profession plays in society. Any profession promotes a set of professional values and serves a particular role in society.[17] The legal profession, like any profession, should serve its appropriate role in society and should fulfill its purpose. A critical question for the profession, and society at large, is whether new technologies undermine or advance

13. *See infra* Section I.B.

14. For example, in 1980, the American Bar Association created a committee to "rekindle professionalism" in the profession. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, "…. IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, at v (1986). Roughly seventy-five years earlier, the creation of the American Bar Association's first Canons of Ethics in 1908 was itself a reaction to a perceived crisis of professionalism in the profession. *Report of the Committee on Code of Professional Ethics*, 29 ANN. REP. A.B.A. 600, 601 (1906) [hereinafter *Report of the Committee*]. Similar events, like the Watergate Crisis and the financial scandals of the early 2000s, have led to similar moments of introspection and reform. *See, e.g.*, JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 101-03 (2013) (describing the impact of the Watergate scandal on the legal profession and law schools); Andrew A. Lundgren, *Sarbanes-Oxley, Then* Disney*: The Post-Scandal Corporate-Governance Plot Thickens*, 8 DEL. L. REV. 195, 197-204 (2006) (describing ethics reform after the financial scandals of the early 2000s).

15. *See infra* Section I.A.1.

16. *See infra* Section I.A.2.

17. *See infra* Section I.B.

that role. What is lost and what is gained with respect to the values the profession is supposed to uphold and those functions it is supposed to fill when new technologies might displace traditional modes of delivering legal services? To answer these questions, one must first assess the values and functions of the American legal profession. Once such an assessment is complete, one can embark upon a broader effort, one that reviews the ways in which new technologies are being deployed and will be deployed in the future, and calibrate such uses in ways that advance a purpose-driven legal services model in a technology-enhanced legal ecosystem. What I hope to accomplish in this Article is to lay out the parameters of the debate around the coming disruptions to the delivery of legal services due to emerging technologies and identify the considerations that should go into any assessment of the proper role that the legal profession should play in the face of this current inflection point.

With these goals in mind, this Article proceeds as follows. In Part I, I provide a brief overview of the history of the American legal profession, identifying the first two waves of lawyering in the United States and attempting to make the case that we are on the verge of a new wave, a third wave, in light of new technologies. I also assess the values the American legal profession, as a profession, is supposed to uphold and the functions lawyers fill within a diverse, multi-racial, constitutional democracy.[18] These values include such things as the rule of law, the preservation of democratic institutions, and a commitment to an adversarial legal system, among others.[19] In addition, the functions have instrumental, affective, and political characteristics to them.[20] Following this description of the values and functions, Part II then develops a framework for determining when certain types of service delivery models are appropriate in different settings to ensure that legal assistance is provided to consumers in ways that are consistent with purpose-driven lawyering.[21] Part III then deploys the framework in several real-world scenarios that help demonstrate the ways this framework can assist in assessing the appropriate service delivery model in particular settings. Part IV then views the framework in light of existing legal ethics paradigms to assess the extent to which this framework is consistent with such paradigms or whether the legal profession needs new paradigms for third-wave lawyering.[22]

At the outset, though, it is important to note that what I am largely exploring is the extent to which new technologies will *change* the practice of law, but not displace lawyers altogether. There is obviously

18. *See infra* Section I.B.1.
19. *See infra* Section I.B.1.
20. *See infra* Section I.B.2.
21. *See infra* Part II.
22. *See infra* Part IV.

some space between a future where all legal matters are resolved through artificial intelligence[23] and one in which the practice of law is preserved in amber, not changing any of its practices in light of new technologies. It is that in-between space I set out to explore here: where some services are delivered by lawyers but assisted considerably through artificial intelligence; where some services are provided predominantly through lawyers with little assistance from artificial intelligence; and where some services are provided exclusively through artificial intelligence and other technologies, with a lawyer playing a small—if any—role in that delivery. The ultimate goal is to begin to develop a sense of the cartography of this space, to identify the borders—blurry though they may be at times—that might separate these different modes of service delivery.

I. THE VALUES AND FUNCTIONS THAT SHOULD ANIMATE "THIRD-WAVE" LAWYERING

A. Three "Waves" of Lawyering

1. The First Wave: The Early American Legal Profession

In the earliest colonies, lawyers were practically non-existent as many of those colonies were founded on religious precepts that tended to vest power in religious leaders,[24] and disputes were often determined by religious principles.[25] Lawyers were often viewed as undermining communitarian values.[26] There was also little need for lawyers in the informal court systems, where most could represent themselves,[27] and some colonies even made it illegal to represent another, other than a family member, in court for compensation.[28]

As the colonies became more populous, and life more complex, the courts became more formal, which meant they required lawyers with

23. I use the term "artificial intelligence" (AI) loosely here as a catch-all for a range of new technologies, including machine learning, which marshals large data sets to provide predictive analytics, and generative AI, which combines search functions with a form of predictive analytics to provide not just search results, but to answer questions posed in search. *See, e.g.*, Bernard Marr, *What Is the Difference Between Artificial Intelligence and Machine Learning?*, FORBES (Dec. 6, 2016, 02:24 AM), https://www.forbes.com/sites/bernardmarr/2016/12/06/what-is-the-difference-between-artificial-intelligence-and-machine-learning [https://perma.cc/787P-U4CX].

24. Anton-Hermann Chroust, *The Legal Profession in Colonial America*, 33 NOTRE DAME LAW. 51, 68 (1957) [hereinafter Chroust, *Legal Profession*].

25. *Id.* at 66-68.

26. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 63-64 (Oxford Univ. Press 4th ed. 2019) (1973).

27. Chroust, *Legal Profession*, *supra* note 24, at 67; SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750-1900, at 69 (1991).

28. Chroust, *Legal Profession*, *supra* note 24, at 59.

some modicum of legal training.[29] Thus began the first "wave" of American lawyering. Legal training at this time would often occur through an apprenticeship with a practicing lawyer for a period of years.[30] The lawyers in a community would then determine whether a particular apprentice was ready to practice on their own.[31] Lawyers could thus control entry to the profession at two points: by determining who could apprentice and then granting those apprentices the authority to practice.[32] Lawyers and their apprentices tended to hail from wealthier classes to begin with: an apprentice typically had to pay for the privilege of serving a practicing lawyer or had to have family wealth sufficient to send them to England to apprentice there.[33] For these reasons, many of the first lawyers had aristocratic backgrounds and held conservative political leanings.[34] At the same time, the legal profession was a "ladder to success, financially and politically."[35] By the time of the Revolution, many lawyers remained loyal to the British Crown and then fled after American independence,[36] with, by some estimates, as many as 200 lawyers leaving the new nation, creating an opening for ambitious strivers.[37]

After the Revolution, the courts had mostly assumed the role of determining admission to the bar, still leaving training to take place through the apprenticeship system.[38] In the early days of the Republic, however, as Alexis de Tocqueville observed, even though he was struck by an apparent "equality of conditions" within the new nation,[39] he would say that the legal profession was the "only aristocratic element" within it.[40] David Hoffman, a prominent Baltimore lawyer, would share this view, asserting that lawyers as a class were just this sort of aristocracy because they were "patriotic, enlightened, and mainly virtuous" as compared to the masses, who were "selfish, crude, and mainly unprincipled."[41]

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29. HABER, *supra* note 27, at 67-76.

30. *Id.* at 73.

31. Chroust, *Legal Profession*, *supra* note 24, at 80-81.

32. FRIEDMAN, *supra* note 26, at 67.

33. *Id.* at 66-67.

34. *Id.* at 70.

35. *Id.* at 290.

36. *Id.* at 289.

37. *Id.*

38. *Id.* at 301.

39. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 6 (Henry Reeve trans., D. Appleton & Co. 1904).

40. *Id.* at 277.

41. ANTHONY GRUMBLER, MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS 233-34 (Baltimore, Coale & Co. 1837). Hoffman published this essay under a pseudonym.

This concept of lawyers as a de facto American aristocracy did not sit well with a nation that would soon become dominated by the Jacksonian ethos of equality of opportunity.[42] During this time, access to the profession became fairly open,[43] and most barriers—for white men, that is—had fallen by the start of the Civil War.[44] This was in part because, as historian Lawrence Friedman explains, with the expansion of the population and growth of the nation, the United States needed a legal profession that was also "large, amorphous, [and] open-ended."[45] After the war and in the last decades of the nineteenth century, however, dramatic changes in life and the law meant that the profession had to change. The changes that occurred led the profession to begin what I will call the second wave of the American legal profession, one marked not by amorphousness and open-endedness, but rather restriction and control.

2. The Second Wave: Lawyers at the Start of the Twentieth Century

While the nation was becoming even more populous, with immigration and migration increasing urbanization and technology impacting manufacturing and the growth of cities, the economy became far more complex, and both the law and the legal profession needed to keep pace.[46] And when law becomes more complex, it opens up more opportunities for lawyers.[47] What is more, the lawyers not only had to help shape the laws around technologies, like telecommunications and the railroads, but they also had to adapt to the use of technologies in their practice itself. However, some lawyers resisted the adoption of the telephone or the typewriter because they were impersonal modes of communication and would inhibit the formation and maintenance of the attorney-client relationship.[48] Others decried the fact that new technologies made it possible to reproduce and disseminate judicial decisions, making them more readily available, meaning that lawyers

42. DOUGLAS T. MILLER, JACKSONIAN DEMOCRACY: CLASS AND DEMOCRACY IN NEW YORK, 1830-1860, at 25 (1967).

43. 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 165-66 (1965).

44. ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920, at 116 (1967).

45. FRIEDMAN, *supra* note 26, at 237.

46. The literature on the changes occurring in the U.S. economy and the laws and regulatory state in particular and life in general in the late nineteenth century is vast. Representative scholarship includes THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 59-74 (2003); WIEBE, *supra* note 44, at 164-95; JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 145-46 (1977); Price Fishback, *The Progressive Era*, *in* GOVERNMENT AND THE AMERICAN ECONOMY: A NEW HISTORY 288 (2007).

47. *Report of the Committee*, *supra* note 14, at 601 (describing recent developments in the law and society and the need for the legal profession to evolve to address "changed conditions").

48. GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970, at 191-96 (1970).

could no longer bluster about general principles in their arguments if they faced adversaries who referenced actual judicial authority for their positions.[49]

The open nature of access to the profession itself, a vestige of the Jacksonian era, also meant that the rolls of the bar were increasing dramatically, with many seeking bar admission from the lower end of the economic spectrum, particularly from new immigrant communities.[50] This spurred a bit of a crisis within the profession's elites, and they embarked upon a decades-long quest to control access to the profession, making it more difficult and expensive to join, while also seeking to curtail some of the tactics that these striving lawyers used to advance the cause of their clients, which were often adversaries of the bar's elites.[51] Bar associations—made up of the bar's elite lawyers—formed at this time and began to write rules for the profession where no formal, national guidance had existed before.[52] The profession in this second wave had as its hallmarks greater barriers to entry into the profession, like bar examinations and educational prerequisites,[53] and a code of ethics that sought in some ways to restrain practices common to non-elite lawyers, like advertising, paying third parties for referrals, and providing financial assistance to clients.[54] This period also saw the emergence, and dominance, of law schools as the main

49. *Id.* at 196.

50. *Report of the Committee on Legal Education and Admissions to the Bar*, 26 ANN. REP. A.B.A. 395, 419 (1903) (decrying the alleged influx of "illiterate foreigner[s] who can hardly read or write English" in the practicing bar).

51. For a description of the formation of the American Bar Association, which would write the first nationwide code of ethics and was made up of elite lawyers serving elite clients, see John A Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association*, *in* THE NEW HIGH PRIESTS: LAWYERS IN THE POST-CIVIL WAR ERA 75, 75-81, 87-90 (Gerard W. Gawalt ed., 1984); *see also* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 45-54 (1977) (arguing that the movement for a code of ethics "concealed class and ethnic hostility" because "Jewish and Catholic new-immigrant lawyers of lower-class origin were concentrated among the urban solo practitioners whose behavior was unethical because established Protestant lawyers said it was").

52. By the time of the writing of the ABA's new Canons, ten state bodies had adopted codes, most of them modeled on Alabama's code, first adopted in 1887. *Report of the Committee on Code of Professional Ethics*, 30 ANN. REP. A.B.A. 676, 676-78 (1907) (describing extant state codes). One state's code, Louisiana's, was roughly two pages long and was not based on Alabama's. *See id.* at 714.

53. According to Richard Abel, "[t]he profession reinforced the exclusion of immigrants and their sons with every new barrier it erected," including pre-law educational requirements which simply reinforced the fact that "many universities discriminated against religious and ethnic minorities," and applied more stringent law school accreditation requirements. RICHARD L. ABEL, AMERICAN LAWYERS 85 (1989).

54. *See* AM. BAR ASS'N, MEMORANDUM FOR USE OF AMERICAN BAR ASSOCIATION'S COMMITTEE TO DRAFT CANONS OF PROFESSIONAL ETHICS 43-50 (1908) (describing debates within the ABA committee charged with drafting the code of ethics over contingency fees, advertising, and sharing fees with non-lawyers); *id.* at 64-79.

avenue through which aspiring lawyers would join the profession.[55] In turn, these institutions of the profession became the hallmarks of the practice of law for roughly a century, which leads to the present moment, which, I argue, has the potential for reshaping the profession so much that it might be time to consider the profession as entering a third wave.

