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# COMPLIANCE AND CLAIM FUNDING: TESTING THE BORDERS OF LAWYERS' MONOPOLY AND THE UNAUTHORIZED PRACTICE OF LAW

*Michele DeStefano\**

## INTRODUCTION

The complexity of commerce in today's globalized era and the rise of technology have sparked new developments in the debate surrounding unauthorized practice of law (UPL) statutes. Proponents of UPL statutes argue that these rules protect consumers from the incompetency of nonlawyers.<sup>1</sup> Opponents, however, argue that UPL statutes are designed to protect lawyers' monopoly<sup>2</sup> on legal and law-related services,<sup>3</sup> contending that these statutes are written so broadly that the distinction between what is legal advice versus nonlegal business or strategic advice is indeterminate.<sup>4</sup> Further, these statutes seem to suggest that, as a profession, we have been unable to define the practice of law in a concrete way. Thus, many argue for the abolishment of UPL statutes. In doing so, opponents of UPL

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1. See *infra* notes 46–51 and accompanying text.

2. I use the term “monopoly” as others have in this context. See, e.g., Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 4 n.7 (1981) (“The term ‘monopoly’ is used throughout this article in a colloquial rather than legal sense. In technical terms, the profession does not enjoy a monopoly in providing legal services; its conduct in restricting entry and negotiating agreements with competing groups is that of a trade association or cartel, rather than that of a monopolist.”).

3. Cf. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 *MINN. L. REV.* 1115, 1128–32 (2000); Christine Parker, *Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism*, 6 *INT'L J. LEGAL PROF.* 175, 175 (1999) (“[G]eneral business deregulation is beginning to achieve a partial loss of monopoly for corporate lawyers that was not accomplished by regulatory reform aimed explicitly at the legal profession.”).

4. See Green, *supra* note 3, at 1143–44 (“As the conception of law practice expanded, the distinction between legal services and other professional services became increasingly blurry.”); cf. Michele DeStefano Beardslee, *Taking the Business Out of Work Product*, 79 *FORDHAM L. REV.* 1869, 1874–81 (2011) (contending that the reality of corporate practice makes it impossible to distinguish between business and law).

statutes believe that, amongst other benefits,<sup>5</sup> access to justice will increase because nonlawyers will be able to do what was traditionally lawyer-only work, and lawyers will lose the power of a monopoly-rooted competitive advantage. Proponents do not appear to disagree and, in fact, have been accused of protecting UPL statutes for this very reason.<sup>6</sup>

Are the opponents to UPL statutes right? This is the primary issue I seek to examine: will abolishing UPL laws enable nonlawyers to encroach on lawyers' monopoly of services?

Arguably, UPL statutes are most contentious on the margins—those areas where the line between business and law is the hardest to draw.<sup>7</sup> More and more lawyers are moving into these quasi-legal jobs, where a legal license is not required but having a law degree provides an advantage.<sup>8</sup> As such, both lawyers and nonlawyers perform key roles and often work together. Although there is debate over who should take the lead, and many scholars have thoroughly studied the unauthorized practice of law by nonlawyers,<sup>9</sup> it does not appear that scholars or regulators have focused on lawyers or nonlawyers working in these quasi-legal roles in relation to UPL or the influence they might have on the reputation and status of the legal profession.<sup>10</sup>

Thus, to fill this gap and analyze whether elimination of UPL restrictions will decrease lawyers' monopoly of legal and law-related services, I explore

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5. For an argument that opening up the legal profession will increase opportunity for innovation, see Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2794–95 (2012).

6. See *infra* Part I.C.

7. See Beardslee, *supra* note 4, at 1874–81 (describing the illusive distinction between business and legal advice); Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 751–55 (2009) (same).

8. See Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 DUKE L.J. 1243, 1259–60 (2014); see also NAT'L ASS'N FOR LAW PLACEMENT, EMPLOYMENT FOR THE CLASS OF 2011—SELECTED FINDINGS 2–3 (2012), available at <http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf> [hereinafter 2011 NALP SELECTED FINDINGS]; see also NAT'L ASS'N FOR LAW PLACEMENT, CLASS OF 2011 NATIONAL SUMMARY REPORT (2012), available at [http://www.nalp.org/uploads/NatlSummChart\\_Classof2011.pdf](http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf) [hereinafter 2011 NALP SUMMARY REPORT]. According to a NALP Press Release, the percentage of jobs in business in 2010 increased to 18.1 percent, compared to prior years reporting 10 to 14 percent. Press Release, Nat'l Ass'n for Law Placement, Law School Grads Face Worst Job Market Yet—Less Than Half Find Jobs in Private Practice (June 7, 2012), available at [http://www.nalp.org/uploads/PressReleases/Classof2011ERSS\\_SelectedFindingsPressRelease.pdf](http://www.nalp.org/uploads/PressReleases/Classof2011ERSS_SelectedFindingsPressRelease.pdf). The press release further states, “About 29% of these jobs [in business] were reported as requiring bar passage, and about 37% were reported as jobs for which a JD was an advantage.” *Id.*

9. See, e.g., UNAUTHORIZED PRACTICE DECISIONS (George E. Brand ed., 1937); UNAUTHORIZED PRACTICE HANDBOOK (Justine Fischer & Dorothy H. Lachmann eds., 1972); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 824–49 (1986); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577 (1989) (tracing the history of UPL prohibitions and the bar's policing of UPL); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159; Rhode, *supra* note 2.

10. See Remus, *supra* note 8, at 1245–46.

two growing areas straddling the border between business and law in which lawyers and nonlawyers compete for jobs: compliance and claim funding (also commonly known as alternative litigation funding).<sup>11</sup> To aid in this exploration, I use: (1) information from interviews I conducted with seventy general counsels and compliance officers of S&P 500 corporations across a variety of industries, including banking, pharmaceutical, and petroleum (the Compliance Study);<sup>12</sup> and (2) my own personal work experience as a consultant to a start-up commercial claim funding company. This set of data and my experience bring to life how some compliance officers, lawyers, and commercial claim funders view and describe their jobs, and, ultimately, aid my analysis of the effect that eliminating UPL statutes may have on lawyers' monopoly of law-related services.

My analysis leads me to three conclusions. First, the work conducted by compliance officers and claim funders could be considered the practice of law,<sup>13</sup> and therefore, UPL statutes could prohibit such work if conducted by nonlawyers. Second, often the people with legal training and practice experience play the role of compliance officers and claim funders. Third, because of their degrees, training, and experience, attorneys may be considered more qualified or better situated to fill these mixed business-law consultant roles than their nonlawyer counterparts.

If these conclusions are correct, they lead me to two preliminary hypotheses. First, contrary to the arguments made in support of abolishing UPL statutes, such a move may not end lawyers' monopoly of legal and law-related services. Instead, lawyers (those trained in the law) may be able to monopolize (or at least maintain a stronghold in) the marketplace for these closely law-related services, even if UPL statutes are eliminated. The role of the corporate attorney has expanded as clients' needs have grown more complex. Clients may prefer that their lawyers fill these law-related roles for two reasons: first, because they have played them historically, and second, because they have the expertise and training to play them well.

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11. Claim funding is often referred to as alternative litigation funding, litigation funding, third-party funding, and litigation finance. AM. BAR ASS'N COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE 6 (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111019\\_draft\\_al\\_f\\_white\\_paper\\_posting.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_al_f_white_paper_posting.authcheckdam.pdf). This Article will use the term claim funding for the reasons described in an earlier article. See DeStefano, *supra* note 5, at 2796 n.22.

12. Included in this Article are interviews with some former general counsels, a chief ethics officer, a former chair of the Association of Corporate Counsel's Compliance and Ethics Committee, and a former member of the SEC. For a full description of the interviews and methodology, see Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71 app. (2014).

13. Admittedly, this is a difficult claim to make because, as suggested earlier, these industries are on the line between business and law, and that distinction itself is almost impossible to discern. But as is discussed *infra*, the activities conducted by claimholders and compliance officers are often the same types of activities that lawyers do and that have historically been categorized as legal services.

Moreover, although law is arguably a business,<sup>14</sup> lawyers are still part of a profession, a delineation that only serves to protect the monopoly.<sup>15</sup>

Second, these lawyer-nonlawyers may add to what Tanina Rostain identified a few years ago as a growing industry of law consultants, who are not necessarily part of the legal profession, and, therefore, not held to the rules governing professional conduct.<sup>16</sup> Because ambiguity surrounds lawyers' work in these quasi-legal areas and the issue of what is the practice of law is also nebulous, lawyers in consultant positions may be able to evade ethical obligations and help clients find legal loopholes because of their training and expertise as lawyers.<sup>17</sup> This raises special concerns for the public and for the legal profession in terms of its reputation and position in the marketplace.

Granted, I examine only two areas that lay on the margins of law and business. More research needs to be done on other areas to determine if these hypotheses have merit elsewhere.

Part I begins by providing a brief overview of the debate over UPL statutes and the theory behind lawyers' monopoly of legal services. Part II describes and explores the type of work that compliance officers and litigation funders conduct. It analyzes whether these law-related jobs could be considered law practice and what skills and expertise are needed to fill these roles. Part III attempts to answer the question posed above: Will eliminating UPL statutes potentially enable nonlawyers to fill the role that lawyers currently play in these areas on the border between business and law? In other words, if UPL laws were abolished, would a nonlawyer or lawyer get the job? My analysis leads to the hypothesis that in the areas of compliance and litigation funding, the lawyer will still get the job. Further, collaboration may not increase between lawyers and nonlawyers, and negative unintended consequences may result from abolishing UPL statutes.

#### I. BACKGROUND: UPL AND LAWYERS' MONOPOLY

The following Part begins by discussing the history behind UPL prohibitions. It then briefly outlines the arguments for and against UPL prohibitions and the theory behind lawyers' monopolization of legal services.

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14. Beardslee, *supra* note 4, at 1874–90.

15. For these reasons, consumers may continue to hire lawyers over nonlawyers to perform these roles, and access to cheaper, affordable legal services may not increase in some areas if UPL prohibitions did not exist.

16. Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1399 (2006) (discussing the emerging industry of "law consultants" and considering the "effects law consulting might have on the interests and values that professional regulation is intended to protect").

17. See Remus, *supra* note 8, at 1246 (making a similar point and explaining that "[t]his ambiguity creates opportunities for abuse by individual lawyers who seek to evade ethical obligations, and for ethical arbitrage by sophisticated corporate clients who seek to access legal expertise without the strictures of professional regulation").

A. *UPL Prohibitions: Brief History and Status*

Research indicates that some states had UPL laws as early as the middle of the 1800s.<sup>18</sup> In 1914, there were bar committees on unauthorized practice<sup>19</sup> and, by the 1920s, growing state interest and a series of cases concerning UPL.<sup>20</sup> The movement against UPL began in the 1930s<sup>21</sup> when the American Bar Association (ABA) created its first committee on UPL.<sup>22</sup> State and local bar associations followed suit.<sup>23</sup> The touted impetus behind UPL prohibitions was to protect the public<sup>24</sup> from nonlawyers who might be offering illegitimate services purely for commercial gain.<sup>25</sup> But as will be discussed further below, the truth behind this purported impetus is not certain.<sup>26</sup>

Some scholars have described enforcement of UPL prohibitions as “episodic.”<sup>27</sup> Evidently, enforcement reached an all-time high in the 1950s and 1960s,<sup>28</sup> and a “significant enforcement threat” persisted in the 1980s.<sup>29</sup>

18. Christensen, *supra* note 9, at 159–201. In a comprehensive study of the UPL movement published in 1980, Barlow Christensen found that five states had unauthorized practice legislation purportedly dating back to the mid-1800s, and another seventeen states had legislation dating from 1870 to 1920. *Id.* at 180 & nn.113, 114 & 117.

19. Andrews, *supra* note 9, at 582 (“One of the first initiatives in this direction was taken by the New York County Lawyers’ Association as early as 1914, when it established a committee to combat the unauthorized practice of law.”); Christensen, *supra* note 9, at 189.

20. Rhode, *supra* note 2, at 6–8; *see also* JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 323 (1950); Christensen, *supra* note 9, at 161–90 (tracing the origin of UPL Laws regulating nonlawyers and substandard lawyers).

21. *See sources cited supra* note 20.

22. *See Proceedings of the Fifty-Third Annual Meeting of the A.B.A.*, 55 ANN. REP. A.B.A. 1, 94 (1930).

23. Andrews, *supra* note 9, at 582 (“By 1940, approximately 400 state and local bar associations had similar committees.”); *id.* at 583 (explaining that the committee was disbanded in 1984); Christensen, *supra* note 9; Edwin M. Otterbourg, *Collection Agency Activities: The Problem from the Standpoint of the Bar*, 5 LAW & CONTEMP. PROBS. 35, 35 (1938); Rhode, *supra* note 2, at 8, 10 (“Between 1930 and 1960, [special interest] journals published some 358 articles on unauthorized practice.”).