3. The Third Wave: The Technology-Enhanced Profession

Although we are a far cry from law firms where telephones and the typewriter made certain lawyers uncomfortable, still, in many ways, the institutions of the American legal profession remain largely intact since their emergence in the early twentieth century: aspiring lawyers still attend law school and take bar examinations; they largely practice in law firms, some of which have been around for more than a century; and they organize into bar associations and follow codes of ethics.[56] At the same time, the practice of law has changed dramatically, largely due to technology.[57] Research on digital databases, word processing and document assembly, e-discovery, electronic document review, digital file management, and remote conferences with courts and adversaries are all part of legal practice in the twenty-first century, and the widespread adoption of at least some of these technologies has accelerated as a response to a global pandemic.[58] Still, lawyers mostly serve clients in traditional, "bespoke" ways: they calibrate the services they offer to the clients before them, based on an individualized assessment of each client's specific needs and whether those clients are individuals or large, multi-national corporations.[59]

What "third-wave" lawyering, super-charged by new technologies centered around artificial intelligence, could mean is that the traditional way of delivering services changes dramatically. Lawyers are likely to use generative AI, if not to write their briefs, at least to give them a little bit of a head start on them.[60] They will utilize predictive analytics to assess cases and determine the optimal claims to raise and

55. *See Proceedings of the Section of Legal Education and Admission to the Bar*, 44 ANN. REP. A.B.A. 656, 662-88 (1921) (describing debates and recommendations for strengthening educational prerequisites to bar admission).

56. For an overview of the current state of the American legal profession, see BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 173-88 (2015).

57. For an overview of some of these technological changes, see Drew Simshaw, *Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J.L. & TECH. 150, 152-56 (2022).

58. For an overview of some of the changes to court procedures in response to COVID protocols, see GINA JURVA, THOMSON REUTERS INST., THE IMPACTS OF THE COVID-19 PANDEMIC ON STATE & LOCAL COURTS STUDY 2021: A LOOK AT REMOTE HEARINGS, LEGAL TECHNOLOGY, CASE BACKLOGS, AND ACCESS TO JUSTICE (2021).

59. RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 34 (2010) (describing "bespoke" legal services).

60. Chavis, *supra* note 5 (describing potential uses of generative AI to draft legal briefs).

the best courts in which to raise them.[61] In many ways, these new technologies will make the practice of law more efficient and are not likely to displace many lawyers, except those lawyers who do not adopt them. Because of this, at least some of these technologies are what Clayton Christensen called "sustaining" innovations: they help incumbents within a market provide products and services in more effective ways, and such sustaining innovations do not do much to change a particular market.[62] But not all changes to the ways in which consumers access legal services will be such sustaining innovations.

There are also likely to be what Christensen would call disruptive innovations as well, innovations that transform an industry and allow new entrants to undermine, if not completely supplant, incumbents.[63] Third-wave lawyering that is more disruptive will likely turn the bespoke model on its head, delivering more and more commoditized services, i.e., services that are not calibrated to a particular consumer but are offered as "out-of-the-box" solutions to consumer problems.[64] These services will be delivered at scale, with the assessment occurring at the front end of the service delivery model, where a determination will be made whether a particular consumer is appropriate for the services provided, and not in the traditional model, where the client is assessed for the services they need and then the lawyer provides those services to them, if the lawyer is competent to do so.[65] In an artificial intelligence-fueled world of legal assistance, the technology will craft solutions based on a range of factors compiled through its algorithms and search functions and then match the consumer to the services available. A machine learning system would also strive to accommodate the needs of those consumers who do not fit into existing models, building a larger and larger library of problem-solving algorithms that will fit a larger and larger consumer base.[66]

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61. Agnieszka McPeak, *Disruptive Technology and the Ethical Lawyer*, 50 U. TOL. L. REV. 457, 461-62 (2019) (describing the use of predictive analytics in law practice).

62. CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, THE INNOVATOR'S SOLUTION: CREATING AND SUSTAINING SUCCESSFUL GROWTH 34-35 (2003) (describing sustaining innovations).

63. *Id.* at 32-34 (describing disruptive innovations).

64. Raymond H. Brescia, *Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*, 64 BUFF. L. REV. 745, 815-17 (2016) [hereinafter Brescia, *Uber for Lawyers*] (describing the potential for commoditized legal services).

65. Again, this is the "bespoke" services Susskind describes. *See* SUSSKIND, *supra* note 59, at 34.

66. This is not the only way in which technology will likely impact the delivery of legal services, but it stands as a sort of example of the basic structure of this impact: artificial intelligence will seek to displace traditional forms of legal services. This type of disruption is consistent with Christensen's theories on disruptive innovation: it begins at the "low" or less-complex end of the market and slowly increases market share. CHRISTENSEN & RAYNOR, *supra* note 62, at 32-35.

A question for the profession is where do lawyers fit within this new "wave" of lawyering? Just because this approach to lawyering might be possible with new and emerging technologies, that does not answer the question of whether it is, on the whole, beneficial and positive for society in general and for lawyers and consumers of legal services in particular. In order to determine whether what I am calling third-wave lawyering is something the legal profession should welcome, or resist, we must first determine whether this approach to the provision of legal services furthers the values and functions the legal profession is supposed to advance. To answer that question, the next Section explores just what those values and functions are and should be.

B. The Profession as a Profession: Defined by Its Values and Functions

According to sociologist Eliot Freidson, whose work informed the ABA's work in the early 1980s that sought to "rekindle professionalism" in the profession,[67] while a profession's existence is instantiated in its physical institutions and their artifacts, like their "charters, official classifications, [and] licensing laws,"[68] there are other "less tangible, but . . . no less essential" elements[69] that "justify the institutions of professionalism."[70] These are "the claims, values, and ideas that provide the rationale for these institutions of professionalism,"[71] and it is this cluster of concepts that set forth and justify a profession's institutional role, or its purpose.[72]

1. The Values of the Profession

A place to start for an understanding of the values at the heart of the legal profession is what lawyers say about themselves, the roles they see themselves fulfilling, and the values they see themselves advancing. Probably the best place for this, though by no means the only repository of such information, is the preamble to the American Bar

67. *See* AM. BAR ASS'N COMM'N ON PROFESSIONALISM, *supra* note 14, at 10 (referencing Freidson's research).

68. ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 105 (2001).

69. *Id.*

70. *Id.*

71. *Id.*

72. *See, e.g.*, Ray Worthy Campbell, *A Comparative Look at Lawyer Professionalism: Contrasting Search Engine Optimization, Lawyering, & Law Teaching*, 50 U.S.F. L. REV. 401, 403-13 (2016) (surveying theories of professionalism and recognizing an ideal for the legal profession, as a profession, that it should promote a "higher purpose" than mere financial remuneration "that sets limits on self-interested behavior" of those within the profession); *see also* WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930, at 45-76 (1986) (describing the emergence of critical institutions at the end of the twentieth century as consistent with the profession's self-perception of its role in society).

Association's *Model Rules of Professional Conduct*.[73] It provides that a lawyer is a member of a "profession," a "representative of clients, an officer of the legal system[,] and a public citizen having special responsibility for the quality of justice."[74] I will use this frame as a way to understand the different core components of the lawyer's role.

As a representative, the lawyer is supposed to play an advocacy role in the adversarial system.[75] The American system of justice is an adversarial one, and we believe that the adversarial process is the one that leads to the most just result, or is at least one where the adversaries, on what is believed to be equal ground, can pursue their interests before an impartial adjudicator to ensure a result we expect will be fair given an application of fair procedures.[76] In a pluralistic, democratic system, it is this belief in a robust adversarial system that produces the fairest result, one that, we hope, is free of the bias or favoritism present in an autocratic system.[77] Of course, we know that there are many biases at work in the system of justice and that racial, ethnic, and income inequality have created a system that does not always dispense justice.[78] Yet we have adopted an adversarial system with the belief that it is the best protection against these biases and will lead to the most just result.[79] In this role, lawyers promote the democratic values of pluralism (the law and the system of justice within which the lawyers work are products of the democratic process) and equality be-

73. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

74. *Id.* pmbl. ¶ 1.

75. The *Model Rules* describes the adversarial role in several ways. Paragraph two of the preamble to the rules states as follows:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.

Id. pmbl. ¶ 2.

76. For a discussion of the American system of adversarial justice and the lawyer's role in it, see DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19-64 (2007).

77. For a discussion of the relationship between an adversarial system of justice and democratic legitimacy, see DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 184-99 (2008).

78. On the role of equality before the law as an essential function of the rule of law, see PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 42-55 (2016).

79. *See* Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME LAW. 479, 481 (1962) (describing the role of the adversarial system in advancing fair results).

fore the law (the legal system views parties equally and without special favor).[80] The lawyer's adversarial role helps in the application of these principles and the pursuit of just results within the system.[81]

But a lawyer plays an "adversarial" role even when we might perceive there being no formal adversary in a particular setting. Lawyers are advocates for their clients' interests, whether involved in formal litigation or providing guidance and counseling in ordering a client's affairs, like drafting a will or forming a business.[82] The lawyer provides informed insights and takes action on behalf of the client to promote the client's goals and to avoid significant problems arising from a failure to order one's affairs correctly.[83] Even where there are multiple parties involved in a matter, like creating a joint business venture or financing a construction project, those parties, represented by lawyers who are functioning as advocates for their respective clients' interests, can seek mutually beneficial results through negotiations that can be completely amicable and non-adversarial.[84]

Similarly, we also know that an adversarial approach, whether espoused by the lawyer on their own or dictated by the situation or the short-sighted demands of a client, can sometimes lead to poorer outcomes for that client.[85] In such situations, the lawyer, as advocate, should strive to educate the client on the value of collegiality, civility,

80. On the relationship between pluralism and the adversarial system, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 264 (1988).

81. At the same time, an adversarial system where both sides do not enjoy legal representation is one that cannot realize these ideals, a notion I will return to throughout this work. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785-86 (2001).

82. Benjamin C. Zipursky, *Integrity and The Incongruities of Justice: A Review of Daniel Markovits's* A Modern Legal Ethics: Adversary Advocacy in A Democratic Age, 119 YALE L.J. 1948, 1973 (2010) (reviewing MARKOVITZ, *supra* note 77) (arguing that "[t]he overwhelming majority of lawyers have a transactional, business, or bureaucratic practice that does not principally involve adversarial advocacy").

83. In the social change context, the role of the lawyer in providing what Richard Marsico calls "facilitative lawyering" is particularly acute because the lawyer wants to protect the client's interests but also their autonomy to make their own decisions about their interests. Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 658-63 (1995).

84. For the conflicts that can arise in even what is quintessentially cooperative work—that is, the creation of a worker cooperative—see Carmen Huertas-Noble, Missy Risser-Lovings & Christopher Adams, *Scaling Worker Cooperatives as an Economic Justice Tool for Communities in Crises*, *in* CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS 229, 245-47 (Ray Brescia & Eric K. Stern eds., 2021).

85. Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 687-88 (2010) ("[A] lawyer must also evaluate whether certain aggressive tactics will in fact advance the interests of his client, or whether engaging in them is more likely to alienate the court and the jury, prevent beneficial negotiations with the prosecution, or result in a loss of credibility that harms the client's cause.").

and cooperation to achieve the client's goals.[86] Of course, there are situations where the client's goals include or demand that the lawyer be as adversarial and aggressive as possible.[87] The lawyer's job is to assist the client in seeing where their long-term interests lie and whether those interests align with a more cooperative or adversarial approach.[88]

With this nuanced understanding of the adversarial role lawyers can play, one of the core values a lawyer promotes is to advocate for their client's interests, whether that leads to adversarial or cooperative behavior. While the client sets the goals of the attorney-client relationship,[89] the lawyer helps them understand those goals and can counsel the client on what the impact of the client's and the lawyer's actions might be on achieving those goals.[90]

Similarly, the lawyer also has broader interests to consider when they engage in advocating on behalf of a client in the pursuit of their interests.[91] As an officer of the legal system, the adversarial nature of the proceedings in which lawyers serve as advocates, or the other settings in which the lawyer advocates for the client's interests, are to be navigated with an understanding of and a belief in the rule of law.[92] We do not permit the lawyer to engage in conduct detrimental to the administration of justice[93] in furtherance of the client's rights and interests even if they would gain a tactical advantage in an adversarial

86. *See, e.g.*, N.Y. STATE UNIFIED CT. SYS., STANDARDS OF CIVILITY § 1.I.B. (2020), https://www.nycourts.gov/LegacyPDFS/RULES/jointappellate/Jan%202020%20-%20civility%20standards%20CLEAN.pdf [https://perma.cc/FSL8-8D9A] ("Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior.").

87. Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 170-71 (1997) (arguing that aggressive legal advocacy in one context, particularly in criminal defense settings, might be appropriate for that context, but not appropriate in others).

88. *See* Turner, *supra* note 85, at 688.

89. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

90. *Id.* (providing that a lawyer "shall consult with the client as to the means by which [the client's goals] are to be pursued"); *see also id.* r. 1.4 (providing that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

91. For example, Model Rule 2.1 provides that, "[i]n rendering advice [to a client][,] a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* r. 2.1.

92. On the role of lawyers advocating for rule-of-law principles on behalf of detainees held on the Guantánamo Bay, Cuba, as a part of the so-called War on Terror, see Laurel E. Fletcher, Alexis Kelly & Zulaikha Aziz, *Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys*, 44 CONN. L. REV. 617, 652-66 (2012).

93. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2020) (providing that it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice").

proceeding or some other setting.[94] For example, the lawyer cannot proffer evidence known to be false or destroy evidence[95] and "should use the law's procedures only for legitimate purposes and not to harass or intimidate others."[96] In these ways, the lawyer is tasked with upholding these rule-of-law-preserving functions.

But lawyers are not just expected to help serve as cogs in an adversarial system, protect and further their client's rights, and uphold the rule of law. Their special role in the legal system—to help it function as it is supposed to function—also demands that they promote the proper functioning of the system itself, and an essential component of that proper functioning is the notion that individuals, groups, corporations, and government interests should all have lawyers to assist them when they have a legal problem.[97] If the lawyer plays a critical role in the functioning of the adversarial system, and this system itself is both a product and a reflection of a pluralistic, democratic society, access to a lawyer to mediate disputes within that system should be a value lawyers should also promote. Lawyers should promote access not just out of self-interest (that lawyers want to have work), but also out of regard for the promotion of the other values lawyers are supposed to advance and espouse, including that the legal system, in a democracy, should reflect the popular will.[98] Indeed, in order for the legal system to operate in an effective way—as a functioning means of resolving disputes in ways that the polity wants such disputes to be resolved—members of the public must help shape that system through participation in democratic channels.[99] Lawyers have a role to play in assisting clients to engage in the democratic process to forge the institutions through which the legal system functions.[100]

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94. For example, Comment 1 to Model Rule 3.2 provides that a lawyer's decision in the litigation context must have "some substantial purpose other than delay" and that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." *Id.* r. 3.2 cmt. 1.

95. *Id.* r. 3.4.

96. *See id.* pmbl. ¶ 5.

97. On the centrality of the legal profession to preserving the rule of law in the American system, see Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism*,*"* 41 EMORY L.J. 403, 422-23 (1992).

98. On the role of popular participation in creating democratic institutions, see, e.g., Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 105, 106 (Ian Shapiro & Stephen Macedo eds., 2000); John Ferejohn, *Instituting Deliberative Democracy*, *in* DESIGNING DEMOCRATIC INSTITUTIONS, *supra*, at 75, 76; *see also* Daniel Philpott, *Self-Determination in Practice*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 79, 81 (Margaret Moore ed., 1998).

99. On the relationship between democratic institutions, liberty, and public participation, see MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 26 (1996); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1501 (1988).

100. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2020) (providing that "legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority").

This dual role (as an advocate within the adversarial system and as a facilitator of popular participation in the shaping of legal institutions) means that lawyers promote not just the functioning of the system, but the processes by which the system operates, making sure they are a reflection of the political will of the populace in a democratic society.[101] As the preamble to the *Model Rules* states, lawyers should not just "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession," but also "further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[102]

For these reasons, the values the legal profession is supposed to promote center around the proper functioning of the legal system as that system has been a product of a democratic society's shaping of that system.[103] The most important way in which lawyers are essential to that system is the fact that they are champions of their clients' interests within the context of adversarial proceedings, the democratically chosen form for resolving disputes.[104] By assisting clients to resolve their disputes through this system, as opposed to outside of it, and by engaging in advocacy that is restrained by a desire to ensure fair procedures and just outcomes, lawyers promote the rule of law.[105] They also help their clients shape the system itself to be a product of those clients' visions for that system.[106] Such engagement with the system helps promote greater participation and faith in it, further advancing the rule of law function.[107] Finally, in order to satisfy each of these values, lawyers should also promote access to justice itself—the ability of members of the public to obtain legal representation to resolve their disputes within the system.[108] Thus, the value-driven role that the legal profession is designed to fill includes having members of the profession serve as (1) advocates for their clients' interests within

101. LUBAN, *supra* note 80, at 264.

102. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2020).

103. *See* MARKOVITS, *supra* note 77, at 184-99 (describing the relationship between the adversarial system and democratic legitimacy).

104. *Id.*

105. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 142-55 (2016).

106. For an argument in favor of what the authors call "movement law," which focuses on legal scholars' partnership with social movements in the design of advocacy campaigns, see Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021).

107. On the relationship between participation in lawmaking functions and trust in the system that participation creates, see, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 83 (1990); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163 (2006).

108. On the relationship between access to justice and democracy, see Rhode, *supra* note 81, at 1785-86.

an adversarial system, (2) facilitators to ensure that system is a reflection of the collective will, (3) protectors of the rule of law, and (4) champions of access to justice.

2. The Lawyer's Functions—the "Jobs" They Do

While this value-driven role would appear laudable in a democratic system, it says little about what lawyers actually do or the functions they fill when carrying out these values. Harvard Business School's Clayton Christensen developed what he called the "jobs-to-be-done" framework when considering what products or services a particular consumer desires or would prefer.[109] He famously conducted a study of the purchasing habits of a fast food company's customers to discover the reasons behind their purchasing of milkshakes.[110] For many of these customers, the milkshake satisfied several needs at once: this was the "job" they had "hired" the milkshake to perform.[111] The customers could consume the milkshake with one hand, it would not spill on their work clothes, it was filling, and it gave the customer something to do.[112] All of these functions helped to make the customers' morning commute a little more bearable and fought off hunger until lunchtime.[113] This prompted Christensen to posit that businesses should look at their product development process from a "jobs-to-be-done" perspective. This point of view, according to Christensen, "causes you to crawl into the skin of your customer and go with her as she goes about her day, always asking the question as she does something: Why did she do it that way?"[114]

Taking this approach to understanding the job-to-be-done perspective of the lawyer role, the lawyer can fulfill different values when they serve a client depending on the setting, which is what I will call "functional" values as opposed to "affective" values. The functional values are fairly straightforward in most instances. The client wants a will drafted, wants to negotiate a lease, wants to enter into a contract,

109. *See* CLAYTON M. CHRISTENSEN, TADDY HALL, KAREN DILLON & DAVID S. DUNCAN, COMPETING AGAINST LUCK: THE STORY OF INNOVATION AND CUSTOMER CHOICE 17-18 (2016) (describing the "jobs-to-be-done" theory).

110. Carmen Nobel, *Clay Christensen's Milkshake Marketing*, HARV. BUS. SCH. WORKING KNOWLEDGE (Feb. 14, 2011), http://hbswk.hbs.edu/item/clay-christensens-milkshake-marketing [https://perma.cc/T36H-2HUG].

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

wants to defeat a criminal charge, wants to secure or defend a patent, etc.[115] The preamble to the American Bar Association's *Model Rules of Professional Conduct* describes these functions as follows:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[116]

Often, but not always, the client can articulate the need and the functional value the attorney can bring.[117] Sometimes the client simply wants to know whether they even have a legal problem.[118] While there are (sometimes) clear functional values that the lawyer brings to the table, there are other, somewhat more amorphous values that the lawyer adds to the relationship.

Affective values deal more with feelings and emotions.[119] While it may seem odd to think of the emotional value that a lawyer brings to the lawyer-client relationship, there are such affective benefits of working with a lawyer, and these can range from simply feeling that one has a degree of peace of mind that comes with having the functional role fulfilled by a lawyer to something deeper, something that connects the lawyer's role to the functioning of the legal system and to democracy itself.[120] Turning once again to the preamble of the *Model Rules*, the American Bar Association suggests that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[121]

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115. Spencer Rand, *Hearing Stories Already Told: Successfully Incorporating Third Party Professionals into the Attorney-Client Relationship*, 80 TENN. L. REV. 1, 24-25 (2012) (highlighting that some clients present legal problems that are "relatively straightforward and there is little risk of not understanding the clients' goals and needs").

116. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 2 (AM. BAR ASS'N 2020).

117. Rand, *supra* note 115, at 25.

118. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22-24 (2007) (listing the ability to identify legal problems as a critical skill that all lawyers should possess).

119. *See, e.g.*, Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493, 502 (1996) (describing the "affective" or personal bond between the lawyer and their clients in the representation of survivors of intimate partner violence).

120. Stuart C. Bear, *The Practice of Elder Law*, 2 MITCHELL HAMLINE L. REV. 865, 871 (2016) (describing the role of a lawyer in at least one setting, elder law, as serving to educate a client about the legal system and to provide peace of mind to them).

121. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2020).

Lawyers often can do so much more than serve as functionaries or clerks, filling out forms, filing paperwork, and checking off boxes, although they certainly sometimes do just that.[122] At a typical residential real estate closing (where much of the work is often done by paralegals), the work is fairly routinized and carried out mostly through the preparation of standardized forms that have been vetted for their accuracy and consistency with legal and regulatory standards.[123] A typical mortgage document contains tens of thousands of words, written in relatively small font size on dozens, if not hundreds, of pages, but only a few of those words may change with each new mortgage executed, like the names of the mortgagors, the address of the property securing the mortgage note, and the amount that is being borrowed.[124] Even in a real estate transaction, however, there is a significant affective role that the lawyer can play. In what is typically the most significant economic transaction in a person's lifetime, the purchase of a home can be weighty and emotionally fraught.[125] Family law practice can also have significant emotional weight, and having a competent lawyer manage the relationship of the client to other members of the family and to the state has real emotional value.[126] Giving the client the peace of mind in such situations goes beyond simply making sure all of the forms are signed in the appropriate places.

In addition to the instrumental and affective roles the lawyer plays, they also fill a "political" role. While some lawyers are certainly political, or "cause" lawyers, seeking to promote what some might call a political agenda (and the notion of a lawyer filling a political role certainly entails this idea),[127] I use the term political here to denote its more literal meaning, referring to the role of the citizen, both in their

122. Manveen Singh, *In the Line of Fire: Is Technology Taking Over the Legal Profession?*, 40 N.C. CENT. L. REV. 122, 125 (2017) (describing some contemporary transactional legal work, because of technology, as amounting to no more than filling out forms for clients).

123. *See also* Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 874-75 (2017) (describing simple real estate transactions as not involving significant power imbalances between the parties or complex legal questions).

124. Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 YALE L. & POL'Y REV. 479, 484-86 (1998) (describing the use of pre-prepared forms at real estate closings and in other simple legal matters).

125. Candace Jackson, *Buying a Home Sight Unseen*, N.Y. TIMES (July 13, 2018), https://www.nytimes.com/2018/07/13/realestate/buying-a-home-sight-unseen.html?searchResultPosition=3 [https://perma.cc/9SUH-DCE2] (describing buying a home as the biggest financial decision in many homebuyers' lives and as "an emotional purchase, with intangibles like the feeling it evokes key to a buyer's attraction").

126. Samuel V. Schoonmaker IV, *Withstanding Disruptive Innovation: How Attorneys Will Adapt and Survive Impending Challenges from Automation and Nontraditional Legal Services Providers*, 51 FAM. L.Q. 133, 148 (2017) ("[F]amily law tasks are complex and nonroutine, and they require high social skills and therefore human labor.").

127. *See* Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 33 (Austin Sarat & Stuart Scheingold eds., 1998) (defining cause lawyering).

relationship to others as well as their interactions with the state.[128] Again, while a lawyer may serve as what is sometimes called a cause lawyer (whether that lawyer advocates for progressive, conservative, or some other political goals), this role is broader than simple cause lawyering on behalf of a specific political agenda in a particular case. The lawyer's "small-p" political functioning is often broader than the particular interests of a client or set of clients.[129]

Viewing the lawyer's political role in this broader way, we see the political *functions* of the lawyer in light of some of the political *values* they promote: the furtherance of interests and the defense of rights (in relation to other individuals, groups, and the state); the maintenance of a positive relationship to the state such that the client sees the legal system as an effective means of dispute resolution as opposed to preferring vigilantism; and the advancement of democratic ideals like fairness and equality before the law.[130] These political functions are corollaries to the instrumental and affective functions of the lawyer and also embody the critical democratic values the lawyer is supposed to uphold: the rule of law; the faith in the legal system as a means of effective dispute resolution; and the vision of law as both a reflection as well as the fruit of a democratic, pluralistic, and just society.[131]

When coupled with the instrumental and affective functions a lawyer is supposed to carry out, the political functions help to round out the role the lawyer plays in society and the values they promote in filling such functions. In doing so, the lawyer engages in the following: they take certain formal actions to protect a client's rights, like preparing legal documents and pleadings, negotiating agreements, and advocating before tribunals; afford the client some degree of confidence that their rights are being protected and trust in the system to protect those rights to the fullest extent possible; and help to order the client's affairs and embed those affairs in the institutions of the client's community and the state. Thus, the lawyer's functions take on these characteristics: they are instrumental, affective, and political.[132]

128. On the relationship between the self and community, see EMILE DURKHEIM, SOCIOLOGY AND PHILOSOPHY 37 (D.F. Pocock trans., The Free Press 1974) (1953).

129. *See* MODEL RULES OF PRO. CONDUCT pmbl. ¶ 1 (AM. BAR ASS'N 2020) (identifying a lawyer as "a member of the legal profession, . . . a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice").

130. On the lawyer's role in ensuring that the community feels the legal system is responsive to the needs of the members of the community to ensure those members see the legal system as offering an effective means of dispute resolution, see, e.g., Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559-60 (1905).

131. *See supra* Section I.B.

132. Christensen and his co-authors point out that many products and services have these sorts of instrumental and affective dimensions to them. *See* CHRISTENSEN ET AL., *supra* note 109, at 84-90.

3. Drawing the Line Between the Functional, Affective, and Political

The functional role of the lawyer arises in almost all client-attorney encounters. The client is turning to the lawyer to fill a need. In another piece of business school lore, legend has it that the CEO of a company that produced power drills once asked his senior staff what they were selling. When they informed him that it was a ¼-inch drill, he responded that they were actually selling a ¼-inch hole. In other words, clients are not turning to a lawyer per se; they are turning to a lawyer to solve a problem.[133]

In some limited contexts, the lawyer's role is purely functional. In those settings, the lawyer's services can be commoditized, i.e., what matters is that they can help fill in the appropriate form, file the appropriate paperwork, or review a simple contract or lease. In these situations, the lawyer meets their obligation to provide competent services, as long as that lawyer also satisfies the functional value the client seeks to have fulfilled.