24. *Report of the Standing Committee on Unauthorized Practice of the Law*, 66 ANN. REP. A.B.A. 260, 268 (1941) (“The public, far more than the lawyers, suffers injury from unauthorized practice of law. The fight to stop it is the public’s fight.”).

25. *Id.*; A. Richard Immel, *Crossing the Bar: Attorneys Try To Stop Do-It-Yourself Trend in Some Areas of Law*, WALL ST. J., Sept. 3, 1976, at 1 (citing Frederick Buesser, former chairman of the ABA Unauthorized Practice Committee, as claiming that the bar has a “duty to see to it that people are protected from charlatans” such as those “out to make a fast buck”); *see also Proceedings of the Fifty-Third Annual Meeting of the A.B.A.*, *supra* note 22, at 94 (explaining that the Committee on Unauthorized Practice was established to “consider what action can be taken to protect the public against such improper practice”); *Report of the Standing Committee on Unauthorized Practice of the Law*, *supra* note 24, at 268.

26. Rhode, *supra* note 2, at 9; *see discussion infra* Part I.C.

27. *See Andrews, supra* note 9, at 580 n.19; Christensen, *supra* note 9, at 175–201; George W. C. McCarter, *The ABA’s Attack on “Unauthorized” Practice of Law and Consumer Choice*, ENGAGE, May 2003, at 131, 132 (explaining that one of the two problems that the ABA cited is the “spotty enforcement of unauthorized practice of law statutes across the nation” (quoting ALFRED P. CARLTON, JR., AM. BAR ASS’N, MODEL DEFINITION OF THE PRACTICE OF LAW CHALLENGE STATEMENT (2002))).

28. *See Andrews, supra* note 9, at 580 n.19.

29. *See id.* (explaining that there were sufficient business cases to make this true).

Today, although varied, many states maintain statutes that criminalize UPL.<sup>30</sup> Model Rule of Professional Conduct 5.5 prohibits the unauthorized practice of law<sup>31</sup> and prohibits lawyers from assisting others in the unauthorized practice of law.<sup>32</sup>

### B. UPL Prohibitions: Definitions

In order to prohibit nonlawyers from practicing law, defining the practice of law would be helpful as an initial matter.<sup>33</sup> However, this has proven to be an elusive task, arguably in part because the definition of law practice has always included (and lawyers have always provided) professional services in addition to those easily categorized as legal services, like “giving an opinion as to the right to maintain an action against another,” or “soliciting, settling, or adjusting personal injury claims,”<sup>34</sup> or litigating and representing clients at court hearings.<sup>35</sup> In 1879, the U.S. Supreme Court provided this definition: “Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country.”<sup>36</sup> As early as the mid-1930s, courts openly admitted their reluctance “to adopt an all-inclusive definition of the term ‘practice of

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30. McCarter, *supra* note 27, at 131. Providing a comprehensive survey of state UPL statutes is beyond the scope of this Article. The ABA has put together a list of state definitions of the practice of law. See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS’N, REPORT app. A, available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model\\_def\\_statutes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf).

31. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2013).

32. *Id.*; Rhode, *supra* note 2, at 5 (explaining the Model Rules of Professional Conduct as they were written in 1981).

33. See *Or. State Bar v. Sec. Escrows, Inc.*, 377 P.2d 334 (Or. 1962) (making a similar point and explaining that the legislature had not provided a definition, preferring to “mark out at least enough of the boundaries of the practice of law so that we can decide whether or not the activities complained of fall within them, leaving to future cases such other definitional problems as may remain unresolved”).

34. *People ex rel. Chi. Bar Ass’n v. Goodman*, 8 N.E.2d 941, 944 (Ill. 1937) (citing *Fitchette v. Taylor*, 254 N.W. 910 (Minn. 1934)). Also included in this list was “[t]he procuring of an agreement enabling an unlicensed person to control the negotiations and the litigation that might follow on the failure of the negotiations, and the hiring of licensed attorneys to conduct litigation for others, for the financial profit of the hirer.” *Id.* (citing *Howe v. State Bar of Cal.*, 298 P. 25 (Cal. 1931); *Smallberg v. State Bar of Cal.*, 297 P. 916 (Cal. 1931); *Shaw v. State Bar of Cal.*, 297 P. 532 (Cal. 1931); *Hightower v. Detroit Edison Co.*, 247 N.W. 97 (Mich. 1933); *In re Otterness*, 232 N.W. 318 (Minn. 1930)). For cases with similar holdings, see *Berk v. State*, 142 So. 832 (Ala. 1932); *Creditors’ Nat’l Clearing House, Inc. v. Bannwart*, 116 N.E. 886 (Mass. 1917); *In re Coop. Law Co.*, 92 N.E. 15, 32 (N.Y. 1910).

35. *In re Duncan*, 65 S.E. 210, 211 (S.C. 1909) (“It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law.”).

36. *Sav. Bank v. Ward*, 100 U.S. 195, 199 (1879).

law.”<sup>37</sup> Today, courts still lament: “It is often difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law.”<sup>38</sup> Thus, historically, the practice of law has consistently been defined very broadly.<sup>39</sup> In the 2000s, a common definition stated that the practice

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37. *Goodman*, 8 N.E.2d at 944.

38. *Ark. Bar Ass’n v. Block*, 323 S.W.2d 912, 914 (Ark. 1959) (“Each case must be decided upon its own particular facts.—The practice of law is difficult to define. Perhaps it does not admit of exact definition.”), *modified by* *Creekmore v. Izard*, 367 S.W.2d 419 (Ark. 1963); *Fought & Co., Inc. v. Steel Eng’g & Erection, Inc.*, 951 P.2d 487, 495–96 (Haw. 1998) (explaining that the court has never formally defined the practice of law); *People ex rel. Ill. State Bar Ass’n v. Schafer*, 87 N.E.2d 773, 776 (Ill. 1949) (same); *Sudzus v. Dep’t of Emp’t Sec.*, 914 N.E.2d 208, 215 (Ill. App. Ct. 2009) (applying the definition quoted *infra* note 39 that the Illinois Supreme Court provided in 1931); *Bd. of Overseers of the Bar v. Mangan*, 763 A.2d 1189, 1193 (Me. 2001) (recognizing that the court has never formally defined the practice of law); *State v. Niska*, 380 N.W.2d 646, 648 (N.D. 1986) (“[W]hat constitutes the practice of law does not lend itself to an inclusive definition.”).

39. For example, in the 1930s, the following represented a common definition of the practice of law:

[T]he practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court. In litigated matters it involves not only the actual representation of the client in court, but also services rendered in advising a client as to his cause of action or defense. The practice of law also includes the giving of advice or rendering services requiring the use of legal skill or knowledge.

*People ex rel. Ill. State Bar Ass’n v. People’s Stock Yards State Bank*, 176 N.E. 901, 907 (Ill. 1931); *see also* *State Bar Ass’n of Conn. v. Conn. Bank & Trust Co.*, 140 A.2d 863, 870 (Conn. 1958) (“The practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field.”); *Del. State Bar Ass’n v. Alexander*, 386 A.2d 652, 661 (Del. 1978) (“The practice of law includes ‘all advice to clients, and all actions taken for them in matters connected with the law’ . . . and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal.” (quoting *In re Welch*, 185 A.2d 458, 459 (Vt. 1962))); *Goodman*, 8 N.E.2d at 944. Some courts attempt to put parameters around the vagueness (i.e., by asking whether the public interest is served or not). *See* *Iowa Supreme Court Comm’n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W.2d 679, 682–81 (Iowa 2001) (specifying that it is the professional judgment of the lawyer that matters); *In re Op. 33 of Comm. on Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999); *see also* *COLO. R. CIV. P. 201.3(2)*; *N.H. SUP. CT. R. 35.1*; *Denver Bar Ass’n v. Pub. Utils. Comm’n*, 391 P.2d 467, 471 (Colo. 1964) (“We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law.”); *Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Baker*, 492 N.W.2d 695, 701 (Iowa 1992) (refraining from providing a single, all-inclusive definition of the practice of law); *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 4 cmt. c (1998); *TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW*, *supra* note 30. Some courts delineate exceptions (i.e., the authorization of law students to represent indigent clients as part of a law school clinic and representation by laypersons in certain administrative agency proceedings). *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 4 cmt. c; *see, e.g.*, *KY. SUP. CT. R. 3.020* (providing an exception for “[a]n appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made”).



of law was “legal knowledge or skill” as opposed to merely “simple, fact-based answers”<sup>40</sup> like “the filling in of blanks in legal instruments.”<sup>41</sup>

Recently, the ABA created a task force to determine whether it should create a model definition of UPL that “would support the goal to provide the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis for effective enforcement of unauthorized practice of law statutes.”<sup>42</sup> The ABA adopted the model definition proposed by the committee and recommended that each state and territory adopt a definition that “should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.”<sup>43</sup>

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40. *Sudzus*, 914 N.E.2d at 217–18 (finding that a nonlawyer’s appearance at the administrative hearing was not the unauthorized practice of law); *see also* *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1168 (Ill. 2005); *In re Discipio*, 645 N.E.2d 906, 910 (Ill. 1994); *Chi. Bar Ass’n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771, 774 (Ill. 1966); *Miller v. Vance*, 463 N.E.2d 250, 251 (Ind. 1984) (“This Court has not attempted to provide a comprehensive definition of what constitutes the practice of law because of the infinite variety of fact situations which must each be judged according to its own specific circumstances.”); *State ex rel. Johnson v. Childe*, 23 N.W.2d 720, 723 (Neb. 1946).

41. *King*, 828 N.E.2d at 1162; *Vance*, 463 N.E.2d at 251. Providing a list of activities or professional services that courts have held are or are not the unauthorized practice of law (like the filling out of forms or charging a fee) is outside the scope of this Article. For a nonexhaustive list, *see Dressel v. Ameribank*, 664 N.W.2d 151, 157 (Mich. 2003) (“Charging a fee for nonlegal services does not transmogrify those services into the practice of law.”). *See also King*, 828 N.E.2d at 1162 (citing *Goodman*, 8 N.E.2d at 944–45; *People v. People’s Stock Yards State Bank*, 176 N.E. 901, 907 (Ill. 1931)); *Kennedy v. Bar Ass’n*, 561 A.2d 200, 208 (Md. 1989) (holding that the practice of law includes the using of “legal education, training, and experience” to apply legal analysis to a client’s problems); *In re Jackman*, 761 A.2d 1103, 1106 (N.J. 2000) (“One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required.”).

42. *ABA Task Force on the Model Definition of the Practice of Law, Model Definition of the Practice of Law, Challenge Statement*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_challenge.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html) (last visited Apr. 26, 2014).

43. STANDING COMMITTEE ON CLIENT PROT., TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, RECOMMENDATIONS AS ADOPTED ON AUG. 11, 2003, *available at* [http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm_authcheckdam.pdf). In a prior recommendation, the Task Force defined the “practice of law” as “the application of legal principles and judgment with regard to the circumstances or objectives of a person” that require the knowledge and skill of a person trained in the law.” *See Task Force on the Model Definition of the Practice of Law, Definition of the Practice of Law Draft (9/18/02)*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_definition.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html) (last visited Apr. 26, 2014) (explaining that a person is presumed to be practicing law when they are, among other conduct, “[g]iving advice or counsel to persons as to their legal rights or responsibilities or to those of others”); *see also* McCarter, *supra* note 27, at 131 (making the point that it is unclear what “trained in the law” means, but that it might mean only a juris doctor degree).

C. *The Debate over UPL Prohibitions and Lawyers' Monopoly*

There is continued debate over prohibitions against UPL. Those in favor of UPL prohibitions argue that they protect the public from bad legal advice and representation and from inferior legal or law-related services.<sup>44</sup> They contend, “The chief reason for defining the practice of law and regulating those who perform services within the scope of the definition is to protect the public from harm that may result from the activities of dishonest, unethical and incompetent providers.”<sup>45</sup> As one court explained:

In modern times the affairs of the people requiring the services of a lawyer have become more intricate and complex, demanding a corresponding increase in the standards of the profession through preliminary education and a lengthened and more diversified course of study by those who would engage in the practice. Administrative law, although of comparatively recent growth, is recognized today as an important branch of the law. Classes for the study thereof are now taught in many of our leading law schools. Relatively speaking, not many years ago that part of a legal education was unknown to the curriculums of law colleges. In addition to the rigid educational requirements, the applicant must possess a good moral character. These prerequisites are not for the purpose of creating a monopoly in the legal profession nor for its protection, but are for the better security of the people against incompetency and dishonesty.<sup>46</sup>

Further, proponents explain that because of information asymmetry, consumers cannot evaluate the quality of legal services. Requiring that

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44. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 92 (2000) (“The stated purpose of the unauthorized-practice-of-law rules is to protect the public. The theory is that a non-lawyer delivering legal services will make errors in legal work that a lawyer would not make, and will thereby harm the consumer of the legal services.”); see also DEBORAH L. RHODE, *ACCESS TO JUSTICE* 83 (2004); J. Howard Beales, III, *The Economics of Regulating the Professions*, in *REGULATING THE PROFESSIONS* 125, 127 (Roger D. Blair & Stephen Rubin eds., 1980) (contending that regulatory protection may be needed because of market imperfections and because the risk of low-quality services are quite high); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2593–97 (1999).

45. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 30, at 5, available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce\\_rpt\\_803.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.authcheckdam.pdf); see also Denckla, *supra* note 44, at 2581, 2593–94 (discussing the legal monopoly and how the Model Code of Professional Responsibility’s Ethical Considerations justify prohibiting UPL).

46. *Goodman*, 8 N.E.2d at 944 (citing *In re Op. of the Justices*, 194 N.E. 313 (Mass. 1935); *People v. Alfani*, 125 N.E. 671 (N.Y. 1919)); Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 6–7 (1988) (“These freedoms are usually analyzed as part of a social bargain: they are public privileges awarded in exchange for public benefits. Lawyers are given a monopoly over certain kinds of work. . . . They enjoy the social prestige of ‘professional’ status. In return, supposedly, the bar regulates its members to ensure that lawyers will not only represent clients competently and faithfully but also uphold the law.”); Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 *NEB. L. REV.* 1379, 1385 (2003) (“UPL laws help to protect the public from charlatans, incompetents, and over-eager, first-year law students.”).

legal services be provided solely by lawyers solves this inequality.<sup>47</sup> Attorneys, as opposed to nonlawyers, must attain a certain level of education and training at an accredited law school, and must have passed the bar and character and fitness requirements.<sup>48</sup> They also need to pass the Multistate Professional Responsibility Examination (MPRE) and follow the Model Rules of Professional Conduct. Nonlawyers, on the other hand, are not subject to the same regulatory and ethical restraints and, therefore, may be tempted to cut corners or may deliberately or accidentally conduct fraud.<sup>49</sup> This view is based on the notion that the legal profession is not a business, but a profession—meaning its purpose is, at least in part, for the public benefit rather than solely for lawyers' profit.<sup>50</sup>

Those opposed to UPL statutes often argue that, instead of protecting consumers, UPL statutes protect lawyers from competition with nonlawyers for law and law-related services.<sup>51</sup> They contend, as Judge Richard Posner

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47. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 436, 437–38 (2001) (“[T]he most common defense of lawyer regulation—protection of the public from incompetents—depends upon two separate claims: information asymmetry . . . and [that] incompetent lawyers could cause substantial harm . . .”).

48. See generally MODEL RULES OF PROF'L CONDUCT (2013) (providing for duties of diligence, confidentiality, and avoiding of conflicts of interest).

49. *In re Mid-Am. Living Trust Assocs.*, 927 S.W.2d 855, 860 (Mo. 1996) (contending that there are at least three harmful effects to consumers stemming from nonlawyer legal service providers); A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or Vulture?*, 2 AM. BANKR. INST. L. REV. 353, 357 (1994) (labeling nonlawyers as “vulture” service providers who “sell their services to the financially distressed, and often cause harm to the debtor”); see, e.g., Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 799 (2003) (“One difference between lawyers and nonlawyers as legal services providers is that, collectively, lawyers as a profession provide all kinds of legal services and in all fields of law, whereas each of the nonlawyer professions and occupations, except paralegals, most always operate in more limited legal service spheres.”).

50. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and the Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995). According to Russell Pearce, “While esoteric knowledge made the bargain necessary, lawyers’ altruism made the bargain acceptable. In contrast to businesspersons, who maximized financial self-interest, altruistic lawyers placed the interests of the common good and their clients above their own financial and other self-interests.” *Id.* at 1239; cf. CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 20 (1999) (“Bad service from lawyers is not just another consumer issue, it makes people feel they have been denied justice.”); Christopher Curran, *The American Experience with Self-Regulation in the Medical and Legal Professions*, in REGULATION OF PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN THE US, BELGIUM, THE NETHERLANDS, GERMANY AND THE UK 50–51 (Michael Faure et al. eds., 1993).

51. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 241–43, 246–47 (1988) (“By restricting the practice of law to members of the bar, of course, a professional monopoly is guaranteed and a higher-than-otherwise level of lawyers’ fees is maintained.”); Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal To Allow Nonlawyers To Practice Law*, 44 VAND. L. REV. 179, 187–90 (1991); *id.* at 180 (“The legal profession consistently has fought outside competition and successfully has controlled competition to ensure professional survival. . . . State statutes and bar association regulations forbid the practice of law by nonlawyers.”); cf. Parker, *supra* note 3, at 175 (“[G]eneral business deregulation is beginning to achieve a partial loss of monopoly for

has, that the legal profession is “a cartel of providers of services relating to society’s laws’ and that restricting entry is the focus of that cartel.”<sup>52</sup> Others analogize it to rent seeking, wherein “skilled crafts and professions have tried to raise their members’ incomes by using the power of the state to limit entry.”<sup>53</sup> They question what UPL statutes try to protect. Are they trying to protect consumers “[f]rom inept charlatans masquerading as experienced practitioners[, which] is what the ABA would have us assume[?] But what about protection from an exclusive trade guild licensed to charge monopoly prices for even routine clerical services?”<sup>54</sup>

These commentators argue that UPL definitions, like the one recently recommended by the ABA, “stymie much-needed efforts to increase accessibility to our civil justice system through the expansion of such nonlawyer services.”<sup>55</sup> As one commentator argues,

Rather than protecting the public, unauthorized-practice rules have been systematically abused to curtail consumers’ options to choose legal services that meet their needs and budgets. As a result, according to a 1996 ABA study, some 38 million low- and moderate-income Americans are closed out of our civil justice system because they simply cannot afford to hire a lawyer to help them.<sup>56</sup>

Some think that opening up the law market will enable nonlawyers to provide services currently only legally provided by lawyers.<sup>57</sup> Subscribers to this view contend that “lawyers cannot fully serve the legal needs of the public, and nonlawyer legal providers are here to stay.”<sup>58</sup> They argue, therefore, that “[i]t is time to come into the 21st century and repudiate protectionist practices that hurt consumers and justifiably engender disdain

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corporate lawyers that was not accomplished by regulatory reform aimed explicitly at the legal profession.”). *See generally* Green, *supra* note 3, at 1128–32; Rhode, *supra* note 2, at 9.

52. McCarter, *supra* note 27, at 131; James C. Turner, *Lawyer vs. Nonlawyer: ABA Chose Wrong Side in Drafting ‘Unauthorized Practice’ Rule*, LEGAL TIMES (Feb. 3, 2003), <http://www.turnerhome.org/jct/Clips/turner-legal-times-02-03-03.pdf> (“There is a long history of state bar associations misusing unauthorized practice restrictions to attack perceived economic threats to lawyer dominance over the delivery of legal services.”).

53. McCarter, *supra* note 27, at 131.

54. *Id.* at 132.

55. Turner, *supra* note 52; *see, e.g.*, RHODE, *supra* note 44, at 79–102; Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976); Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) [hereinafter Rhode, *Delivery*]; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) [hereinafter Rhode, *Professionalism in Perspective*].

56. Turner, *supra* note 52.

57. *See, e.g.*, RHODE, *supra* note 44, at 79–102; Cavanagh & Rhode, *supra* note 55; Rhode, *Delivery*, *supra* note 55; Rhode, *Professionalism in Perspective*, *supra* note 55.

58. Turner *supra* note 52; ABA Task Force, HALT, <http://www.halt.org/what-we-do-for-you/improve-legal-access/unauthorized-practice-of-law/aba-task-force> (last visited Apr. 26, 2014) (“The Federal Trade Commission and the Department of Justice also testified, indicating that the proposal raised antitrust concerns. Many legal service providers, including legal publishers and paralegals, testified at the hearing about the adverse effect that the proposed definition would have on their businesses and, by extension, on their customers’ access to legal services.”).

for the legal profession.”<sup>59</sup> In keeping with that view, the public has consistently resisted UPL prohibitions since the 1960s, instead seeking less expensive alternatives that it believes are just as good.<sup>60</sup>

Moreover, opponents contend that UPL statutes are written so broadly that the distinction between legal advice versus nonlegal business or strategic advice is indeterminate.<sup>61</sup> As the needs of clients became more complicated in the 1980s and 1990s, the role of attorneys changed and the conception of the scope of legal practice broadened. As Bruce Green explains, this conception “swept far beyond the traditional notion that lawyers’ work centers primarily on representing clients in court and giving advice about legal causes of action and drafting certain legal documents.”<sup>62</sup> Lawyers began competing with nonlawyers for what might be described as ancillary legal services, like accounting, tax, financial planning, mediation, labor relations, mergers and acquisitions, real estate consultancy, and insurance consultancy.<sup>63</sup> The broadness of the definitions adopted by state bar associations and courts would arguably cover some, if not all, of these ancillary services.

Opponents to UPL statutes also contend that UPL legislation “prohibited nonlawyers from combining with lawyers to offer the lawyer’s services for profit.”<sup>64</sup> This is because disciplinary rules against multidisciplinary partnerships and sharing fees with nonlawyers must also be considered in

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59. Turner, *supra* note 52.

60. See, e.g., BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 231 (1977) (citing a 1974 ABA study in which 82 percent of respondents agreed that “[t]here are many things that lawyers handle—for example, tax matters or estate planning—that can be done as well and less expensively by nonlawyers—like tax accountants, trust officers of banks and insurance agents”); Rhode, *supra* note 2, at 3–4 (observing the growth of “self-help” and “do-it-yourself” legal publications and organizations in the 1980s); Bennett H. Beach, *Those Sue-It-Yourself Manuals*, *TIME*, Dec. 8, 1980, at 112 (reporting that about fifty publishers provide legal self-help manuals); see also Rhode, *supra* note 2, at 39–40 (surveying state administrative agencies and state authorities in charge of policing UPL and finding that most UPL complaints were about lawyer—and not nonlawyer—misconduct). Of course, in addition to UPL prosecution, consumers have other tools by which to attack nonlawyer misconduct, such as by civil actions for false advertising and other state consumer protection statutes. Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers To Champion Practice by Nonlawyers*, 73 *FORDHAM L. REV.* 883, 893–94 (2004) (explaining that UPL sanctions are fairly weak, the harshest being a misdemeanor conviction and that they do not generally include damages or attorney’s fees as do many states’ consumer protection statutes).

61. Cf. Beardslee, *supra* note 4, at 1874–82 (contending that the reality of corporate practice makes it impossible to distinguish between business and law); Green, *supra* note 3, at 1143–44 (“As the conception of law practice expanded, the distinction between legal services and other professional services became increasingly blurry.”).

62. Cf. Green, *supra* note 3, at 1143–44.

63. *Id.* at 1149; cf. Beardslee, *supra* note 4, at 1874–82 (contending that the reality of corporate practice makes it impossible to distinguish between business and law); N.Y. State Bar Ass’n, *Comm. on Prof’l Ethics*, Op. 206 (1971), available at [http://old.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&template=/CM/ContentDisplay.cfm&ContentID=48584](http://old.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=48584) (explaining that the following occupations constitute the practice of law when conducted by a lawyer: “accountant, collection agency, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax service, [or] loan or mortgage broker”).

64. Andrews, *supra* note 9, at 580.

the debate over UPL, as they run “parallel.”<sup>65</sup> Like UPL prohibitions, although they may be motivated partially by legitimate concerns for consumers,<sup>66</sup> these restrictive model rules apparently were developed in order to protect lawyers’ monopoly by preventing competition by nonlawyers.<sup>67</sup> The defense for such restrictions was the threat of UPL. For example, in 1984, the New York State Bar prevented a lawyer from forming a professional relationship with a nonlawyer accountant because the lawyer would “be enabling the accountant to hold himself out to his clients as offering legal services through the affiliated lawyer.”<sup>68</sup> In other words, the justification for forbidding the collaboration, like that used to justify UPL statutes, was to protect consumers who would erroneously believe that a nonlawyer was providing legal assistance when, in fact, the nonlawyer was not.<sup>69</sup>

Thus, the theory behind UPL and other restrictions on collaboration is essentially the same: that lawyers are better than nonlawyers at providing legal and law-related services because of their training, expertise, and adherence to professional rules of conduct.<sup>70</sup> However, if lawyers are better than nonlawyers at providing legal services that protect consumers, will they not be able to retain a monopoly on those services even if statutes against UPL are abolished (or more narrowly defined)?