Millions of Americans currently file their personal income taxes using web-based programs like TurboTax.[134] Through an interrogatory interface, taxpayers can file their federal and state income taxes without consulting with a tax professional, and even when some do still consult with tax professionals, many of those use programs similar to TurboTax to fill out the customer's tax forms.[135] In this situation, which admittedly is not considered the provision of legal services, we can see the type of functional role such services can provide.[136] In the legal services context, many consumers are turning to services like LegalZoom to meet their need for simple estate planning services, basic business services like incorporation, and assistance with intellectual property matters.[137]

In such instances, it is easy to see where services through such automated outlets like LegalZoom could potentially satisfy the client's desire to meet a functional need, to fill a ¼-inch hole so to speak. At the same time, there are instances where even the most functional of

133. *See* Clayton M. Christensen et al., *Marketing Malpractice: The Cause and the Cure*, HARV. BUS. REV., Dec. 2005, at 76.

134. Binyamin Appelbaum, *Good Riddance, TurboTax. Americans Need a Real 'Free File' Program.*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/opinion/intuit-turbotax-free-filing.html?searchResultPosition=1 [https://perma.cc/E2EW-7HYK] (describing TurboTax services).

135. Rodney P. Mock & Nancy E. Shurtz, *The TurboTax Defense*, 15 FLA. TAX REV. 443, 456 (2014) (describing the use of tax preparation software by tax preparers).

136. *See, e.g.*, United States v. Gurtner, 474 F.2d 297, 298-99 (9th Cir. 1973) (holding that tax preparation is generally not considered the practice of law).

137. For a description of the scope of LegalZoom's offerings, see Brescia, *Uber for Lawyers*, *supra* note 64, at 807.

roles is blended with the affective. There is no doubt that in many situations, even where it might seem like the lawyer is doing no more than filling out forms, they may also afford the client some peace of mind, fulfilling affective values.[138]

What is more, there is certainly some affective component to attorney-client interactions, one that helps meet the functional values better. There is a reason the attorney-client relationship is cloaked with an evidentiary privilege that preserves attorney-client communications from disclosure in most circumstances: we want to infuse the relationship with trust so that the client will be candid in their communications with the lawyer and the lawyer can satisfy the client's functional needs.[139]

Most instances where a client has a legal job to be done will thus blend both functional and affective values. To be competitive with newer forms of delivering legal assistance, the lawyer providing traditional legal services will have to show how they can better meet the client's functional and affective needs while understanding that there will be instances where these newer forms may simply meet the range of needs the client wants satisfied, including the desire for more affordable, more accessible services.[140]

The final role the lawyer plays is a political one, again, using the broader definition of this term. Lawyers help clients structure their relationships to others, to their communities, and to the state.[141] The political function can be fulfilled in a simple real estate dispute with a neighbor; in a land use matter before a town body; or in a criminal matter, where the liberty of the client is at stake.[142] In each of these and the countless other settings in which a lawyer represents a client, the lawyer's role is to assist the client in navigating their relationships with others and the governments with which they come into contact.[143]

The activities a lawyer carries out in assisting the client in dealing with others will have instrumental and affective components, of course. A client needs formal representation in a property dispute,

138. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 404 (2010) (describing emotional support lawyers can afford clients).

139. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1061 (1978) (describing the purpose of the attorney-client privilege).

140. The idea that one product or service might be better than another is central to the Innovator's Dilemma thesis. CHRISTENSEN & RAYNOR, *supra* note 62, at 32-34.

141. *See* Brandeis, *supra* note 130, at 560-62.

142. For the argument that lawyers must protect client interests in their relations to others and to the state provides one of the main arguments used in favor of self-regulation of the legal profession as opposed to more extensive oversight by state authorities, see Mark H. Aultman, *Cracking Codes*, 7 GEO. J. LEGAL ETHICS 735, 736 (1994).

143. As the preamble to the *Model Rules* sets forth, "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living." MODEL RULES OF PRO. CONDUCT pmbl. ¶ 9 (AM. BAR ASS'N 2020).

land use matter, or criminal proceeding; in addition, through these services, the client is offered some degree of peace of mind and assurance (hopefully) that their rights are being protected. While the lawyer is helping the client navigate their relationships with other people and the state, the lawyer is also adding instrumental value as well as playing an affective role.[144]

When assessing new models and new means of providing legal services through new and emerging technologies, it is important to note that the relative importance of each of these functions will vary, as will their centrality to the representation and the degree to which a client is seeking to have the lawyer fulfill one of these functions more than another.[145] A land dispute with a neighbor may seem trivial; a conflict over where to set the boundary line between two properties may shift that line a few inches either way, yet the client wants to feel assured that their rights are being protected and they are not being taken advantage of by a pushy and aggressive neighbor. "It's the principle of the thing," a client may say when discussing the reasons why they want assistance resolving the matter.[146] While there are formal actions the lawyer must take to protect the client's rights, the knowledge that the client has a lawyer in their corner in the dispute helps to satisfy some of the functions the client desires the lawyer to fulfill in that setting. The criminal setting has similar components: the lawyer has practical steps they must take in carrying out the representation—filing suppression motions, cross-examining witnesses—but they also play an affective role, providing some degree of assurance (again, hopefully) that the client will have all of their procedural and substantive rights protected during the resolution of the charge.[147]

4. The Coming Disruption in the Legal Profession and the Job the Client Wants Done

Before proceeding further, it is important to take a step back and explore why the legal profession even faces this sort of disruption by

144. For a discussion of the difference between merely instrumental lawyering and what the author calls relational lawyering, which focuses, at least in part, on the emotions relevant to the attorney-client relationship, see Serena Stier, *Reframing Legal Skills: Relational Lawyering*, 42 J. LEGAL EDUC. 303, 304-07 (1992).

145. Not only must lawyers recognize the differences between clients, but they must also recognize the differences between clients and lawyers. For a description of exercises that can help teach law students about the potential differences between clients and their lawyers, see Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 62-95 (2001).

146. William H. Fortune & Dulaney O'Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 632 (1994) (describing representing clients who might claim that the "principle is the thing").

147. Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 945 (2006) (describing feelings of solidarity as well as the emotional bonds that can arise between lawyers and their defendants facing criminal charges).

the introduction of new technologies. While it is sometimes difficult to gauge why a prospective client does not access a lawyer to solve their legal problem, partly because that client might not know they have a legal problem in the first place, recent research shows that there are a range of reasons why individuals do not turn to a lawyer to address their legal problems. Some of these reasons are obvious, and others less so. A study led by Rebecca Sandefur found that residents of one American city did not seek the assistance of a lawyer to address their legal problems in some instances because of the associated cost, and other reasons included not knowing they needed a lawyer or how to access one even if they wanted representation, thinking they could handle the matter on their own or with the assistance of a third party like a family member or friend, or they chose to ignore the problem.[148]

Looking at these different reasons as to why a client might not turn to a lawyer for every legal problem, even if they know they have one, there are certain situations where bringing a lawyer into the problem can actually make matters worse, and this study seems to suggest that the survey respondents understood this. We know that there are instances where we would not necessarily turn to a neighbor, co-worker, or family member and say, "Talk to my lawyer." Doing so could escalate the problem, drawing the parties to take even more protective or aggressive stances against the other, making informal resolution of the matter more difficult.[149]

Putting such situations aside, even assuming a prospective client understood they had a problem, thought the problem was one the lawyer could help resolve, and knew how to access the lawyer, the question of cost is a significant one, and remains one of the fundamental reasons that the justice gap still exists.[150] Roughly eighty percent of low-income people and half of middle-income people do not have access to a lawyer

148. REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 12-13 (2014).

149. *See, e.g.*, Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 806-07 (1998) (arguing that advocacy by lawyers can make parties less trusting of each other).

150. Although one ABA study found that the high cost of legal services is one of the reasons for the justice gap, it is not one of the leading causes identified. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 21 (1994); *see also* Milan Markovic, *Junking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 80 (2016) (arguing that "[a]lthough more empirical research must be undertaken, there is little evidence to support the view that the high cost of legal services is responsible for the high incidence of unmet legal needs"). More recent research points to cost still being one of the main reasons why Americans find it difficult to access legal services, although the fact that many consumers are unaware that they have a legal problem, or do not realize a lawyer might help them solve a problem they might have, are also significant reasons for the justice gap. SANDEFUR, *supra* note 148, at 12-13.

to resolve their legal problems.[151] Even if a full-service lawyer could be made available to every one of them, it is unlikely they could afford one. Unless current public priorities change dramatically, it is also unlikely that governments or philanthropy are prepared to expand the availability of legal services substantially to low- and middle-income populations any time soon.[152]

The question for the legal profession is not necessarily how to hold on to what may be a dwindling market share, but is rather how to determine when technology can help meet client needs; how to utilize the new tools technology offers to meet client needs in an efficient and effective way; and when traditional legal services can help satisfy the instrumental, affective, and political needs of the client in ways those clients appreciate and will pay to obtain. It is important to explore the role traditional lawyers can continue to play in meeting clients' needs and determine when newer forms of legal services delivery might suit clients well, potentially meeting clients' instrumental, affective, and political needs adequately.

In some instances, there is simply no substitute for a living, breathing lawyer. Lawyers still need to manage litigation, defend the accused in criminal proceedings, and handle high-stakes negotiations. Even the instrumental aspects of much of this work, it would seem, cannot be outsourced or automated. Yet we are starting to see the encroachment of non-traditional approaches on even these settings, using Blockchain technologies and so-called smart contracts to displace roles typically played by traditional legal services providers.[153] eBay and PayPal are two companies that have used the Modria system for online dispute resolution, where it is claimed that, through the use of com-

151. *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 13 (2009), https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [https://perma.cc/6347-PAKN] (finding that only one in five low-income Americans faced their legal problems with a lawyer); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013) (stating that it is "estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet").

152. *See generally* LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 43-55 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [https://perma.cc/ZD69-KYGC] (describing the current state of access to justice in the United States).

153. On Blockchain technologies and smart contracts, see John Flood & Lachlan Robb, *Professions and Expertise: How Machine Learning and Blockchain Are Redesigning the Landscape of Professional Knowledge and Organization*, 73 U. MIAMI L. REV. 443, 479-80 (2019); Carla L. Reyes, *Autonomous Business Reality*, 21 NEV. L.J. 437, 443-51 (2021). On the challenges of automated contract negotiations and document review through artificial intelligence, see generally Mattias Rättzén, *Automated Contract Review: Challenges and Outcomes of a Data Annotation Framework*, 62 JURIMETRICS 225 (2022).

puter algorithms, a significant proportion of disputes between consumers and business entities are resolved without the human involvement of representatives of the business.[154]

The challenge for the legal profession in the twenty-first century is to understand the job the client wants done, to facilitate the delivery of services that fulfills that job in an effective and efficient way, to adapt to a new technological landscape while doing so, and to reorient the provision of legal services with the client-customer in mind. If that means there will be fewer lawyers, that is a reality the legal profession will have to face. The goal of the legal system, or even the legal profession, should not be to provide jobs for lawyers. Instead, as self-professed guardians of democracy and of the rule of law, the lawyer's role should be to protect the functioning of a just legal system, one in which the client's legal needs—instrumental, affective, political—are met. To meet these multi-faceted legal needs, the legal profession must fully comprehend the role it does play and should play in the lives of the clients, the community, and broader society, and strive to fulfill the range of values it is asked to address. It should also do so in efficient, effective, affordable, and accessible ways, even if that means there is a technology-based solution that is more efficient, more effective, more affordable, and more accessible than service delivery through traditional modes of representation. In the end, the answer should not be that a lawyer is the only answer to the question of how to provide services within a legal services ecosystem that satisfies the values and functions—the purposes—of such a system. The next Part explores how to create a framework that offers a means by which to assess the best method of service delivery in any given situation.

II. DEVELOPING A FRAMEWORK FOR A PURPOSE-DRIVEN LEGAL ECOSYSTEM

In previous Sections, I have identified the values the legal profession is supposed to uphold and the functions that the lawyer is supposed to fill.[155] When assessing whether a technology-first solution can deliver on these values and functions, there are a number of different characteristics—of both the legal problem the client has and of the client—that can help identify the method that is best equipped to carry out these values and functions. Here, I attempt to identify the characteristics of legal problems and clients that might help uncover those situations and those clients that are better suited to a particular

154. *See* TYLER TECHS., ONLINE DISPUTE RESOLUTION: EMPOWER CITIZENS TO RESOLVE THEIR OWN DISPUTES ONLINE, ANYWHERE, ANYTIME—WITH PROVEN TECHNOLOGY (2017), https://www.tylertech.com/Portals/0/OpenContent/Files/4080/Modria-Brochure.pdf [https://perma.cc/D7J8-BG3M] (describing the Modria system). For a discussion of Modria and online dispute resolution, see Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3075-76 (2014).

155. *See supra* Part I.

means of delivering legal assistance. I then address the extent to which those characteristics can serve as a means of assessing when different modes are adequate to serve the client's needs, thus identifying a method by which we can determine when these different modes can further the values and fulfill the roles of the legal profession moving forward.