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65. *Id.* at 580 (“As we shall see, the significance of this legislation cannot be fully understood until the parallel restrictions on lawyers are considered.”).

66. Green, *supra* note 3, at 1117 (“The premise of these rules is essentially that, when lawyers practice law, they must avoid the corrupting influence of nonlawyers (other than, of course, their own clients); clients are best served by lawyers who preserve their ‘professional independence’ by avoiding unholy alliances with the laity.”).

67. *Id.* at 1144 (explaining that this “was the acknowledged motivation behind the restrictions at their inception” and was “to expand lawyers’ turf”); *id.* at 1140–44 (tracing the history of the Model Rules of Professional Conduct that restrict lawyers from working with nonlawyers and contending that these rules do so to protect lawyers’ monopoly on legal services); *id.* at 1118, 1135 (contending that the real and “actual motivation” behind the development of the rules originally was to “thwart competition,” “protect lawyers’ livelihood,” and increase profits); *id.* at 1135, 1145 (contending that today’s “justification” to protect clients from lawyers being corrupted by nonlawyer’s influence “is a belated explanation for restrictions that, at their inception, were transparently motivated by the financial self-interest of the bar’s leadership”); *see also* McCarter, *supra* note 27, at 131–32 (“[S]cholars who have examined the data have consistently found no genuine threat to the public from lay provision of legal services.”); Rhode, *supra* note 2, at 9 (“Although the organized bar has often suggested that the campaign against lay practitioners ‘arose as the result of a public demand,’ the consensus among historians is to the contrary.” (quoting John C. Satterfield, *The President’s Page*, 48 A.B.A. J. 99, 112 (1962))).

68. N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 557 (1984), available at [http://old.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&template=/CM/ContentDisplay.cfm&ContentID=49184](http://old.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=49184) (holding that the lawyer and accountant cannot jointly provide tax advice and consultancy services to the client); N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 22 (1962), available at [http://old.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&template=/CM/ContentDisplay.cfm&ContentID=48388](http://old.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=48388) (stating that a lawyer cannot serve as a lawyer if the lawyer is in a partnership with an accountant).

69. *See* N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 557.

70. *See* Green, *supra* note 3, at 1146–47 (making a similar but broader point about rules restricting collaboration between lawyers and nonlawyers and identifying other premises).

## II. UPL ON THE BORDER: TWO EXAMPLES

Arguably, UPL prohibitions are most contentious when applied to services that lie on the border between business and law.<sup>71</sup> In those areas, nonlawyers already perform key roles and work with lawyers, and sometimes nonlawyers and lawyers play the same roles. Two such areas are compliance and claim funding (also known as alternative litigation funding).<sup>72</sup> This Part provides background on these types of professional services and attempts to determine whether these services would be considered the practice of law—or, rather, run the risk of being considered the unauthorized practice of law when provided by nonlawyers. In order to conduct this analysis, in light of the vague definition of the practice of law, this Part attempts to compare the function of compliance officers and claim funders to the traditional function of corporate attorneys.<sup>73</sup>

### A. Compliance

Before analyzing whether compliance officers violate UPL prohibitions, the following sections provide background on the compliance function at large, publicly traded corporations and a description of what compliance officers do. These sections incorporate quotes from the Compliance Study interviews to animate how the compliance function is managed and viewed by some general counsels and compliance officers.<sup>74</sup>

#### 1. Background

As a result of changes to corporate criminal liability rules, sentencing guidelines, and settlement patterns, most large, publicly traded corporations in the United States now employ personnel dedicated to overseeing the compliance function at their corporations and/or have compliance departments.<sup>75</sup> Historically, the general counsel has ultimately overseen the compliance function at large, publically traded corporations.<sup>76</sup> In the wake

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71. See *supra* note 7 and accompanying text.

72. For a definition of claim funding, see *infra* note 103.

73. See *infra* notes 82–83.

74. For a description of the Compliance Study, see *supra* note 12 and accompanying text.

75. See generally DeStefano, *supra* note 12, at pt. II (providing an overview of the regulatory history behind compliance and a general description of the compliance function at large publicly traded corporations); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 694 (2009) (“Over the last few decades there has been tremendous growth in the importance of corporate compliance and ethics programs in criminal and civil liability.”).

76. See DeStefano, *supra* note 12, at 73–74 (explaining that sometimes the general counsel actually serves as the chief compliance officer); Ford & Hess, *supra* note 75, at 693 (making this point and that sometimes the CCO also reports to the CEO); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 481 (2008) (finding that most of the ten CCOs in her study reported to the general counsel); see also Roy Snell, *Greg Luce Talks About the Relationship Between Legal Counsel and Compliance*, J. HEALTH CARE COMPLIANCE, March–April 2007, at 31, 32 (“Notwithstanding the preference of the Office of Inspector

of recent corporate scandals,<sup>77</sup> however, and in response to government incentives, corporations have begun to departmentalize the compliance function from general counsel oversight, creating distinct and separate compliance departments that report to the CEO and/or the Board of Directors.<sup>78</sup> Regardless of where they are housed, compliance departments are generally comprised of many professionals that were trained in and practiced law.<sup>79</sup> A compliance officer does not, however, need to have a

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General (OIG) to separate the compliance and general counsel functions, many organizations include a report to the general counsel by the compliance officer.”).

77. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS, WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 170, 171 (2011); Lori A. Richards, Dir., Office of Compliance Inspections & Examinations, SEC, Compliance Programs: Our Shared Mission (Feb. 28, 2005), available at <http://www.sec.gov/news/speech/spch022805lar.htm> (discussing the emergence of corporate misconduct across large and small industries and the need for change in how “we all think about compliance”); see David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1 (describing the corporate scandal of Wal-Mart de Mexico, where the company allegedly spent millions of dollars on bribes to obtain permits across Mexico in order to dominate the market).

78. Christine Parker & Sharon Gilad, *Internal Corporate Compliance Management Systems: Structure, Culture and Agency*, in *EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 170* (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); ASEEM PRAKASH & MATTHEW POTOSKI, *THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS 1–3* (2006) (same); DeStefano, *supra* note 12, at 75–76; Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1114–15 (1997); Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 106 (arguing sentencing guidelines that “base fines partly on the extent to which companies have taken steps to prevent that misconduct” have motivated companies to reorganize); Donna Boehme, *Big Banks Giving the CCO a Seat at the Table*, CORP. COUNS. (Mar. 1, 2013), [http://compliancestrategists.com/csblog/wp-content/uploads/2013/11/Corporate-Counsel\\_Big-Banks-Giving-the-CCO-a-Seat-at-the-Table.pdf](http://compliancestrategists.com/csblog/wp-content/uploads/2013/11/Corporate-Counsel_Big-Banks-Giving-the-CCO-a-Seat-at-the-Table.pdf); Donna Boehme, *JPMorgan Chase Takes a Giant Step on CCO Independence*, CORP. COUNS. (Jan. 29, 2013), [http://compliancestrategists.com/csblog/wp-content/uploads/2013/11/Corporate-Counsel\\_JPMorgan-Chase-Takes-a-Giant-Step-on-CCO-Independence.pdf](http://compliancestrategists.com/csblog/wp-content/uploads/2013/11/Corporate-Counsel_JPMorgan-Chase-Takes-a-Giant-Step-on-CCO-Independence.pdf) (explaining that historically the CCO was subordinate to the general counsel but that healthcare settlement agreements are requiring that CCOs no longer report to the general counsel); cf. Christine Parker, *The Ethics of Advising on Regulatory Compliance: Autonomy or Interdependence?*, 28 J. BUS. ETHICS 339, 339 (2000) (describing the various incentives that exist to motivate corporations to voluntarily create compliance and ethics programs). Wal-Mart’s CCO reported the CEO. See *WalMart Global Compliance Action Steps*, WALMART, <http://news.walmart.com/walmart-global-compliance-action-steps> (last updated July 8, 2013); see also Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. REV. 487, 490 (2003) (citing support for corporate liability mitigation provisions for corporations that enhance internal compliance structures); Lori Richards, Dir., Office of Compliance Inspections & Examinations, SEC, *Instilling Lasting and Meaningful Changes in Compliance* (Oct. 28, 2004), available at <http://www.sec.gov/news/speech/spch102804lr.htm>; Lori Richards, Dir., Office of Compliance Inspections & Examinations, SEC, *The New Compliance Rule: An Opportunity for Change* (June 28, 2004), available at <http://www.sec.gov/news/speech/spch063004lar.htm> [hereinafter Richards, *New Compliance Rule*].

79. Parker, *supra* note 78, at 339; see Ford & Hess, *supra* note 75, at 693; see also DeStefano, *supra* note 12, at 98 (citing studies that show that the general counsel is often also the chief compliance officer); cf. Parker, *supra* note 3, at 181; David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2131–32 (2010) (citing Rostain, *supra* note 16, for this proposition).



law degree or any type of compliance or ethics certification.<sup>80</sup> This is because—according to various sources including secondary literature, the government, general counsels, and compliance professionals—compliance is not considered the practice of law.<sup>81</sup> Chief compliance officers (CCOs), when playing the role of compliance officer, are not acting as in-house lawyers representing the company, even if they were or are active members of the bar.<sup>82</sup> The following subsection analyzes the function of compliance officers to evaluate whether compliance services violate UPL prohibitions.<sup>83</sup>

## 2. What Do Compliance Officers Do and Is This the Unauthorized Practice of Law?

The job of a compliance officer has two main focuses: (1) preventing, detecting, and responding to compliance transgressions, and (2) managing corporate ethics.<sup>84</sup> Thus, a major part of the compliance officer's job is to monitor, create, and implement policies and programs to ensure that

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80. See DeStefano, *supra* note 12, at 101.

81. See *id.* at 91 n.83; Richards, *New Compliance Rule*, *supra* note 78 (“Routine compliance monitoring is not subject to attorney-client privilege.”); see also, e.g., Parker, *supra* note 3, at 181–83 (reporting the number of new professional associations and backgrounds of compliance professionals); *id.* at 186 (“[C]ompliance professionalism poses a challenge to legal professionalism by making compliance advice and application the province of a variety of people within the company with different skills and with responsibilities at all levels.”); Parker, *supra* note 78, at 339; Anonymous Telephone Interview with Vice President Deputy General Counsel (June 24, 2010) (“What I tell people is that the compliance work, we should consider it probably not to be privileged. And so when I do my compliance work, I always make sure they would have work product [protection] and I tell my clients, because a lot of times my clients are the same.”); SOC’Y OF CORP. COMPLIANCE & ETHICS & THE HEALTH CARE COMPLIANCE ASS’N, SHOULD COMPLIANCE REPORT TO THE GENERAL COUNSEL? 6 (2013), available at <http://www.hcca-info.org/Resources/View/ArticleId/910/Should-Compliance-Report-to-the-General-Counsel.aspx> (reporting that compliance professionals believe there is a conflict of interest between lawyers’ role as defender of the corporation and compliance officers’ duty to report).

82. See DeStefano, *supra* note 12, at 128–29 (quoting CCOs and general counsels from the Compliance Study).

83. Again, this is difficult because the UPL prohibitions are so broad that the answer can always be that nonlawyers are violating UPL prohibitions if they do any service that lawyers commonly provide. Therefore, to tackle this question, I *seek* to confine the comparison to traditional notions of what lawyers do.

84. See DeStefano, *supra* note 12, at 93; Ford & Hess, *supra* note 75, at 689–95 (showing that corporate compliance programs now focus on compliance, ethics, and corporate culture); Paine, *supra* note 78, at 106 (explaining that the goal of a compliance department is to “prevent, detect, and punish legal violations. But organizational ethics means more than avoiding illegal practice . . . [and requires] a comprehensive approach”); Parker, *supra* note 3, at 183 (“[C]ompliance professionals understand their work as being about the articulation, accommodation and harmonisation of legal norms to organisational culture, corporate governance systems and business goals.”); Parker, *supra* note 78, at 340; Caron Carlson, *How the Modern CCO Came To Be*, COMPLIANCE WEEK, Feb. 20, 2008, available at <http://www.complianceweek.com/how-the-modern-cco-came-to-be/article/185468/>.

employees comply with the law, regulations, and any other ethical rules of the corporation.<sup>85</sup> As one compliance officer explained,

Compliance officers need to be very good at figuring out what the law is, and explaining it to your clients. At that point, as a lawyer, you have done everything you are supposed to do. Compliance is getting up out of your chair and following your clients back into their business and making sure they really are doing all of the things that you've advised them to do.<sup>86</sup>

As another CCO explained: "I'm in charge of making sure that everyone understands the [laws] and follows them so that the company . . . and the individual stays out of trouble."<sup>87</sup>

In comparison, a nonlawyer compliance officer described his job as follows:

First and foremost . . . being aware of all the regulations or laws that could adversely affect the company and devising programs, plans, [and] strategies to adhere to the laws, while at the same time not making it too difficult for the company to make money to do what it does best. So you find a way to make sure that the company stays . . . on top of the laws and that . . . they're obeying [them]. You look at how the laws are being interpreted . . . a lot of times what is said versus how it's prosecuted sometimes is a little bit different, so my job was to stay apprised of all those things and devise programs that could basically keep the company compliant without straying too far from doing what we need to do to make money.<sup>88</sup>

As indicated above, despite the general view that people working in compliance are not acting as lawyers, compliance officers are (or are perceived as) either interpreting the law or giving legal advice. Indeed, as many interviewees in the Compliance Study exclaim, "[T]he problem you often face is compliance officers giving legal advice—and it's hard for them not to do it sometimes, given the nature and scope of their jobs and that many of them were trained as lawyers."<sup>89</sup> Indeed, internal clients, and even lawyers working within the legal department itself, sometimes believe that they can receive (or are receiving) legal advice from the compliance officer.<sup>90</sup>

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85. See Parker, *supra* note 78, at 346 ("Law must be translated into training that makes sense to line managers and staff and, where possible, into operational procedures and principles that fit into what already happens."); see also Compliance Procedures and Practices of Certain Investment Companies, 17 C.F.R. § 270.38a-1 (2014); Ben W. Heineman, Jr., *Don't Divorce the GC And Compliance Officer*, CORP. COUNS., Jan. 2011, at 49; Richards, *New Compliance Rule*, *supra* note 78. See generally Carlson, *supra* note 84; DeStefano, *supra* note 12 (reporting findings from a study that included interviews with over seventy general counsels and CCOs).

86. Anonymous Telephone Interview with Chief Ethics and Compliance Officer (June 21, 2010).

87. Anonymous Telephone Interview with Compliance Manager (May 19, 2011).

88. Anonymous Telephone Interview with Compliance Manager (May 18, 2011).

89. Anonymous Telephone Interview with General Counsel (Aug. 26, 2010).

90. Anonymous Telephone Interview with Chief Compliance Officer (June 30, 2010).

Hearing how nonlawyers describe the job belies the point. As one compliance officer that was not a lawyer said,

My job is basically reading whatever the law or regulation says. You look for what are the controls . . . like the Foreign Corrupt Practices Act. Bottom-line is for thirty pages of jargon that boils down to, you need to have an adequate program, audit program or financial controls, training, things of that nature . . . I'd always look at the precedent, if one existed, for companies that maybe had violated some law and to look how it's interpreted . . .<sup>91</sup>

This compliance officer explained he would reach out to the legal team when he was confused and say, “[T]his is what I’m seeing here, the regulation says X, however, the way the Court interpreted it is a little bit different. Help me understand this.”<sup>92</sup> But otherwise, he felt he could interpret new regulations and implement programs and policies to ensure compliance with them.<sup>93</sup>

Although it may not be an accurate point of differentiation (and indeed many general counsels would disagree), compliance officers distinguish what they do from what lawyers do by explaining that lawyers say what you *can* do and compliance officers say what you *should* do.<sup>94</sup> Although both the general counsel and the CCO are in the “risk mitigation business,” the “general counsel may restructure a deal to minimize the risk and [the CCO] may stop the deal to minimize the risk,” i.e., “[t]he Compliance Officer has to stop things or can stop things, but the lawyer has to figure out a way to get to where [the client] wants to go.”<sup>95</sup>

In terms of the ethics component and how it differs from the regulatory aspect of the CCO position, one interviewee summed it up aptly:

You have certain rules, whether it’s regulatory rules, whether it’s court rulings, whether it’s internal policies, etc., and you outline what the rules are and you communicate them and you hold people to them . . . [The ethics component], on the other hand, it’s broader, it’s more holistic in a sense, it’s culture, it’s doing the right thing, understanding how you treat people in a certain way and the thinking is that if you have an ethical culture and the compliance rules would flow because you’ll do—you’ll

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91. Anonymous Telephone Interview with Compliance Manager, *supra* note 88.

92. *Id.*

93. *Id.*

94. This was true of the interviewees and also true of compliance officers quoted in the press. Anonymous Telephone Interview with Chief Compliance Officer (July 14, 2010) (“The risk is that you will see lawyers that are more akin or more used to basically putting the answer in terms of whether or not you can do it instead of whether or not you should.”); *see* Anonymous Telephone Interview with General Counsel (June 17, 2010) (“Legal tells you what you can do to comply with the law—what you literally need to do to comply with the law. Compliance tells you what you should do to comply with the spirit of the law—may be more than legally required.”); *see also* Roy Snell, *Letter from the CEO*, COMPLIANCE TODAY, Dec. 2009, at 18, available at [http://www.hcca-info.org/Portals/0/PDFs/Resources/Compliance\\_Today/1209/ct1209\\_18\\_CEO.pdf](http://www.hcca-info.org/Portals/0/PDFs/Resources/Compliance_Today/1209/ct1209_18_CEO.pdf) (“The lawyers tell you whether you can do something, and compliance tells you whether you should.” (quoting Lewis Morris of the Office of Inspector General)).

95. Anonymous Telephone Interview with Compliance Manager, *supra* note 87.

naturally do what's appropriate, whether you know specifically what the rules or the regulations say."<sup>96</sup>

But the ethics part of the CCO's job is not that different from the ethics part of the general counsel's job. Many general counsels believe that creating an ethical culture is their responsibility and describe this as an important aspect of their function in the company:

In our case, the legal function is independent but very integrated in business. We have a strong GC, and insist on adherence on principles rules and tools. All my in-house lawyers sit with and report to the business units on a matrix and report to the VP they advise but they directly report to me, so my guys all have the ability to say no when they have to and are not dependent on the VP for performance evaluations or bonuses. This helps us maintain an ethical compass. This is *the* most important job—maintaining and aligning an ethical compass.<sup>97</sup>

Thus, what CCOs do and how they perceive their role in the corporate client's management structure is not that different from what a general counsel does and how a general counsel describes his or her function. If UPL statutes are interpreted to apply to the types of services and advice corporate attorneys provide to clients (in other words, if UPL boundaries expand with the role of the corporate attorney), almost all law-related professional services could be considered UPL when conducted by a nonlawyer. This is because corporate attorneys today, in order to provide comprehensive legal advice to their clients, provide (or at least rely on) an array of law-related services, such as public relations or banking, financial, and accounting services.<sup>98</sup> The way that compliance is managed and viewed is further support for my contention in other articles that the law of lawyering is oriented around an artificial distinction between legal advice and "other" services (business, strategic, etc.),<sup>99</sup> and it is motivated by protectionist reasons as an effort to maintain a monopoly on the law and legal services market.<sup>100</sup>

I am not contending that the ethics part of the CCO's job is—or should be considered—the practice of law, even if the definitions of the practice of law in UPL statutes might cover it. But the other part of the compliance officer's job—the part that attempts to interpret new laws and regulations and counsel the client on how to comply with those laws and regulations—actually appears to overlap with the traditional job of the corporate attorney. As mentioned above, it appears to those people working with compliance

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96. *Id.*

97. Anonymous Telephone Interview with General Counsel (Apr. 19, 2010).

98. Beardslee, *supra* note 7, at 736–42. Arguably, the fact that general counsels oversee ethics does not render such oversight a legal service that nonlawyers can no longer perform. As a parallel, the director of public relations does not violate UPL prohibitions when offering advice about legal controversies, although managing public relations around such controversies is now a core part of any general counsel's job.

99. Beardslee, *supra* note 4, at 1925–32.

100. See Green, *supra* note 3, at 1128–32; see also DeStefano, *supra* note 5, at 2794–95.

officers (even to the lawyers within the corporation) that compliance officers are practicing law.

### B. Claim Funding

Before analyzing whether claim funders practice law and, therefore, violate UPL prohibitions, the following section provides background on the claim funding industry, a hypothetical example of commercial claim funding,<sup>101</sup> and a description of what claim funders do.<sup>102</sup>

#### 1. Background

Claim funding is the provision of finance to an individual or company that holds a claim (claimholder) by a person or entity other than a lawyer, law firm, or insurance agent.<sup>103</sup> Like a contingency fee arrangement, in exchange for funding, the claim funder receives an interest in the proceeds of the prospective settlement, judgment, or award if the claimholder prevails.<sup>104</sup> Claim funding is a type of nonrecourse financing.<sup>105</sup>

101. This Article focuses on commercial claim funding as opposed to consumer claim funding.

102. These sections are based on secondary literature, conferences I have attended, and also my experience as a consultant to a start-up claim funding company that, since its inception, has closed its doors.

103. AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 11, at 6; *see also* STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES 1 (2010), *available at* [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP306.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf) (describing alternative litigation financing as the “provision of capital (money) by nontraditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities”).

104. AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 11, at 6.

105. In some cases the loans may be recourse but generally they are not. *See, e.g., Introduction, in* CONFERENCE PROCEEDINGS: THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER: TRENDS AND IMPLICATIONS FOR THE CIVIL JUSTICE SYSTEM 1 (Geoffrey McGovern et al. eds., 2010) [hereinafter CONFERENCE PROCEEDINGS], *available at* [http://www.rand.org/content/dam/rand/pubs/conf\\_proceedings/2010/RAND\\_CF272.pdf](http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf); Selvyn Seidel, *Stakeholders and Products in Third-Party Funding Arrangements, in* CONFERENCE PROCEEDINGS, *supra*, at 4–5; *see also* JOHN BEISNER, JESSICA MILLER & GARY RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD PARTY LITIGATION FUNDING IN THE UNITED STATES 2 (2009), *available at* <http://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf> (“Third-party financing contracts generally resemble non-recourse loans: if the party recovers nothing, it does not have to repay the funding company.”); Nathan M. Crystal, *Professional Ethical Issues in Third-Party Litigation Financing, in* CONFERENCE PROCEEDINGS, *supra*, at 15–18; Timothy D. Scramton, *Sources and Structures of Claim Investments, in* CONFERENCE PROCEEDINGS, *supra*, at 11–12. Avoiding usury laws is one reason why the loans are not recourse and the structure contemplates a purchase of an interest in the claim or the proceeds. Some state courts have held that nonrecourse claim funding agreements are not loans and therefore are not limited by usury rules. *See, e.g.,* Dopp v. Yari, 927 F. Supp. 814, 824 (D.N.J. 1996); Kraft v. Mason, 668 So. 2d. 679, 683–84 (Fla. Dist. Ct. App. 1996); Nyquist v. Nyquist, 841 P.2d 515, 518 (Mont. 1992); Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 98–99 (Tex. Ct. App. 2006); BEISNER, MILLER, & RUBIN, *supra*, at 2 (stating that third-party funding “avoids prohibitions against usury”). Other state courts (in the consumer context), however, have found that the loans from claim funders are limited by usury rules. *See, e.g.,* Oasis Legal Fin. Grp., LLC v. Suthers, No. 10CV8380, slip op. at 6 (Colo. Dist. Ct. Sept. 28, 2011), *available at* [http://www.coloradoattorneygeneral.gov/sites/default/files/press\\_](http://www.coloradoattorneygeneral.gov/sites/default/files/press_)

In the claim sourcing and selecting process, a typical commercial claim funder looks for claims that have the potential for a 400 percent return over an average three-year investment life.<sup>106</sup> The claim funder's share of recovery generally ranges from 20 to 50 percent,<sup>107</sup> and is based on a calculation that includes the value of the case, risk analysis and tolerance, complexity of the claim, anticipated time to recovery, the amount of the original investment or funds already spent pursuing the claim, and settlement opportunity.<sup>108</sup> Given that most cases settle, one claim funding company explained in its frequently asked questions sheet: "Time-to-return is one of the principal unknowns in claim investing."<sup>109</sup> Claim funders "intend[] to only invest in claims that have compelling settlement prospects and reasonably knowable settlement ranges, settlement timing is a key variable."<sup>110</sup>

Claim funders provide financing for consumers, businesses, and law firms for a variety of purposes; these include alleviating litigation costs, assisting chief financial officers or general counsels to manage risk and stabilize litigation budgets, and helping the corporate claimholder stay in business while waiting for the claim recovery.<sup>111</sup> Claim funding enables

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releases/2011/09/29/oasis\_order.pdf (holding that "the transactions" between the funder and claimholder "create debt under the plain language of the UCCC" and "are 'loans' governed by the UCCC"); *Lawsuit Fin., LLC v. Curry*, 683 N.W.2d 233, 238–40 (Mich. Ct. App. 2004).