I have posited that there are both values and functions that can present themselves as the fruit of the provision of legal assistance. Based on the needs of consumers and their legal problems, different methods of service delivery—whether it is through traditional means, a technology-first solution, or some hybrid of the two—are likely better suited to different situations. To determine when one mode might be a superior method for delivering legal services, we need to understand the characteristics of both the legal problems and the clients who have them. While legal problems and prospective clients have many characteristics, too many to mention really, what I have attempted to do here is identify those critical features of each that can serve as important variables in the assessment process. These can help us focus on the differences of each that might help us understand when one delivery channel might be superior to another in a given context. The following is an attempt to identify these characteristics, looking first at the different facets of legal problems that might present themselves and second at the qualities of clients and how different qualities may bear upon the appropriate choice of legal services delivery method.

A. The Characteristics of Legal Problems

Legal problems vary in many ways. The services required to resolve a problem may be preventative, like the preparation of a will, or reactive, like confronting a criminal charge on behalf of a client. Services may also be forward-looking and require a lawyer to prevent further problems down the road rather than react to them, like when the lawyer creates a business corporation or non-profit. Services can also be retrospective and reactive, looking to untangle complex corporate relationships in a bankruptcy proceeding.[156] It is based on these characteristics that we can begin to assess the situations in which the different modes of service delivery are or are not adequate to deliver values-based legal services in an effective way.

One of the first characteristics of legal problems that can help determine the appropriate type of legal response is the relative complexity of the matter. Some matters are fairly straightforward and require

156. Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 412 (2003) (distinguishing between preventive and reactive lawyering).

minimal legal expertise or judgment.[157] Parties to a residential lease arrangement who opt for standard lease terms and where the law governing landlord-tenant relations in the jurisdiction is fairly straightforward will require minimal legal guidance.[158] At the same time, a somewhat similar setting involving the execution of a commercial real estate transaction can demand more intense legal assistance if it involves customized renovations and tailored lease terms.[159] In such a situation, the matter becomes complex, requiring lengthy negotiations, multiple drafts of the lease agreement, and perhaps working through financing components of the deal. Such a problem requires a lawyer seasoned and experienced with the nuances of commercial real estate transactions to handle the matter.[160]

The relative complexity of the matter thus will help determine the manner in which legal services should be delivered. A relatively simple matter might be resolved through brief advice or tailored information. In the case of a legal question that could be resolved with minimal information, like determining whether someone is receiving an hourly wage that complies with minimum wage requirements,[161] the matter may be resolved simply through the passive information available on a website or "know-your-rights" guide.[162]

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157. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 135-41 (2000) (describing at least some legal matters that lawyers handle as routine).

158. At the same time, landlord-tenant relations and the laws that might relate to them have been called, at least in one state, an "impenetrable thicket, confusing not only to laymen but to lawyers." *In re* 89 Christopher, Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1974).

159. *See, e.g.*, Robert M. Ruzzo, *Deep Thoughts About What Constitutes a Binding Contract for the Transfer of Real Estate*, BOS. BAR J., Nov.-Dec. 1998, at 23-24 (contrasting simple and complex commercial real estate lease negotiations and transactions).

160. As the *Model Rules* makes clear: "Expertise in a particular field of law may be required in some circumstances." MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2020). While the rules do not set forth precisely what those circumstances are, they do state that the requisite competence that a lawyer must deploy in any given situation will hinge on

> the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id.

161. Of course, even something as straightforward as determining whether an employer is complying with minimum wage requirements can also be complex, like trying to sort out the many potential differences between the minimum wage requirements or different states and the federal minimum wage laws, whether so-called "spread-of-hours" requirements are being met, whether the employee is entitled to overtime, etc.

162. *See, e.g.*, NAT'L LAWS. GUILD, KNOW YOUR RIGHTS: A GUIDE FOR PROTESTORS (2022), https://www.nlg.org/wp-content/uploads/2022/06/Know-Your-Rights-Booklet-2022.pdf [https://perma.cc/AP4D-7TYQ] (describing the rights of protestors in interactions with law enforcement authorities).

At the same time, the process of determining the relative complexity of a matter might itself require a great deal of legal expertise, experience, and legal know-how.[163] Even what might seem to be a relatively straightforward question, like whether someone has been discriminated against in their place of employment, can turn on complex issues, like the burdens of proof to establish discrimination, evidentiary questions, and statute of limitations problems.[164] One of the critical functions a lawyer plays is assessing the relative complexity of a problem and making sure they take into account the nuances of a particular client's situation.[165] One of the biggest hurdles that any legal services delivery mode—other than the traditional full-service model of representation, that is—must overcome is in the ability of any mode to assess the relative complexity of a case and the different factual and legal facets of a given problem. For some problems, even a sophisticated interrogatory interface on an interactive and dynamic website will not surface all the issues of a client's situation that bear on the representation.

The second characteristic I will explore is what I will call "tactical agility." Some legal problems require a relatively static response. A client who wants to draft a will who has an estate with few assets in it and a straightforward plan for how they want those assets distributed on their death, or a worker seeking to file for the Earned Income Tax Credit (EITC), can answer a few basic questions about their situation, and the lawyer will know immediately how to proceed to protect and further the client's interests.[166] The problem can be assessed for certain factors or aspects of the case that might disqualify the client from receiving simple assistance, like owning assets or earning income that might disqualify them from receiving the EITC. In these situations, a relatively simple set of interrogatories can determine when all that is needed are straightforward services that do not require the exercise of a lawyer's expertise or judgment, or to shift tactics throughout the course of the representation.

163. As the commentary to Model Rule 1.1 provides, "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve." MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2020).

164. *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) (describing a case that had initiated as a "relatively routine" sex discrimination case but resulted in five written opinions regarding discovery disputes).

165. *See* Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 437-78 (2007) (identifying the component parts of what it means to "think like a lawyer," which includes identifying the legal problem and engaging in problem solving related to it).

166. For a description of a program that funds organizations to provide guidance to low-income tax filers, including with respect to the Earned Income Tax Credit, see generally *IRS VITA Grant Program*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/irs-vita-grant-program [https://perma.cc/HS6D-STJH] (last updated Dec. 06, 2023).

At the same time, trial matters and complex negotiations (maybe all negotiations) require a lawyer to exercise their judgment and respond quickly to the shifting factual and legal landscape under their feet.[167] Such shifts might require a lawyer to, in turn, alter tactics, demeanor, or their entire legal strategy. A problem that requires a range of tactics to address, or that the lawyer shift those tactics quickly in response to a change in the situation, is a problem unlikely to be suitable for legal assistance short of full-service representation.[168] Such settings that require tactical pluralism and agility are generally not amenable to a technology-based method of service delivery alone, even assistance that is somewhat tailored to a particular client's problem.[169]

The third characteristic of legal problems that helps us assess the propriety of different service modes to address them is whether a particular problem the lawyer is asked to address can be characterized as preventative or reactive.[170] Helping a client order the affairs of their estate or creating a corporate entity are problems that require the lawyer to act to prevent problems from arising in the future.[171] In such situations, the lawyer can use planful approaches that help the client avoid problems down the road.[172] The cost of legal services today, even though ordering one's affairs before problems arise can save money, often means that prospective customers do not seek legal assistance until it is too late for preventative services. When a legal matter becomes a legal problem—i.e., a lawyer must react rather than plan—the matter becomes more complex, the lawyer might have to deploy different tactics to deal with it, and it gets harder to deliver competent services to the client through anything short of full-service representation.[173]

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167. Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems*," 61 RUTGERS L. REV. 867, 915-16 (2009) (identifying the ability to "think[] on [one's] feet" as a critical component of "thinking like a lawyer").

168. *See, e.g.*, Susan R. Jones, Jacqueline Lainez & Debbie Lovinsky, *Viewing* Value Creation by Business Lawyers *Through the Lens of Transactional Legal Clinics*, 5 U.C. DAVIS BUS. L.J. 49, 92 (2014) (recognizing that so-called "unbundled" legal services may not be appropriate in complex matters).

169. One can see in case law setting forth the contours of the unauthorized practice of law that there is a line between generic, non-specific information about rights, which is not considered the practice of law, and information tailored to the needs of a specific consumer, which is, and that this distinction is relevant in an assessment of the situations in which a lawyer's services and expertise are required. *In re* N.Y. Cnty. Laws.' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967) (reversing a decision based on the dissenting opinion in a proceeding below which distinguished between providing general and tailored advice).

170. Kovach, *supra* note 156, at 412 (describing these two different kinds of problems).

171. *Id.* at 401.

172. *Id.* (noting that preventive approaches to law "focus[] primarily on counseling and regular 'legal check-ups,' in order to anticipate or avoid legal matters").

173. *See, e.g.*, Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1979-97 (2007) (describing a complex workers' rights legal campaign that involved a wide range of tactics).

Finally, the last characteristic of legal problems that help dictate the appropriate level of service is what is at stake when a legal problem arises. The ABA's *Model Rules* recognizes that what is at stake in a given legal matter can sometimes determine the level of service, preparation, and expertise required to address it. Comment 5 to Model Rule 1.1. provides as follows:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.[174]

While the transaction that consummates the sale of a multi-million-dollar home might look like the sale of a home with a much lower value, the lawyer might not leave the former transaction in the hands of a paralegal to the extent they might do so with the latter transaction. What is at stake can help determine what level of service the lawyer should deliver. From the perspective of the lawyer, their potential malpractice exposure will be greater in the situation where the stakes are higher, because their failure to provide competent representation to the client could result in a higher malpractice award, should the client lose the interest that is at stake. A personal injury action valued at $10,000 will expose the lawyer to liability based on the relatively low value of the claim, just as it would be based on proportion if that claim is valued at $1,000,000.[175] Similarly, when a client faces a trial on a capital offense, the stakes are higher than when they face a speeding ticket. The level of expertise, effort, and energy the lawyer applies to the case will vary with the interests of the client. With an increase in the stakes often comes an increase in complexity. It also increases the need for tactical pluralism and agility, making the delivery of services through systems that offer anything less than full-service, bespoke representation inadequate.

As I will explore further in Section II.B., these characteristics of legal problems—whether problems are complex, require agility, are preventative or reactive, or where the stakes are high—will help determine the propriety of delivering legal services through different modes to address them. But the characteristics of the problems themselves are not the only considerations we must consider when as-

174. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2020).

175. *See* John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1131-35 (1988) (describing the relationship of malpractice liability to the value of the underlying claim).

sessing the appropriate channel through which to deliver legal services. The characteristics of clients, which I will explore next, can also come into play in this inquiry.

B. The Characteristics of Clients

Russian novelist Leo Tolstoy opens *Anna Karenina* with the following line: "All happy families are alike; each unhappy family is unhappy in its own way."[176] Similarly, every client has a legal problem, but every client and their legal problem is different from every other client. Every client possesses different features and characteristics, and as a result, different service delivery modes might be more appropriate for a particular client than another. While we may not like it, one of the key features of every client or customer in every market-based setting, like legal services, is their ability to afford legal services and, if they can afford them, how much they can afford. Because one of the critical distinguishing features of the different service delivery modes is the different cost of the services being offered through them, the differing ability of prospective customers to afford these different modes of service delivery makes a significant difference in determining which is the appropriate mode for each client.[177] While I would like to believe that the cost of legal services should not matter, and that everyone should be entitled to a traditional, full-service lawyer whenever they *want* one, the reality of the market is that, at best, we can argue that everyone should have a full-service lawyer when they *need* one. This effort, to identify those situations where a full-service lawyer is necessary to uphold the values and fill the functions of the profession and when one can have their need for legal assistance met by something less than the highest level of service, attempts to identify this line between want and need.[178]

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176. LEO TOLSTOY, ANNA KARENINA: A NOVEL IN EIGHT PARTS 1 (Richard Pevear & Larissa Volokhonsky trans., Allen Lane The Penguin Press 2000).

177. The assumption is that most technology-first, consumer-facing services will be more affordable than more traditional modes of service delivery, even though there are considerable up-front costs associated with building such systems. *See* Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23 HARV. J.L. & TECH. 259, 274-75 (2009) (describing the "economics" of legal technology, including the upfront costs associated with building legal tech systems).

178. As the preamble to the *Model Rules* provides:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession[;] . . . be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance[;] . . . [and] devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2020). While lawyers should provide services to those who desire them, they should also ensure that those who *need* services receive them as well.

Another characteristic of clients is their relative ability to both access and receive information as well as to act effectively to protect their rights without full-service representation. While this may sometimes hinge on the complexity of the problem (which the previous Section addresses), it can also depend on the client's own facility with legal information, their ability to advocate for themselves, and their understanding of the problem before them.[179]

Identifying the appropriate mode of service delivery for any particular consumer will also depend on that individual's ability to access those information-based resources in the first place.[180] Obviously, web-based and mobile portals for information and assistance are only effective if a customer has access to the internet or a mobile phone. The so-called "digital divide" is a serious problem for the delivery of legal services through the internet and mobile applications, threatening to create even more inequalities of access to legal assistance and exacerbating pre-existing differences in the ability of low-income clients to obtain such assistance, especially if lawyers for low-income communities and the governmental and philanthropic sources of support for them redirect funds toward digital platforms without assurances that such platforms will be accessible.[181] While such funders do not typically direct their resources to hardware that would enable customers to access web-based and mobile platforms, some accommodations should be made to ensure any new service delivery models are fully accessible. In communities where customers cannot take advantage of digital delivery models, such avenues are inadequate to meet those communities' needs for legal assistance, and any such mode should adapt to the relative ability of customers and communities to access them.[182]

C. A Framework for Calibrating Service Delivery Modes

In order to determine which approach to the delivery of legal services is optimal given the different characteristics of legal problems and consumers, one must assess each problem and consumer not just based on their respective characteristics, but in the values the lawyer might promote in each context and the functions they are asked to fill

179. *See, e.g.*, Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 921-22 (1998) (explaining that in limited-service arrangements, the client's ability to understand and consent to the arrangement is an essential element of this form of practice).

180. Raymond H. Brescia, *The Downside of Disruption: The Risks Associated with Transformational Change in the Delivery of Legal Services*, 2 N.Y. L. SCH. IMPACT 113, 117 (2016) (describing the importance of access to digital technologies in a system delivering services through digital platforms).

181. *See id.* (describing the digital divide).

182. *Id.* ("Technology-enabled services are only an effective means of meeting the promise of access to *justice* if individuals and families of low- and moderate-income communities have access to the *technology* that makes such access to justice possible.").

in that context. By assessing each of these variables, one can determine the best service delivery channel through which legal assistance can flow in each context. To review, here are the components of this analysis:

Characteristics of Problems	▪ Relative Complexity ▪ Need for Agility and Tactical Pluralism ▪ Preventative or Reactive ▪ Stakes
Characteristics of Clients	▪ Sophistication ▪ Diminished Capacity or Disability that Impacts Access ▪ Ability to Pay ▪ Other Barriers to Access
Values	▪ Adversarial Role ▪ Democratic Interests ▪ Rule of Law ▪ Access to Justice
Functions	▪ Instrumental ▪ Affective ▪ Political

How would such an analysis work? In the next Part, I will use an example of a pair of legal contexts to assess the variables at play and the extent to which one mode of service delivery might be a more appropriate channel through which to deliver legal services than another. Once again, I start from the presumption that a full-service lawyer, providing bespoke services, is, in almost every instance, the optimal service delivery vehicle. But financial and political realities, for low- and moderate-income individuals in particular, take such options off the table in many instances. Instead, this inquiry can help us identify those situations in which less-than-full service is an acceptable form of service, one in which the values and functions of the legal profession can be furthered and fulfilled. Furthermore, for those interested in promoting greater access to justice, when a particular level of service is adequate to meet a particular client's needs, devoting resources in an optimal way can help meet the promise of access to justice for the greatest number of people.

Before I begin the assessment of a specific legal context, let me identify what should always be the yardstick against which any delivery of legal services must be measured. While many problems an individual or business may face require simple, non-legal problem-solving

measures, I am confining my discussion here to those situations that require problem-solving services that qualify as the practice of law. If we limit ourselves to such contexts, the services that will be offered through different modes must be delivered in a competent fashion. While courts have routinely held that offering information to individuals to help them navigate legal problems on their own does not constitute the practice of law,[183] I am going to take an inclusive approach and include such practices in my assessment of the modes of legal services delivery in order to identify those situations in which the lowest "level" of service—generic legal information—is adequate to further the values and fill the functions of the legal profession. While one could argue that these are situations in which the outlet providing such information is not providing legal services, I use the analysis here to identify those situations in which this level of service is adequate to promote the values and fill the functions of the legal profession. When it is adequate, we should not concern ourselves with whether we call the service that is being offered legal services or not.

III. APPLYING THE FRAMEWORK TO A REAL-WORLD PROBLEM

In my practice as a legal services attorney, I represented many non-profit organizations looking to provide services to low-income communities, primarily communities of color. The following discussion explores the type of problem that would often present itself in this practice. These are fictionalized problems, but many of their elements, in both of the scenarios described below, are drawn from experiences in my practice. This Part is also lightly sourced in that it is derived, mostly, from my personal experiences in that practice.

A. Scenario One: East Harlem All Stars

Assume a small group of individuals want to start a non-profit organization; I will call it East Harlem All Stars (EHAS). Starting with their personal characteristics, let us assume they are community leaders with a degree of savvy, smarts, and sophistication that enables them to understand basic legal concepts and have a clear sense of what it is they want to do and how they want the entity to be organized. If information is explained to them in a clear way, they are capable of

183. *See, e.g.*, *In re* N.Y. Cnty. Laws.' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967) (distinguishing between general and tailored advice); *see also* Joseph J. Avery, Patricia Sánchez Abril & Alissa del Riego, *ChatGPT, Esq.: Recasting Unauthorized Practice of Law in the Era of Generative AI*, 26 YALE J.L. & TECH. 64, 87-92 (2023) (describing outcomes in cases involving UPL challenges to several legal technology companies and uses); Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 461 (1997) ("Giving a client legal advice tailored to the specific facts presented by that client is at the heart of the definition of the practice of law.").

grasping complex legal concepts, like the duty of care and loyalty that is imposed on non-profit organizations.[184] By assuming these facts about the characteristics of these leader-clients, we can conclude that there are no personal characteristics of the clients that would disqualify any potential service delivery mode. We will leave to the side for the moment their ability to pay, which would have some bearing on which service delivery mode might be out of their reach in a strict, fee-for-service world.

Let us now look at the characteristics of the problem. As described above, there is a typology of the characteristics of legal problems that helps us assess the appropriate service delivery mode: the legal problems' complexity, the tactical agility they require, whether they are preventative/prospective or reactive/retrospective, and what is at stake. Turning to the first of these characteristics, generally speaking, there is great heterogeneity in the level of complexity across different legal problems. Let us say the group wants to create a non-profit organization that will promote youth basketball in the community. They have already secured a site; a local parochial school will permit them to use its gymnasium two nights a week. They will be operated completely by volunteers, will hold a few bake sales throughout the year, and will seek small donations from local businesses to sponsor teams and events so that they have enough to pay the school rent for the gymnasium, pay for the players' uniforms, and host an awards ceremony at the end of each season. They do not anticipate paying salaries to anyone other than the small honorarium they will pay the referees who officiate at the games. The incorporators and, ultimately, the board and officers of the organization will not draw a salary for their work. Their anticipated budget, which is entirely realistic, anticipates annual expenses and revenue of roughly $10,000. The group does not want to be a membership-based organization but will have a self-perpetuating board of five members who will be chosen by the incorporators (in fact, the first board will be the incorporators).[185] They will hold no assets other than a bank account where the funds raised will be maintained and the equipment they will use in the games.

For these reasons, this is a matter that does not score very high on the complexity factor. Simple guidance, given the sophistication of the clients, should be enough to walk the clients through the steps they need to take to incorporate and even maintain their organization, with annual filings being relatively straightforward given their income and

184. *E.g.*, ELIZABETH SCHMIDT & ALLEN MADISON, NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION 63-71, 82 (3d ed. 2021) (describing governance duties in non-profit entities).

185. Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 834-35 (2003) (describing the role of incorporators in non-profit entities).

expenses.[186] Furthermore, at this stage of the representation—the pre-filing stage—there is little need for tactical agility, and the guidance the individuals need is mostly preventative or prospective, i.e., to set up an organization to obtain tax-exempt status and avoid individual liability for the incorporators and ultimately the directors.[187]

Given the characteristics of the problem, once again, it does not seem that any service delivery channel would be foreclosed. Going further, brief advice or tailored information would likely be more than sufficient to get this organization off the ground, understanding, once again, that full-service might be preferred but might not be possible given the economic constraints under which the incorporators operate. While they might have access to a lawyer willing to volunteer their time to handle the matter, there might not be a non-profit legal services provider in the community that provides such services.[188] Given this final constraint, it is possible that the incorporators would have to rely on a service delivery channel other than full service. Given the nature of the services required, it is possible that, depending on the quality of the information available in the community in this field and the technology that might deliver it, even such a technology-based solution might provide services to the incorporators in a wholly effective way.[189]

If any service delivery method is adequate for the relatively simple task at hand, incorporating the organization, will the delivery of services through technology further the values and fill the functions of the legal profession in this context? With respect to the values, as stated earlier, lawyers are (1) champions for their clients' interests within an adversarial system, (2) facilitators to ensure that system is a reflection of the collective will, (3) protectors of the rule of law, and (4) champions of access to justice.[190] The role of legal assistance in this setting, although there is no clear adversary, is the promotion and preservation of the clients' interests. The incorporators want to organize the entity to conform to state and federal law to ensure that the

186. On federal exempt organization annual filing requirements, see SCHMIDT & MADISON, *supra* note 184, at 568-79.

187. *Id.* at 39-40.

188. For empirical findings concerning the justice gap among non-profit entities in New York State, see Raymond H. Brescia, Bahareh Ansari & Hannah Hage, *The Legal Needs of Nonprofits: An Empirical Study of Tax-Exempt Organizations and Their Access to Legal Services*, 17 HASTINGS RACE & POVERTY L.J. 451, 469-84 (2020).

189. For a discussion of assessing client capacity for use of a technology-based tool, see Raymond H. Brescia, Alexandria Decatur & Julia Kosineski, *Civil Society and Civil Justice: Teaching with Technology to Help Close the Justice Gap for Non-Profit Organizations*, 29 ALB. L.J. SCI. & TECH. 16, 50-51 (2019).

190. *See supra* Section I.B.

corporation shields the individual incorporators' assets from the liabilities the corporation might incur.[191] In terms of tax liability, competent legal assistance will organize the entity to protect it from most forms of taxes and will permit donations to the organization to qualify as tax-deductible charitable donations.[192] Legal assistance will inform the preparation of the constitutional documents of the organization, its certificate of incorporation or another similar document, and its by-laws so that the organization's leaders have clear guidance on the purposes and operations of the organization to maintain it in good standing with regulators.[193]

A second value the legal assistance will advance reflects the role of legal assistance in permitting the incorporators to participate in the democratic life of the community by offering them an opportunity to express their collective interests within civil society. The organization they will create with the aid of legal guidance is shaped by the legal institutions that permit the operation of tax-exempt organizations at the same time that this organization will, in a small way perhaps, help to shape community life and the institutions present within it.[194] In these ways, the legal assistance, by aiding in this endeavor, helps the incorporators to take part in the democratic life of the community in meaningful ways.

By ensuring the incorporators and the entity they form all comply with the law in the activities of the entity and its organization and operations, legal assistance in this context helps preserve the rule of law: it prevents individuals from using the tax code in an extractive way, to shield assets improperly and engage in activities that a for-profit business would undertake but on which it would pay taxes.[195]

Finally, legal assistance in this setting helps to advance the value of access to justice, ensuring that the individual incorporators have the legal guidance they need to form and operate their organization in a lawful manner, provided, of course, that the legal assistance they receive is up to the task.[196] This final value is only furthered when the

191. On liabilities of nonprofit entities, see SCHMIDT & MADISON, *supra* note 184, at 35-41.

192. On charitable contributions to nonprofit entities, see *id.* at 245-59.

193. On the creation of organizational documents of a nonprofit entity, see *id.* at 31-41.

194. For a case study of the role of civil society in Italy and its impact on democratic norms and practices, see generally ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NONETTI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993).

195. For a discussion of how entities can exploit their nonprofit status in ways contrary to its intended purposes, using the example of how religious organizations can engage in private inurement for their leaders and other, similar pursuits, see Mathew Encino, *Holy Profits: How Federal Law Allows for the Abuse of Church Tax-Exempt Status*, 14 HOUS. BUS. & TAX L.J. 78, 90-103 (2014).

196. For a description of the legal needs of nonprofits, see Brescia et al., *supra* note 188, at 479-84.

legal assistance offered, regardless of the service delivery model through which it comes, reflects the core instrumental, affective, and political characteristics of legal assistance described above.

In this setting, the legal assistance will permit the client-incorporators to prepare the necessary documents and file them with the appropriate state and federal authorities. If the guidance is sound, clear, accessible, and actionable, it should give the clients peace of mind that they are forming and operating the organization within the law. Blending the affective and the political will enhance their ability to operate within civil society and to contribute to the civic life of the community. The ability of the legal assistance in this setting to deliver effective services along the instrumental, affective, and political metrics likely hinges on some of the questions raised above, i.e., the complexity of the legal issues, the low level of tactical agility required to respond to them, that the legal assistance is preventative for the most part rather than reactive, and that the stakes are relatively low in this example. While it might be too much to ask these incorporators (again, this will depend on their level of sophistication with legal matters) to utilize purely passive, generic, and information-based legal assistance to obtain the guidance they need, it is also apparent that they can likely proceed effectively with a technology-based solution alone and that this can both further the values and fill the functions expected of legal services in this setting.

B. Scenario Two: The Safe Center

At the same time, it is possible to consider another scenario, one that is in some ways similar but in many ways quite different from the one described above, and calls out for more intensive legal assistance, assistance that requires delivery through traditional, bespoke methods of legal services. Instead of creating an organization that will host basketball programming, imagine that the incorporators wish to embark on a very different endeavor. Perhaps they want to start a drop-in center for runaway youth, particularly lesbian, gay, bisexual, and transgender (LBGT) youth. Maybe they want to offer emergency housing, addiction and mental health counseling, and medical services like AIDS testing. They will need a permanent physical location and cannot rely on donated, temporary space. They will pursue donations from foundations but will also seek to provide services paid for by Medicaid and private medical insurance. They will seek government funding to operate the emergency shelter. I will call this organization "The Safe Center" (SC).

Some of the legal assistance the incorporators of SC will require will be nearly identical to that which the incorporators of EHAS need. SC will need to prepare a certificate of incorporation and bylaws, and it will need to file a form for recognition as a tax-exempt organization

with the IRS. That is where the similarities end, however. The incorporators will likely need permission from the state's department of health to operate[197] and will need to follow guidelines for the operation of an emergency shelter (which will be found in regulations as well as consent decrees litigated over the years that set forth the requirements that shelter providers must follow).[198] The staff will need to be licensed and trained (and the facility will likely need an operating license as well), and recordkeeping will have to comply with protections related to health records and information.[199] The organization will need to negotiate a lease and, more importantly, will likely face land use hurdles for the siting of a medical facility and emergency shelter, let alone challenges from local community-based organizations and even religious groups opposed to the type of facility the group wants to operate.[200] And these are all issues that must be resolved before the organization even opens its doors.