106. See, e.g., Anonymous Claim Funding Company Frequently Asked Questions 13 (unpublished manuscript) (on file with author).

107. *Id.* at 14. This number is lower for passively managed claims (around 20 to 35 percent of gross claim recoveries), higher for actively managed claims (around 25 to 45 percent), and even greater for acquired claims (around 70 percent). *Id.* For a description of the difference between active and passive claim management, see *infra* notes 130–37 and accompanying text. For a more detailed description and comparison, see Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?*, 63 DEPAUL L. REV. 1701 (2014).

108. BEISNER, MILLER & RUBIN, *supra* note 105, at 2; Jonathan Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO L.J. 65, 93–94 (2010); see Anonymous Claim Funding Company Frequently Asked Questions, *supra* note 106, at 14 ("[Commercial claim funder] seeks to optimally invest money in pursuit of a claim to yield monetization at an optimal point in the life of the claim. An optimally pursued claim manages capital outflows and time to settlement or litigation such that the greatest net recovery is obtained in the shortest amount of time. An optimally pursued claim achieves the highest internal rate of return (IRR) for the total investment. To illustrate, if a claimholder were to invest \$1M, and was offered a settlement of \$3M one year later, the IRR on this hypothetical investment would be 200%. If plaintiff were to invest \$1M and was offered a settlement of \$5M 2 years later, the IRR would be 124%."); *id.* at 14 ("Generally, there will be a \$10 million limit per claim. [Commercial claim funder's] targeted individual claim investment will be \$3 million–\$10 million on an expected lifecycle of two to four years. Capital will likely be "drip-fed" over time as ongoing operational costs are required to prosecute the claim, but tranches or levels may also be funded on a lump sum basis.").

109. Anonymous Claim Funding Company Frequently Asked Questions, *supra* note 106, at 10.

110. *Id.*

111. See Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 649–50 (2005). The Model Rules of Professional Conduct prevent lawyers from "provid[ing] financial assistance to a client in connection with pending or contemplated litigation." MODEL RULES OF PROF'L CONDUCT R. 1.8e (2013).

claimholders to continue to work with their law firm of choice, even if that law firm does not offer contingency fee arrangements or it has overextended its funding capacity.<sup>112</sup>

The claim funding industry is growing rapidly<sup>113</sup> and is projected to approach over one billion dollars in value nationwide.<sup>114</sup> Although some states still prohibit claim funding by nonlawyers via old doctrines of maintenance, champerty, and barratry,<sup>115</sup> more than half allow claim

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112. John C. Coates et al., *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQUIRY 999, 1002, 1012–15 (2011) (presenting findings from an empirical study of chief legal officers, that for important matters, corporate claimholders hire outside counsel based “on relationship factors” and that selection is “almost always determined” by prior personal experience working with the lawyer or team of lawyers).

113. Claim funding is prevalent in the United Kingdom and Australia. See Nikki Tait, *Third-Party Funds Backing \$174M Claim Against Auditor*, FIN. TIMES, Jan. 5, 2007, at 1 (“Litigation funding . . . has become more established in some overseas jurisdictions, notably Australia.”); Wayne Attrill, *Ethical Issues in Litigation Funding*, CLAIMS FUNDING INT’L 1, 2 (Nov. 12, 2008), [http://www.claims-funding.eu/fileadmin/Documents/Ethical\\_Issues\\_Paper.pdf](http://www.claims-funding.eu/fileadmin/Documents/Ethical_Issues_Paper.pdf); see also LAW COUNCIL AUSTRALIA, REGULATION OF THIRD PARTY LITIGATION FUNDING IN AUSTRALIA: POSITION PAPER (2011), available at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Regulationofthirdparty litigation funding in Australia.pdf>. Claim funding also occurs in Germany and Switzerland. See Andreas Frischknecht & Vera Schmidt, *Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration*, 8 TDM 1, 16 (Oct. 2011), <http://www.chaffetzlindsey.com/wp-content/uploads/2012/03/tv8-4-article04.pdf>. For a review of the status of claim funding in the United Kingdom and Australia, see DeStefano, *supra* note 5, at 2821–23. In the United States, however, claim funding is considered an emerging industry. See AM. BAR ASS’N COMM’N ON ETHICS 20/20, *supra* note 11, at 7 (explaining that it is an emerging industry in the United States); *id.* at 41 (“The market for alternative litigation finance involves suppliers and customers who demand this form of financing. Because of this demand, and because of the complexity of regulation in various states, the specific form of [alternative litigation funding] transactions will undoubtedly continue to evolve.”); see also Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 754–59, 788–97 (discussing both traditional and emerging law firm models and trends in claim funding).

114. See N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2011-2 pt. I (2011) (“As of 2011, [the third-party litigation financing] industry has continued to grow, both as to the number and types of lawsuits financed and financing provided. The aggregate amount of litigation financing outstanding is estimated to exceed \$1 billion.”); *New York City Bar Gives Thumbs Up to Litigation-Funding*, THOMSON REUTERS NEWS & INSIGHT (June 20, 2011), [http://archive-com.com/page/481471/2012-10-19/http://newsandinsight.thomsonreuters.com/Legal/News/2011/06\\_-\\_June/New\\_York\\_City\\_Bar\\_gives\\_thumbs\\_up\\_to\\_litigation-funding/](http://archive-com.com/page/481471/2012-10-19/http://newsandinsight.thomsonreuters.com/Legal/News/2011/06_-_June/New_York_City_Bar_gives_thumbs_up_to_litigation-funding/) (“The practice of seeking funding for cases from outside investors has been on the rise for the past 20 years, the [New York City Bar Association] said. It has moved from a cottage industry of personal-injury cases to a \$1 billion business involving a wide swath of commercial litigation.”). This growth has been predicted, in part, because of the “global recession, which has created more claims but less funds to pursue them,” along with “an appetite for new, alternative assets.” Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 459 n.2 (2012). According to Professor Steinitz, “The expansion of litigation funding is also driven by a global transformation of legal services egged on by the *Legal Profession Act 2004*, which allows incorporation of legal practices in Australia, and the *Legal Services Act*, which allows investment in British law firms.” *Id.* (citations omitted).

115. See, e.g., *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 333–34 (Va. 1998) (citing *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Ct. App. 1976)); see also *In re*

funding in some form.<sup>116</sup> Further, claim funders have been funding cases for over twenty years in the United States<sup>117</sup> in both the consumer<sup>118</sup> and commercial context.<sup>119</sup> Today, there are between thirty and eighty companies in the United States that offer claim funding.<sup>120</sup>

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Primus, 436 U.S. 412, 424 n.15 (1978) (“[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.”); AM. BAR ASS’N COMM’N ON ETHICS 20/20, *supra* note 11, at 10 (“Champerty is considered a type of maintenance.”). For a description and analysis of these doctrines in the claim funding context, see generally Richmond, *supra* note 111. Some courts deny agreements that assign the cause of action itself, but they approve those that assign a portion of the proceeds, because they can be viewed as an enforceable equitable assignment similar to an insurance contract. See *Goodley*, 133 Cal. Rptr. at 85; see also *Costanzo v. Costanzo*, 590 A.2d 268, 271 (N.J. Super. Ct. 1991). Other courts claim that there is no distinction. See, e.g., *Karp v. Speizer*, 647 P.2d 1197, 1199 (Ariz. Ct. App. 1982); *Town & Country Bank of Springfield v. Country Mut. Ins. Co.*, 459 N.E.2d 639, 640–41 (Ill. App. Ct. 1984); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 121–22 (2011) (“[T]he common law of the United States embraces free assignability in all choses of action except personal injury . . . , legal malpractice (except when it does), and fraud (except when it does).”).

116. See Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1333–41 (2002); Sebok, *supra* note 115, at 98–99 & n.162 (specifying that 28 jurisdictions allow champerty with some limitations).

117. See, e.g., *Killian v. Millard*, 279 Cal. Rptr. 877, 878 (Ct. App. 1991) (explaining that plaintiffs were “[u]nable to personally finance their lawsuit” and thus “syndicated it by creating 50 ‘units’ for sale at \$10,000 per unit with a 2-unit minimum per investor”); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 498 (1992). Those states that do allow claim funding, however, often only do so if there is limited influence and control by the funder. See, e.g., OHIO REV. CODE ANN. § 1349.55(B)(3) (LexisNexis 2012); *Anglo-Dutch Petroleum Int’l, Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. Ct. App. 2006); AM. BAR ASS’N COMM’N ON ETHICS 20/20, *supra* note 11, at 22; see also *id.* at 25 (“Even in states permitting an [alternative litigation funding] supplier to obtain an interest in a party’s cause of action, retention by the supplier of control over the decision-making of the party and its counsel, via a contractual provision between the supplier and the party, may be deemed unlawful as champerty or maintenance.”). For a history of the doctrine and its current status, see generally Sebok, *supra* note 115. For an overview of the case law and regulations on claim funding, see Steinitz, *supra* note 114, at 460 n.6. In Australia, however, claim funding is allowed even when the funder has a high level of control and influence over case management. See *Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd.*, (2006) 229 CLR 386 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/41.html> (upholding claim funding agreement wherein the funder had a level of control and influence over case management); *Domson Pty Ltd. v. Zhu* [2005] NSWSC 1070, ¶¶ 74–77 (Austl.), available at <http://www.lawlink.nsw.gov.au/scjudgments/2005nswsc.nsf/2005nswsc.nsf/WebView2/F0A04DA2784A83A1CA2570A00025114B?OpenDocument>.

118. Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 84 n.4 (2008) (“Nevertheless, it is fairly well known that many large lawsuits, such as the vitamins anti-trust suit, the asbestos cases and the Vioxx cases, have been supported by litigation financing companies which are funded by banks, private equity and hedge funds.”); Alison Frankel, *The Loan Arrangers*, AM. LAW., Oct. 1, 2005, at 74.

119. See Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER, Jan. 9, 2012, at 38, 43 (stating that Burford Capital invested millions of dollars in the Ecuadoran case against Chevron); see also *Burford Capital Profits Up 965%*, STOCKMARKETWIRE (Apr. 4, 2012, 09:02 AM), <http://www.stockmarketwire.com/article/4343538/Burford-Capital-profits-up-965pct.html> (reporting Burford’s expected net profits at approximately \$32 million in 2011).

120. *Member Providers*, AM. LEGAL FIN. ASS’N, <http://www.americanlegalfin.com/OfficersAndMembers.asp> (last visited Apr. 26, 2014) (having at least thirty-nine members);



Commercial claim companies are often founded and/or led by people that are trained as lawyers with extensive experience in litigation, negotiation, and resolution of complex commercial claims.<sup>121</sup> Indeed, a common way that a commercial claim funder finds a case is through or because of his or her prior career and success as a trial attorney. Like a compliance officer, however, a claim funder does not need to have a law degree, because like compliance, claim funding is not considered to be the practice of law. Claim funders are not lawyers representing the claimholders, even if they are or were practicing lawyers.<sup>122</sup> The next subsection illustrates the claim funding dynamic through a hypothetical example of a situation ripe for

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*see* GARBER, *supra* note 103, at 10 n.14 (stating that there might be as many as eighty claim funding companies); *see also* Michael G. Blum, *Financial Management in a Contingent Fee Practice*, FINDLAW (Mar. 26, 2008), <http://practice.findlaw.com/financing-a-law-firm/financial-management-in-a-contingent-fee-practice.html> (explaining that some provide claim funding in the commercial context while others do so in the consumer context). Many businesses invest in personal injury claims (which are outside the scope of this Article). A number of hedge funds and public companies also invest in commercial claims. Margie Lindsay, *Third-Party Litigation Funding Finds Favour with Hedge Funds*, HEDGE FUNDS REV. (Jan. 19, 2012), <http://www.fulbrookmanagement.com/news/120119.html>; *see also* Steinitz, *supra* note 114, at 461. For example, PeachTree Financial Solutions, owned by Credit Suisse, “purchase[s] assets including structured legal settlements, annuities, lottery winnings, sports contracts and life insurance policies.” *About Us*, PEACHTREE FIN. SOLUTIONS, <http://peachtreefinancial.com/company/> (last visited Apr. 26, 2014). Hedge funds include Centurion, Eton Park, Elliot, Fortress, arms of Deutsche Bank, Credit Suisse (from which Parabellum Capital LLC recently spun off), and Allianz (which recently stopped its direct funding activities due to internal conflicts of interest). Companies dedicated to commercial claim funding include Juridica Investments (AIM-listed company), Burford Capital (AIM-listed company), and IMF (public company listed on the Australian Securities Exchange), Bentham Capital (IMF’s U.S. subsidiary), and BlackRobe Capital (recently closed its doors due to internal conflict). *See* Jennifer Smith, *Litigation Finance Firm BlackRobe Shuts Down*, WALL ST. J., May 15, 2013, at B3. In the United Kingdom, several private companies have entered the litigation funding market, including Harbour and Calanius. Insurance companies invest in commercial claims (through subrogation and other techniques like providing insurance to the claim funder against loss of the principal should the claim fail). *See* Steinitz, *supra* note 114, at 461–62.