An assessment of the characteristics of this problem to determine which service delivery channel is appropriate to handle the matter probably needs to go no further than reviewing the complexity of this problem to conclude that only full-service legal assistance can further the values and fulfill the functions expected of legal services. Simply put, this scenario, which involves health law and regulation, land use law, public services law, and many other substantive areas of law, is highly complex and likely requires a high degree of specialization and expertise. It is of such a quality that a general practitioner would not likely know the requirements for operating a shelter and siting one in the community. It will require tactical agility, including not just compliance and regulatory work but perhaps litigation, if the community fights the land use questions. While it might appear prospective in nature, it is likely highly reactive, requiring legal assistance that responds to questions from the IRS, health regulators, and the local land use board. Finally, the stakes are high. The likely implications for cli-

197. To outline all of the requirements for operating a medical facility goes well beyond the scope of this Article. For a brief introduction, see *About Hospitals and Clinics in New York State*, N.Y. ST. DEP'T HEALTH, https://www.health.ny.gov/facilities/hospital/key.htm [https://perma.cc/MM6V-9HKD] (last visited Apr. 10, 2024).

198. Leonard Koerner, *Institutional Reform Litigation*, 53 N.Y. L. SCH. L. REV. 509, 512-13 (2008) (describing consent decrees governing the provision of shelter to the homeless in New York City).

199. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262(a) et seq., 110 Stat. 1936.

200. Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REGUL. 29, 32 (2006) (describing the NIMBY, or "not-in-my-backyard," syndrome, as related to the siting of such uses as "homeless shelters, prisons, airports, and waste disposal sites" that "impose concentrated and localized costs while creating widely dispersed benefits" and "often provoke[] intense resistance from local residents").

ents, providers, and the community if SC fails to follow Medicaid rules or provides unlicensed medical services are profound, which can lead to ruined lives, lawsuits, and distrust in the community.[201]

An assessment of the characteristics of the clients in this situation would likely yield a similar result. Regardless of the incorporators' level of sophistication, the work of dealing with all the legal issues the formation of SC presents would require an individual or team with a range of expertise, from health law and regulation to land use. The group would likely want to retain a lawyer or group of lawyers with experience doing this sort of work. Again, a general practitioner would not have the level of competence required to handle all of the nuances of this work, which will require an expert; indeed, it is likely several experts are needed to provide competent services in a number of areas of law.[202] The work is also labor and time intensive, and a lay person, regardless of their level of sophistication, would need countless hours to begin to even understand the legal issues involved were they to try to tackle the many problems without the assistance of a lawyer.[203] But the substantive legal knowledge is only a part of the work in this case. Effective advocacy in this setting requires understanding process as well as substance, e.g., the steps necessary to secure Medicaid approval and the customs of dealing with the local land use board. One of the significant assets a lawyer brings to the table in such settings is their knowledge of the process, rules, and practices for navigating a client problem through the institutions that touch on that problem.[204] There are certainly some lay people who might have experience with a particular process because they have tried to navigate that process on their own, but a knowledge of multiple complex systems is likely too much to ask of individuals who do not do this type of work for a living.[205]

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201. Even allegations of mismanagement or substandard treatment can ensnare a community institution. *See, e.g.*, Sharon Otterman, *Who's Spending $1 Million to Attack This Struggling Hospital?*, N.Y. TIMES (Feb. 26, 2023), https://www.nytimes.com/2023/02/26/nyregion/maimonides-medical-center-brooklyn-hospital.html [https://perma.cc/76SL-V3JE].

202. Although the commentary to the *Model Rules* provides that "[i]n many instances, the required proficiency" to address a given problem "is that of a general practitioner," it also points out that "[e]xpertise in a particular field of law may be required in some circumstances," without pointing out exactly what those circumstances are. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2020).

203. *See* Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 448 (2010) (noting critical roles lawyers and their legal training play in navigating complex legal systems).

204. *Id.*

205. Another characteristic of the clients will be their ability to pay, and, unless the group is able to secure the pro bono assistance of a private lawyer, the clients will likely need significant resources to hire a for-profit lawyer to do this work. While there might be nonprofit legal services providers able to give this assistance, with some exceptions, funding streams for such organizations tend to focus on the delivery of services to individual clients or ban the delivery of services to groups outright. Thus, whether the clients in this setting will be able to secure a lawyer or lawyers to do this work will depend to a large extent on

Moving from the characteristics of the problem and the clients, another component of the inquiry that will determine the appropriate type of legal assistance to help meet the clients' need in this setting is an assessment of the values at stake. Legal assistance in this setting will require adversarial advocacy with state health agencies and local community institutions to further the interests of the group. It will require a high level of substantive sophistication and tactical facility to navigate the processes before these entities. The legal assistance will strive to promote democratic values and the rule of law by ensuring that this entity can operate to deliver desperately needed services to the community and act as a bulwark against discrimination and lack of resources for outsider groups. It will oppose bias in land use decisions and narrow, discriminatory practices of neighborhood residents who seek to exclude marginalized individuals from partaking fully in community life. The provision of legal services in this setting will ensure access to justice to an otherwise underserved community, promoting the other values legal services are supposed to uphold. But doing so will likely require a mastery of several different subject matter areas and a knowledge of practice before different institutions and perhaps even tribunals if the work involves affirmative or defensive litigation to protect and advance the interests of the group.[206]

Finally, turning to the functions of the legal profession in this setting, the instrumental needs, given the complexity, the need for agility, the reactive nature of the work, and the stakes, demand full-service assistance. It is hard to say that the affective functions could be fulfilled by anything less than full service. The clients could hardly address the complex and involved legal issues by scouring digital sources of information or by sending countless queries to generative AI that are unlikely, given the current state of the technology at least, to provide fully competent, nuanced guidance.[207] Finally, the political functions in this problem are critical to the success of the organization, requiring nuanced navigation through interactions with agency representatives, community board officials, neighborhood groups, and other

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their ability to pay. *See, e.g.*, David I. Schulman, Ellen Lawton, Paul R. Tremblay, Randye Retkin & Megan Sandel, *Public Health Legal Services: A New Vision*, 15 GEO. J. ON POVERTY L. & POL'Y 729, 776-77 (2008) (describing the difficulty of pro se individuals navigating complex legal systems).

206. On the role of lawyers in the campaign for marriage equality and the lessons learned for other forms of social change advocacy for marginalized groups, see William N. Eskridge Jr., *Marriage Equality's Lessons for Social Movements and Constitutional Change*, 62 WM. & MARY L. REV. 1449, 1465-75 (2021).

207. Nathaniel F. Sussman, *Functional Limitations on Generative AI*, *in* eDISCOVERY FOR CORPORATE COUNSEL § 26:12 (Carole Basri ed., 2024) (arguing that "for certain highly complex issues, or where the legal standards at play rely on normative judgments that may be inconsistent with other judgments on similar issues in the past, generative AI simply may not be particularly helpful or otherwise add much value . . . [and] there are important aspects of legal service that may not yet be appropriate subjects for generative AI applications").

stakeholders. Only a skilled and experienced lawyer with a strong sense of the political forces at play in the group's efforts will be able to chart a course through the rocky waters the group will face.[208]

After this review of the characteristics of the problem and the clients, the functions legal assistance is supposed to fulfill, and the values legal services are supposed to further in this setting, one is hard pressed to come to any other conclusion than an organization such as SC would require traditional legal services to address the legal needs of this group. The complexity, the tactical agility needed, the reactive nature of much of the work (even though we are just talking about setting up the organization at this point), and the stakes all point in the direction of direct, full-service legal assistance. The complex functions and the critical values that are implicated by the work in this setting call out for sophisticated, knowledgeable, reactive, agile, and robust legal assistance that can only be offered through traditional legal services: negotiations, preparation of filings, counseling, regulatory advocacy, complex transactional assistance, and litigation.

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These two simple examples help to illuminate the process through which we can assess the appropriate mode to deliver legal services in different settings. It requires an assessment of the characteristics of the legal problem and, to a certain extent, those of the client. It also requires an appreciation for the functions the client wants the legal assistance to carry out and the values legal assistance might advance in a given setting. Different legal problems and clients will require different approaches to the legal assistance they need and different delivery channels through which that assistance can flow. To what extent, then, are existing ethical paradigms consistent with, or contrary to, this multi-level assessment? And if they are sufficient to provide guidance to the legal profession as we enter a potential third-wave lawyering role, such lawyering is likely consistent with those paradigms. As the following discussion shows, though, existing rules and institutional principles, beyond the mere mention of technological competence in a comment to the *Model Rules*,[209] are implicated by the application of this assessment.

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208. As Eskridge, writing about the marriage equality campaign, has argued, social change work for marginalized groups generally is challenging to say the least:

> A lot has to come together for big changes to happen: favorable demographic and economic developments, mobilization of the group's widely dispersed members who agree that they are being treated unjustly, the recruitment of unaffiliated allies, political organization at the local and national levels, enormous funding to create smart, emotion-packed campaigns and media attention, and a great deal of luck.

Eskridge, *supra* note 206, at 1466 (citation omitted).

209. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2020) (providing that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of

IV. EXISTING ETHICAL PARADIGMS AND THIRD-WAVE LAWYERING

As described above in Part I, what I call the second wave of American lawyering emerged in the early twentieth century when the legal profession created a range of institutions designed to professionalize the profession. One of the most significant of these was the adoption of a code of ethics, and that code should, for all intents and purposes, both reflect best practices for lawyers but also serve a regulatory function: to set the standard of care in many respects, guide conduct, and serve as a yardstick against which to measure attorney conduct and misconduct.[210] Since the adoption of that first national code by the American Bar Association, the ABA has made significant changes to the body of legal ethics rules two more times, with the most recent iteration of these rules being the Model Rules of Professional Conduct, first adopted in 1983 and modified every few years since.[211] To gauge the values/functions framework for lawyering in a technology-enhanced new "wave" of practice, existing ethical paradigms must provide guidance to lawyers to function effectively within these paradigms. In the first Section, I explore the ways third-wave lawyering fits within these paradigms. In the second Section, I look at ways that these paradigms might not match the needs of third-wave lawyering.

A. Third-Wave Lawyering Within Existing Ethical Paradigms

An assessment of third-wave lawyering appears along four dimensions: the characteristics of the legal problem, the characteristics of the client, the values the lawyer is being asked to advance, and the functions the lawyer is being asked to carry out. As the following discussion shows, any review of the degree to which technology-first legal services are adequate to address the need of a particular client in a specific situation will require an assessment of the complexity of the matter[212]: an evaluation of client needs, goals, capacity for self-representation, and technological and legal sophistication. It will then

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" (emphasis added)).

210. Admittedly, the first code provided few avenues for holding lawyers accountable for violations of the rules. Indeed, the ABA's efforts to amend the initial code of ethics was due, in part, to the recognition that it offered few mechanisms for enforcement of violations. *See, e.g.*, Lewis F. Powell, Jr., J., Evaluation of Ethical Standards, Address at the ABA House of Delegates (Aug. 12, 1969) (describing the lack of enforcement mechanisms in initial canons).

211. On the evolution of the rules of ethics for the profession, see Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2081-83 (2000).

212. An assessment of the complexity of the matter will also incorporate the concepts contained in the framework for determining the characteristics of the problem, including

require effective decisionmaking around the proper scope of the lawyer's involvement, if any, in the representation, a clear-eyed determination of the best interests of the client in each situation, and a willingness to put those interests ahead of those of the lawyer. Each of these elements of the assessment live comfortably within existing ethical paradigms.

1. Assessing Complexity

The core standard of care under existing rules is that lawyers should "provide competent representation to [the] client."[213] Such representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[214] The commentary to Rule 1.1 provides that when

> determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.[215]

In addition, the commentary provides further that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."[216]

Similarly, when considering the reasonableness of the fee the lawyer plans to charge, or has charged, a client, the level of complexity of the matter comes into play. There, the assessment of the reasonableness of the fee involves factors similar to those described above that relate to the degree of competence required of a lawyer in a particular situation, including the following: "the time and labor required" for the representation, including "the novelty and difficulty of the questions involved, . . . the skill requisite to perform the legal service properly," "the amount involved" in the representation, "and the results obtained," among other factors.[217]

It seems clear, then, expecting a lawyer to assess the complexity of a particular matter is something that should be familiar to every lawyer and fits comfortably within the existing legal paradigms that gov-

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whether there is a "need for agility and tactical pluralism," whether the services are "preventative or reactive," and what is at stake. *See supra* Section II.C.

213. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2020).

214. *Id.*

215. *Id.*

216. *Id.* r. 1.1 cmt. 2.

217. *Id.* r. 1.5.

ern the practice of law. A lawyer must always provide competent representation to the client and such representation necessarily hinges on the relative complexity of the matter the lawyer is handling on behalf of the client.[218] To bring in the technological component of this assessment, it is not a stretch to say that when lawyers begin representation on behalf of a client—whether it is preparing a complaint, answer, will, or term sheet—they also likely consider whether what they might have done in a similar case related to the matter before them is something that might serve as a starting point for the representation in the new matter.[219] It is not hard to make the leap to third-wave lawyering. A lawyer would know the capacities and functions of the technology available in a particular situation, either that will assist the lawyer in providing representation to the client or in advising the client that a particular consumer-facing tool might be adequate to address the complexity of the client's situation. In such settings, to use the "job-to-be-done" framework, the lawyer could assess whether there are technological tools appropriate for effective service provision in a particular setting. They can then use that technology themselves or, in the case of technology available to a particular client to address a particular matter, can recommend that the consumer use that technology instead of turning to the lawyer to help that consumer address their legal issue. Of course, as I have described earlier, the complexity of the matter is just one element of the third-wave lawyering framework. The second, critical element of the framework involves an assessment of the interests and capacities of the client, which I address next.