121. For example, the three founders and leaders of BlackRobe Capital were John P. “Sean” Coffey, Timothy D. Scrantom, and Michael Chepiga. *See* Smith, *supra* note 120. Coffey is a nationally recognized plaintiffs’ litigator who retired in 2009 as co-managing partner of Bernstein Litowitz Berger & Grossmann LLP. Coffey served as lead counsel on cases with recoveries totaling in excess of \$10 billion. *See Renowned Trial Lawyer John P. “Sean” Coffey Joins Kramer Levin Naftalis & Frankel in New York: The Former NY Attorney General Candidate Will Lead the Firm’s Complex Litigation Group*, KRAMER LEVIN NAFTALIS & FRANKEL (Nov. 14, 2013), <http://www.kramerlevin.com/Renowned-Trial-Lawyer-John-P-Sean-Coffey-Joins-Kramer-Levin-Naftalis--Frankel-in-New-York-The-Former-NY-Attorney-General-Candidate-Will-Lead-the-Firms-Complex-Litigation-Group-11-14-2013/>. Tim Scrantom was a barrister, a contingency fee lawyer, and the founder of Juridica, where he was president through the deployment of most of its investable capital. *See Litigation Finance*, SCRANTOM DULLES, <http://www.sdils.com/main/litigation-finance#.UxkVa-ddXlo> (last visited Apr. 26, 2014). Mike Chepiga has thirty years’ experience as a defense lawyer at a major Wall Street law firm, where he defended several of the most high-profile securities and mergers and acquisitions matters of the past few decades. *See Prominent Corporate Litigator Michael J. Chepiga Joins BlackRobe Capital*, PR NEWSWIRE (Apr. 9, 2012), <http://www.prnewswire.com/news-releases/prominent-corporate-litigator-michael-j-chepiga-joins-blackrobe-capital-146663185.html>.

122. *See* AM. BAR ASS’N COMM’N ON ETHICS 20/20, *supra* note 11, at 22.

claim funding and the role claim funding can play in the commercial context.

## 2. Claim Funding Example

A new government of Egypt retains WeSpy, an investigative firm specializing in locating and seizing assets that have been misappropriated by corrupt public officials, to find several hundred million dollars that members of a prior military junta had illegally skimmed from Egypt's military budget.<sup>123</sup> WeSpy's contract provides that it will receive 25 percent of all assets that it helps seize and return to the new government. Two years into the contract, WeSpy secures and wires to the new government \$300 million. Within a few days of the wire, the new government writes a letter to WeSpy canceling their contract, claiming that WeSpy breached the contract by failing to exercise appropriate diligence in pursuing assets and devoting enough resources to the project. To date, WeSpy has spent \$5 million on the project.

WeSpy wants to sue the new government for breach of contract on pretext grounds, which, per the contract agreement, has to occur via arbitration in London. WeSpy seeks advice from its preferred outside law firm. The lawyers investigate the situation and conclude that the odds of winning are about 75 percent and that pursuing the claim will cost WeSpy about \$3 million. WeSpy is distraught because \$3 million is larger than its entire litigation budget for the next two years; further, the company is in debt. It would be willing to settle at \$45 million because it could use the cash. WeSpy asks its lawyers if they will do the case on contingency, but the lawyers say that they cannot. Their firm is not a contingency fee firm nor is it structured to offer contingency fees. WeSpy really does not want to hire lawyers whose main line of business is suing companies, managers, and directors; it prefers to use its current law firm with whom it has a longstanding relationship and whose lawyers know WeSpy's business best. The lawyer tells WeSpy that it might be able to get funding from a commercial claim funder that will loan WeSpy the money for a piece of the recovery. WeSpy is intrigued. The lawyer then calls the commercial claim funder, a former partner at a law firm where the lawyer used to work.

The commercial claim funder conducts due diligence on the case (analyzing it from a financial and legal standpoint) and ultimately decides to offer funding to the claim holder. It provides a term sheet to WeSpy that explains that it will fund the prosecution for up to \$3 million on a nonrecourse basis, in return for the first \$9 million of any recovery or 25 percent of the gross recovery, whichever is larger. The law firm will be paid at 80 percent of their typical rates, with the balance plus 5 percent of the recovery paid. The commercial claim company will fund the case in three stages: first, up to \$750,000 through the filing of the notice of

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123. This hypothetical is based loosely on a hypothetical that I helped revise and that was presented and discussed at the Federal Bar Council Conference on January 17, 2012, in Hawaii by a panel that included Sean Coffey, Peter Jarvis, Tony Sebok, and James Hubbard.

arbitration and selection of the arbitrators; second, up to \$1 million for the arbitration itself; and third, up to \$500,000 for appeals and enforcement of the judgment. Further, the term sheet provides that the claim funding company must be consulted before WeSpy makes any settlement offer, and that the commercial claimholder must be advised of any settlement offer received.

### 3. What Do Claim Funders Do and Is This the Unauthorized Practice of Law?

As described above in the WeSpy hypothetical, at the prefunding stage, prior to committing funds, claim funders scrub the case. They evaluate the claim and perform due diligence and underwriting to determine the value of the claim and the economics around the risk of failure.<sup>124</sup> In order to conduct such due diligence, claim funders need to assess the legal merits of the case. They do this by reviewing the public case pleadings, dockets and memoranda, and discoverable evidence (including documents and witness testimony). They also seek review of confidential information that might be protected by the work product or attorney-client privilege doctrine.<sup>125</sup> They review and assess the case file, the claimholder's lawyers' views of the claim, and the current or proposed litigation strategy. They investigate the claimholder. And they provide written opinions and financial assessments of the claim to the claimholder and its lawyers.<sup>126</sup> Further, they do this by assigning strategic advisors to the case. These strategic advisors are generally lawyers with substantive expertise in the subject matters involved in the case, experts in litigation risk, and/or experts in the risks, ethics, and varying state laws related to claim funding.<sup>127</sup> One commercial claim funder described the prefunding stage as follows: "The *pre-funding* stage involves developing strategic and tactical plans for the case, creating a budget, helping identify the right lead and supplemental law firms, engaging experts, designing a strategic plan for claim monetization, and assisting in gathering and evaluating evidence."<sup>128</sup> In sum, before funding the case, claim funders perform almost the same tasks that a contingency fee law firm might in assessing whether to take the case.<sup>129</sup>

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124. W. Bradley Wendel, *Alternative Litigation Finance and Anti-commodification Norms* (Cornell Legal Studies, Research Paper No. 13-91, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2261343##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261343##) (describing the extensive amount of due diligence conducted by commercial claim funders and its importance).

125. For a discussion of whether such sharing of information waives attorney-client privilege and work-product doctrine protection, see generally DeStefano, *supra* note 107.

126. For a discussion of whether such work would be considered work product under the work-product doctrine, see *id.* at 1749–1762.

127. For a description and analysis of these doctrines in the claim funding context, see Richmond, *supra* note 111, at 652–69.

128. Anonymous Claim Funding Company Frequently Asked Questions, *supra* note 106, at 9.

129. For descriptions of the types of due diligence conducted, see Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 592 & n.150, 593, 597 (2010); see also GARBBER, *supra* note 103, at 26; Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 387–90 (2009); Aaron Katz &

Post-funding behavior can differ slightly.<sup>130</sup> Sometimes claim funders take a more passive approach to managing the claims, with only minor input from the investor into the claimholder's strategy, team, budget, financial management, or settlement.<sup>131</sup> But, as other scholars and courts have pointed out, because the claim funders have a lot of money at stake and are shouldering the risk, they follow the case and work with the lawyers on a day-to-day or at least weekly basis.<sup>132</sup> Further, the claimholder and the attorneys value their point of view because they are often former successful law firm partners. Moreover, as depicted in the WeSpy hypothetical, the attorneys are usually responsible for sourcing the claim funder, so they take great interest in protecting the preexisting relationship and preserving trust and respect. Thus, even in the passive approach, claim funders will be somewhat involved.

Other claim funders take an even more active approach, offering capital and expertise. They partner with the claimholder's choice of law firm to manage and oversee the case and monitor the law firm's performance and legal strategy. They track the cash burn rate and the financial aspects of the claim's proceedings—and, as in WeSpy, tie future funding to the progress of the case. They collaborate with the claimholder to develop settlement strategy. They hire and manage extralegal professionals, such as public relations, foreign diplomacy, and accounting professionals. They work to restructure the claim asset to accommodate additional funding and attempt to add value to the overall monetization strategy.<sup>133</sup> As one commercial claim funder explained:

[The claim funder] transcends the role of capital-provider and becomes the overall strategic partner with the claimholder. While neither practicing law nor giving legal advice, the [claim funder's] team of experts offers strategic leadership to counsel, consultants, and

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Steven Schoenfeld, *Third-Party Litigation Financing: Commercial Claims As an Asset Class*, PRAC. L.J. TRANSACTIONS & BUS., Mar. 2012, at 36, 45, available at [http://www.parabellumcap.com/docs/March2012\\_ThirdPartyLitigation.pdf](http://www.parabellumcap.com/docs/March2012_ThirdPartyLitigation.pdf).

130. See DeStefano, *supra* note 107, at 1714–23 (describing the different approaches in more detail).

131. See AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 11, at 23 (“[S]ome [alternative litigation funding] suppliers disclaim any control over the decision-making of lawyers, stating that they are in an entirely passive role.”); see also Martin, *supra* note 118, at 109 (“[I]n the United States, litigation funders merely advance money to plaintiffs to use any way they wish; they do not directly fund the litigation at all, a role that is, however, permitted for U.S. attorneys.”).

132. Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?* 6–7 (The Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 441, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247973](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247973) (explaining that passive investing may more likely exist in the consumer context when the amount of lending is fairly low but not necessarily when the investments are much larger as they are in the commercial context); see AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 11, at 24; see also *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, 434 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/41.html> (stating that funders should be able exert the same level of control and influence over litigation as insurers).

133. Anonymous Claim Funding Company Frequently Asked Questions, *supra* note 106, at 9.

claimholders on issues involving strategy, economics, geographic and political concerns, financial modeling, investigative work, and public relations input.<sup>134</sup>

In other words, especially in the active context,<sup>135</sup> claim funders view themselves as “claim managers”<sup>136</sup> who, in addition to evaluating and managing legal strategies, oversee all law-related activities that are essential to a successful outcome in today’s global, complex, highly litigated legal marketplace.<sup>137</sup> This is the role an active funder would play in the WeSpy hypothetical above.

Nevertheless, the claim funders contend that they are not practicing law and that they are not providing legal advice or services. Instead, they explain,

[The claim funder] will not render “professional legal services,” even though it expects to consult with the claimholder’s legal team on business aspects of the litigation. Its approach to claim management services will complement the roles played by the claimholder’s internal financial team, its outside and in-house legal counsel, and other experts. Its strategic management of the claim helps to better align the interests of the law firm with those of the claimholder and other claim stakeholders.<sup>138</sup>

However, this description sounds a lot like what a partner at a large top-tier law firm does.

Thus, all claim funders, regardless of the extent to which they play an active role, appear to rely on legal expertise in both the pre- and post-funding stages. They read and interpret laws and, like attorneys, seek to implement the most effective and efficient litigation strategies. So, despite the fact that claim funders are not practicing law, given the nature and scope of their jobs, they still may be giving legal advice and providing something that could be described as legal services.

If claim funders are affecting, manipulating, and advising on litigation strategy, one might make an argument (like the one made regarding compliance officers in Part II.A.2) that claim funders are violating UPL

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134. *Id.* (explaining that the claim funder “believes that by being more active in claim strategy, management and, where possible, settlement discussions, time-to-return may be optimized to some degree. Likewise, active participation in a claim prosecution allows [it] to better manage the disbursement of its invested capital and the use of that capital against agreed budgets and prosecution benchmarks”).

135. Arguably, this is also partly true in the passive context as many have argued that claim funders look to affect legal strategy and settlement in either scenario. *See* DeStefano, *supra* note 5, at 2824.

136. Anonymous Claim Funding Company Frequently Asked Questions, *supra* note 106, at 7 (“It expects to accomplish this investment strategy through its world-class team, its advanced underwriting and sourcing processes, and its next-generation claim management techniques.”).

137. For a discussion of the importance of active management of public relations around legal controversies, see Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion Installment I: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009).