2. Evaluating Client Interests and Capacities

In assessing the client's interests and capacities in a particular situation, the job-to-be-done framework is particularly helpful. The lawyer will work with the client to identify the values the consumer wants the lawyer to advance and the functions the consumer wants the lawyer to fill. Here, the lawyer will strive to understand the client's goals for the representation and to assess whether the consumer has the capacity to utilize a particular technology that might be available to assist that consumer in resolving their legal problem.

The lawyer will necessarily engage in an inquiry similar to one they should use in any particular representation. Indeed, existing rules already provide that the lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions

218. *See id.* r. 1.1 (outlining the duty of competence).

219. For an exploration of the extent to which lawyers might or might not use pre-existing templates for legal documents, see generally Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57 (2017).

regarding the representation,"[220] and "shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."[221] To start, the lawyer must examine the client's instrumental goals for the representation. Does the client want the lawyer to file or defend against a lawsuit, prepare a will, or carry out some other straightforward function? But a client's goals can also go beyond mere instrumental functions to encompass the affective and political elements of a particular legal situation. Will the client feel comforted by having a lawyer in their corner and will such representation satisfy their affective needs in a particular situation? What other emotional elements might go into the representation that the client wants to get out of their retention of a lawyer?

When it comes to the more affective and political elements of the representation, the lawyer is assessing the client's goals related to those elements or needs, all falling within the rubric of understanding the client's goals for the representation. At the same time, another characteristic of a client or potential client is always their ability to pay. Perhaps the client's desire to have a lawyer represent them to satisfy their emotional needs in a particular situation is a "luxury" they simply cannot afford. This is a cold, hard truth about these situations, but it is always factored into the assessment. To the extent the lawyer provides services through a non-profit organization, the assessment of the client takes on a different cast: it is not whether the client can afford the services, but, rather, whether they qualify for the services of the organization according to the restrictions under which the organization operates and the extent to which the organization has sufficient funding to provide services to all of those prospective clients who might qualify for their services.[222]

Thus, when considering whether a particular technology-based legal intervention might address a particular consumer's interests and needs, the lawyer will have to determine what those interests and needs are and whether such a solution might meet those needs. That does not seem beyond the realm of the existing ethical requirements imposed on the lawyer. One area that does seem new as it relates to the adoption of technological interventions to address client needs is the consumer's capacity to use the technology in the first place. Thus, when it comes to the potential deployment of technology in a given situation, the lawyer should also attempt to assess the client's facility

220. *See* MODEL RULES OF PRO. CONDUCT r. 1.4(b) (AM. BAR ASS'N 2020).

221. *Id.* r. 1.2(a); *see also id.* r. 1.4(a)(2) (providing that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

222. Different non-profit legal services organizations will operate under different restrictions, often tied to their funding sources. Such restrictions might involve the client's income or net worth, the geographic catchment area of the organization, or the nature of the client's case.

with the tools the lawyer might suggest that they use to address their legal problem. More elementally, it should also require an assessment of whether the consumer has access to those tools. Since this is related to the scope of the assistance the lawyer will provide the consumer in any particular situation, and that which will be offered through technology, I address that aspect of the framework analysis next.

3. Defining Roles

Generally, a lawyer is supposed to provide assistance to a client to the conclusion of any particular matter for which the lawyer was retained.[223] But that begs the question: what is a matter? Rule 1.2 now incorporates the notion of "limited scope representation," which allows the lawyer to narrow the nature of the representation, including handling just a particular component or step in a particular "matter." When a lawyer provides representation that is limited in a particular matter, that limitation must itself be reasonable and the client must provide informed consent to the limitations imposed; that is, they must understand the nature of the limitations imposed on the representation and their potential ramifications of that type of circumscribed representation.[224]

With the incorporation of technology to aid in the delivery of legal services, the lawyer's role might include simply assessing the complexity of the matter, whether there is a technology that is adequate to address the needs of the client, and whether the consumer is equipped to utilize that technology to address their needs adequately. The consumer would have to understand the role the lawyer is playing in the matter—that is, they are simply conducting this assessment—and consent to the lawyer playing such a role. Even in such limited circumstances, the lawyer could engage in malpractice; that is, they could make an incorrect assessment of any of the aspects of their analysis: the complexity of the matter, the capacity of the consumer, and the fit of the technology to meet the consumer's needs.[225]

223. Comment 1 to Model Rule 1.3 provides as follows: "Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client." *Id.* r. 1.3 cmt. 1. It provides further that when "a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved." *Id.*

224. Model Rule 1.2(c) provides as follows: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." *Id.* r. 1.2(c).

225. Many law students are familiar with the canonical case of Mrs. Togstad, where a lawyer was found responsible for committing malpractice when he provided advice in a relatively brief, forty-five-minute conversation stating that the client essentially did not have a viable medical malpractice case. When it turned out that she did, the attorney was found liable to the plaintiff for hundreds of thousands of dollars: an amount equivalent to what she would have won against the medical provider but for the lawyer's incompetent assessment of her case. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

4. Placing Client Interests Ahead of Those of the Lawyer

Lastly, the application of the framework will require the lawyer to make an honest assessment about the consumers' needs and interests in a way that truly puts that consumer's interests ahead of their own; that is, the lawyer should, in good faith, assess whether the consumer would be served in a manner consistent with their needs and interests by available technology, even if that means less work for the lawyer. This requires the lawyer to put the consumer's needs ahead of their own. In other words, it asks, simply, that the lawyer serve as a fiduciary to that consumer, which is, of course, one of the core responsibilities of lawyers under current ethical paradigms.[226] In summation, then, it does appear that these paradigms offer the legal profession some degree of guidance in how to incorporate technology into their practice to deliver effective services to clients in meaningful ways that can advance the purpose of the profession. Still, as the next Section shows, there are ways that these paradigms are not well calibrated to the needs of third-wave lawyering.

B. Third-Wave Lawyering's Challenges to Existing Paradigms

While it would appear that applying the third-wave framework sits comfortably within existing legal ethics requirements, there are aspects of third-wave lawyering that will likely test the boundaries of these requirements and will require some significant adjustments to the infrastructure that governs the practice of law. My interest so far has been showing that the new, technology-enhanced practice of law does appear to fit squarely with lawyering best practices; there are areas, which others have explored in much greater depth, that the profession might need to consider in order to promote effective technology-enhanced lawyering. To the extent that others have addressed some of these questions, what I add here represents more of an identification of the topics for debate, and I have highlighted what I believe to be some of the more important of these topics as we prepare for a new normal in the practice of law.

1. Engaging with Non-Lawyer Professionals

Few lawyers are able to develop the technological tools that will serve as the infrastructure of third-wave lawyering. While there are certainly some lawyers involved in the development of legal technologies, and law schools are teaching students how to utilize technologies to help close the justice gap, for the most part, the new technologies

226. *See, e.g.*, GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING § 4.7 (4th ed. 2021) (noting the fiduciary obligations to a client as one of the core duties lawyers must uphold).

that are likely to transform the practice of law are not being built by lawyers. Nevertheless, lawyers will have to work with those technologists to understand user experience and design, and to help those technologists understand the use of the technology to meet consumer demand for tech-based solutions to legal problems. At present, lawyers are responsible for non-lawyer assistants—and assistance—that serve clients.[227] It is appropriate for lawyers to take responsibility for the technology they use and those they advise consumers to use in place of lawyers. It is unlikely, however, that law firms will employ computer and other engineers to work collaboratively to design technology-based solutions. When they do not, but lawyers still partner with such professionals and experts, questions of confidentiality and conflicts necessarily arise. Some degree of flexibility will have to apply to these sorts of lawyer/non-legal professional partnerships; otherwise, lawyers will find themselves limited in their ability to partner with non-lawyer professionals.

2. Exploring Non-Lawyer Ownership of and Investment in Law Firms

One aspect of the development of technology-based solutions is that they are expensive to build and costly to maintain.[228] While private law firms have long adopted technological tools with the goal of making their work more efficient and effective, to the extent that true technological interventions are adequate to satisfy consumer needs, it will require large up-front cost expenditures.[229] Investment in the development of such tools will likely require, well, investment. At present, law firms in the United States operate under restrictions that prohibit non-lawyer ownership of or investment in such firms, while the United Kingdom and Australia have opened up law firms to such non-lawyer investment, and Arizona recently created a program to examine the risks and benefits of such non-lawyer investment in firms.[230] To ensure

227. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020) (describing lawyer responsibility for the actions of non-lawyer assistants as well as any *assistance* the lawyer may utilize in their practice). On the shift in the rule from covering assistants to assistance, see Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 201 (2018).

228. Chris O'Leary, *Legal Technology's Authoritative Guide: List of Use Cases and Benefits*, THOMSON REUTERS (Dec. 19, 2023), https://legal.thomsonreuters.com/blog/technology-in-law-is-the-new-norm/ [https://perma.cc/NB49-HJZA] (noting the expense associated with many new law practice technologies).

229. *See* THOMSON REUTERS, THE BUSINESS CASE FOR AI-ENABLED LEGAL TECHNOLOGY (2021), https://legalsolutions.thomsonreuters.co.uk/content/dam/ewp-m/documents/legal-uk/en/pdf/reports/the-business-case-for-ai-enabled-legal-technology.pdf [https://perma.cc/3DL4-9MQE] (discussing the costs and potential savings related to the deployment of artificial intelligence in legal practice).

230. *See* Matthew W. Bish, Note, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 680 (2009).

effective and wide-scale development and adoption of technological tools that can help close the justice gap and deliver effective legal services, restrictions on non-lawyer investment in law firms is something that rule-generating bodies will have to address. [231]

3. Reshaping the Contours of Unauthorized Practice of Law

Similarly, unauthorized practice of law (UPL) rules are in desperate need of review and reassessment, which has been true for a very long time.[232] Technological advances have transformed the practice of law for roughly 150 years, since the introduction of the telephone in common use in law firms.[233] While I have mostly focused on instances where lawyers are involved in the triaging of legal problems and clients for their appropriate match, it is also likely that some interventions will not require a lawyer in any aspect of the service delivery function. To the extent that consumer needs can be met adequately through the delivery of technology-based solutions, even where lawyers are not involved in any aspect of the service delivery function, UPL rules do no more than protect the lawyer cartel, which is contrary to the purposes of the profession. At present, cases such as *Upsolve, Inc. v. James*, currently pending in the Second Circuit Court of Appeals[234] after a federal district judge granted an injunction barring New York State from enforcing the state's UPL laws against a nonprofit organization,[235] could possibly reshape UPL rules and prohibitions. As in other moments when the legal profession sought to get out in front of change, rather than have change thrust upon it,[236] it is long past the time when the profession needed to revisit these rules to provide a modicum of consumer protection while not undermining other values the profession is supposed to uphold. The framework set forth above in Part II can also serve as a guide for the proper role and function of lawyers, and the values and functions lawyers are supposed to uphold, advance, and fill. To the extent the purposes of the profession can be preserved while restraining UPL overreach, the more the pro-

231. On the relationship between expanding ownership models and increasing access to justice, see Angela O'Meara, Note, *Non-Lawyer Ownership and Management of Law Practices*, 53 GONZ. L. REV. 339, 341-43 (2017).

232. One of the strongest cases against UPL overenforcement was made by Deborah Rhode over forty years ago and was inspired by her own experience as a law student intern. *See* Rhode, *supra* note 11.

233. MARTIN, *supra* note 48, at 192.

234. *See* No. 22-1345 (2d Cir. filed June 22, 2022).

235. 604 F. Supp. 3d 97 (S.D.N.Y. 2022).

236. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, *supra* note 14, at 56 (urging the profession to take action on reform; otherwise, "far more extensive and perhaps less-considered proposals may arise from governmental and quasi-governmental entities attempting to regulate the profession").

fession will fulfill its rightful role, even where the lawyer is out of the picture because a technological solution is more than adequate to solve the consumer's need, their job to be done.

CONCLUSION

As technology allows lawyers and engineers, artists and programmers, and communications experts and computer scientists to all work together to create new models of legal services delivery, I hope that the issues explored here will help guide their actions, inform the profession's approach to the provision of services in new and exciting ways, and improve access to justice for all communities. In order to chart a course through a new generation of technology-enabled service delivery models and understand the role they can play in advancing the purposes of the legal profession, one needs to understand the important values and functions we ask the legal profession to advance and fill. This review posits that the core values of the legal profession include playing a critical role in an adversarial system of justice, advancing the rule of law, promoting the development and functioning of democratic institutions, and ensuring access to justice. Apart from the values the legal profession promotes, it also fills certain functions, which are instrumental, affective, and political. To the extent new technologies can carry out these values/functions, it should encourage the profession to embrace such new ways of delivering services. Moreover, by making services more accessible and affordable, new service delivery tools hold out the promise of not just satisfying these values and functions, but also of ensuring that more people are able to harness the benefits that flow from legal guidance, if not exclusively representation. When new service delivery tools are able to advance the values and fulfill the functions of legal assistance in a more efficient, more effective, more affordable, and more accessible way, and, as a result, more people are able to gain access to the benefits of legal assistance, the legal profession has an obligation to consider embracing these new models of service delivery as a way of promoting these core values and fulfilling its core functions.