138. Anonymous Claim Funding Company Frequently Asked Questions, *supra* note 106, at 9–10.

statutes—even if one defines the practice of law more narrowly and traditionally.

### III. ABOLISHING UPL STATUTES: UNINTENDED CONSEQUENCES

The preceding description and analysis fills a gap in the literature by providing an in-depth look at two new types of law-related services that challenge our understanding of defining the practice of law and the boundaries of UPL statutes. Although UPL prohibitions are written very broadly, many of the activities that lawyers and nonlawyers perform as compliance officers and litigation funders appear to overlap with some of the traditional notions of lawyering, such as interpreting the law and legal regulations, providing advice on legal risk, and consulting with lawyers on legal strategy. Arguably, if UPL violations were pursued in these areas, they might be successful.<sup>139</sup> The questions posed in this Article, however, are these: What effect may the elimination of UPL prohibitions have on lawyers' monopoly in these areas that straddle the law-business divide, such as compliance and claim funding? Will undoing UPL statutes make a dent in that monopoly?<sup>140</sup> What other effects might there be from such reform?

#### A. Hypothesis 1: Eliminating UPL Statutes May Not Overthrow Corporate Lawyers' Monopoly in Areas That Border Business and Law

Commentators hypothesize that the deregulation of business is eating away at corporate lawyers' monopoly.<sup>141</sup> Interestingly, in the case of compliance, there is an increase in regulation that has led to departmentalization of compliance from the legal department and an opportunity for nonlawyers to take on roles that were formerly owned by lawyers. Given the costs associated with hiring lawyers, coupled with the widely held belief that compliance is not a "legal" service requiring legal advice, one might imagine that the number of nonlawyers managing compliance is likely to increase if the trend of separating out compliance from the legal department continues. To that end, many (if not most) of the Compliance Study interviewees agreed with the point of view that compliance could be effectively run by a nonlawyer.<sup>142</sup> Some interviewees pointed out qualities that a nonlawyer might have that a lawyer might not,

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139. Perhaps legislators have not pursued these statutes because so many people that work in these areas are lawyers, or because these areas are emerging industries that deal with savvy clients. Therefore, the threat of information asymmetry may not be as great.

140. To that end, whether the threat of UPL prosecutions stops nonlawyers from taking on these roles is unclear.

141. Parker, *supra* note 3, at 175 ("[G]eneral business deregulation is beginning to achieve a partial loss of monopoly for corporate lawyers that was not accomplished by regulatory reform aimed explicitly at the legal profession.").

142. See Anonymous Telephone Interview with General Counsel (Aug. 5, 2010) ("I think a nonlawyer—I mean I hate to say [can do the job] just as well [as a lawyer]. I think they would bring different strengths and different weaknesses to the process and I think it's very personally dependent. I would say the [right] nonlawyer could do this job as well or maybe better if it's the right person."); Anonymous Telephone Interview with Compliance Activist Committee Member (Apr. 16, 2010) ("[A n]onlawyer can run compliance.").

like project management, technology, and training skills.<sup>143</sup> Nevertheless, most of the interviewees claimed that there were advantages to being a lawyer. Indeed, when interviewees were asked “[I]f you were not a lawyer, could you do your job?” most answered in the negative or replied along the lines of “I could, but I think it would be difficult—you’d have to find somebody with subject matter expertise in the area,”<sup>144</sup> or, “yes . . . but it helps to be one.”<sup>145</sup> As another healthcare industry CCO (a former practicing attorney) explained:

I think it is probably better to be a lawyer, because you have that sense of gravitas. I think that even if you are not acting as a lawyer, you could speak as a lawyer [so your audience] understand[s] that you have got legal training. I have criminal defense experience, so I would say, “look, if you want to hear stories about people who made some wrong choices, I have got a billion of them.” . . . I am speaking from experience, so you know, that helps I think. But it is preferred, not required . . . but I think in a corporate setting, it probably makes sense for a compliance officer to be a lawyer.<sup>146</sup>

It makes sense that a compliance officer in the healthcare industry, who has a background in criminal law and a familiarity with sentencing guidelines, would be better equipped to perform the role of compliance officer than a nonlawyer. Although some of the skills required of compliance officers, including project management, technology, and training, might not be the skills taught in law school, interpreting and ensuring compliance with the law, assessing legal risks, and providing advice about regulations and legal strategy are at the core of what compliance officers do.

This is not that different from the role that claim funders play. While claim funders need financial analysis and modeling capabilities, skills not commonly taught in law school, the core of what claim funders do is assessing legal risks and strategies employed in the claim litigation.

Further, the ethics training that law students receive in law school and that lawyers (as part of the profession) are required to maintain in continuing education credits to keep bar membership in many states might add value to either role given the ethics involved in claim funding and compliance. Thus, from an ethical standpoint, having a law degree might be essential—and, at the very least, beneficial.

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143. See Anonymous Telephone Interview with Compliance Manager (May 8, 2011) (“Someone with a technology background could help to bridge the gap between the legal and the business and the technology side.”); Anonymous Telephone Interview with General Counsel, *supra* note 142 (“I’d start by saying they are like—they are more process experts. So they establish policies and procedures, they advise the business on appropriate policies and procedures for incorporating compliance activities, control activities into their regular business processes, they provide training to the businesses.”); *id.* (“First of all, I think that’s an area where the average lawyer is not particularly strong and that’s an area where I think compliance departments are evolving. I think good compliance departments are starting to hire more project managers and more technology people.”).

144. Anonymous Telephone Interview with Chief Compliance Officer (June 17, 2010).

145. Anonymous Telephone Interview with Chief Compliance Officer, *supra* note 94.

146. Anonymous Telephone Interview with Compliance Manager, *supra* note 87.

Even if UPL rules were relaxed, the recent trend in corporate governance has resulted in an increase in the number of compliance jobs. This may actually enhance lawyers' prospects of being hired for those jobs, creating a demand for the new "business lawyer." Moreover, some Compliance Study interviewees mentioned that they would be open to hiring recent law school graduates.<sup>147</sup> This may create an opportunity for law schools to develop a compliance certification that provides project management, technology, and systems training to nonlawyers, lawyers, and law students. Generally speaking, this certainly may bode well for lawyers and law firms. For example, it may represent an opportunity for outside law firms to increase business. Corporations might turn to law firms (as opposed to other professional service providers) to offer ancillary services in these areas, given the reconfiguration in the relationship between attorney and client from one of agency to one of interdependency.<sup>148</sup>

The situation appears to be similar in the commercial claim funding industry. Lawyers are forming claim funding start-ups and hiring lawyers to work with them in due diligence and strategic advising.<sup>149</sup> Do claim funders also hire nonlawyers to help with law-related services like public relations, government relations, and financial modeling? Yes, but if UPL prohibitions were eliminated, it does not appear that nonlawyers would be taking lawyers' roles in these companies.

This same hypothesis might hold true in other areas where a bar license is not required but education and legal practice add advantage and where we have witnessed an increase in lawyers, such as investment banking, legal process outsourcing, and accounting.<sup>150</sup>

*B. Hypothesis 2: Eliminating UPL Statutes Might Enhance Risks and Create Negative Consequences*

Part of the motivation behind creating the chief compliance officer role and the trend of departmentalization is to enable those overseeing compliance to do so without the obligations of a lawyer, such as a lawyer's independence, duty of confidentiality, and restricted reporting-up requirements. The problem with this, however, is that if the lawyers themselves are uncertain about whether the compliance officers are acting

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147. Anonymous Telephone Interview with Chief Ethics and Compliance Officer, *supra* note 86.

148. Wilkins, *supra* note 79, at 2100–01 (detailing the arrangement between Tyco and Eversheds that contains an incentive for Eversheds to help Tyco in compliance initiatives to "avoid getting into legal trouble in the first place").

149. See *Fulbrook Homepage*, FULBROOK CAPITAL MGMT., LLC <http://fulbrookmanagement.com/> (last visited Apr. 26, 2014); see also *About Us*, PARABELLUM CAPITAL, <http://www.parabellumcap.com/> (last visited Apr. 26, 2014).

150. Remus, *supra* note 8, at 1259–60 ("Although laypeople routinely performed, and continue to perform, quasi-legal work, increasing numbers of licensed lawyers are now occupying quasi-legal roles. They include investment bankers, compliance officers, consultants, and accountants; they lead hedge funds, banks, private equity firms, and large corporations. With the collapse in the market for legal services, many young lawyers now enter these quasi-legal roles directly from law school." (footnotes omitted)).



as lawyers,<sup>151</sup> then surely the employees must be as well. Thus, there is the risk that employees will assume that the compliance officers are providing legal advice when, indeed, they are not. Employees are often already misguided in thinking that the lawyers represent them (as opposed to the corporation).<sup>152</sup> Now, another confusing layer is added—lawyers, many of whom formerly worked in the legal department and now work in the compliance department, are not even lawyers anymore.<sup>153</sup>

The claim funder context presents a slightly different but similar conundrum. The claimholder hires the funder, but the funder controls settlement decisions. The funder behaves like another lawyer on the team, influencing (if not controlling) settlement decisions and legal strategy, which requires updates on case management and other confidential information that may risk waiving the attorney-client privilege or other protective doctrines. The claim funder even makes litigation strategy recommendations. Yet the claim funder is not the claimholder's lawyer.

This leads to a fundamental question: can a lawyer ever not be a lawyer? One general counsel interviewee that was also the chief compliance officer at his company did not believe so:

There is no such thing as a nonpracticing lawyer—purely practical—if you are a lawyer you are a lawyer. It doesn't matter if you are licensed to practice law or not. People look at you as a lawyer and rely on you as [one] and believe you dispense legal advice despite title . . . and, therefore, in my view, I'm a GC of a company; if one of my lawyers screws up, I'm responsible. I can't say that's a lawyer in compliance and I get a "bye" . . . I think that is functionally wrong . . . .<sup>154</sup>

In both of these contexts, the consumer is a commercial entity that is fairly savvy and represented by other counsel. Therefore, the risk of information asymmetry is not as great as in noncorporate contexts. But a different risk exists: a lawyer acting as a nonlawyer may actually have just enough information, training, power and what Robert Rosen, Christine Parker, and Vibeke Lehmann Nielsen call "the lawyer cast of mind,"<sup>155</sup> to do more bad than good. As Dana Remus points out, "Corporate actors can manipulate the coverage of the professional rules to their advantage, relying on lawyers in different roles for different purposes. In this way, they can manage risk and liability and access legal expertise subject to as few constraints as possible."<sup>156</sup> Thus, lawyers can be used strategically to help

151. *See supra* note 90 and accompanying text.

152. Beardslee, *supra* note 7, at 797 n.358.

153. Remus, *supra* note 8, at 1264–65 (making a similar point about consumer confusion).

154. Anonymous Telephone Interview with General Counsel (Apr. 19, 2010).

155. Robert Eli Rosen, Christine E. Parker & Vibeke Lehmann Nielsen, *The Framing Effects of Professionalism: Is There a Lawyer Cast of Mind? Lessons from Compliance Programs*, 40 FORDHAM URB. L.J. 297 (2012).

156. Remus, *supra* note 8, at 1269–70 ("The proliferation of quasi-legal roles allows corporate management to expand its strategic access to legal expertise under a greater range of conditions and subject to fewer constraints. For example, management could hire a licensed but nonpracticing lawyer to serve as a compliance officer.").

corporations pursue risky actions that are arguably legal but not within the spirit of the law, or worse, to aid corporate misconduct.<sup>157</sup> This risk has been identified as one that exists even when lawyers are held to the Model Rules of Professional Conduct,<sup>158</sup> therefore they are magnified here.

Thus, the compliance officer and claim funding roles may lead to a whole new area of consultancy and quasi-legal work that lawyers (as opposed to others) are more qualified and better situated to fill. If the purpose of UPL laws is to further the monopoly of lawyers as legal service providers, then there is clearly not a problem. If the purpose of UPL laws is to protect the public, then, counterintuitively, despite the fact that these compliance officers and claim funders were trained as lawyers, there might be a problem. There is a risk to the public and to the reputation of lawyers as a profession, because these ex-lawyers, now *law consultants*, may not consider themselves bound by the Model Rules of Professional Conduct and part of the profession.<sup>159</sup> If that is the case, these legally trained compliance and claim funding professionals may pose more of a risk than nonlawyers to the public interest.<sup>160</sup>

#### CONCLUSION

Whether UPL statutes should exist, and if so in what form, is a continuing debate. Given that the functions and services of lawyers have grown, coupled with the broad definition of law practice under UPL statutes, this debate matters. There appears to be a consensus, however, that eliminating UPL restrictions will, if not defeat, at least detract from lawyers' monopoly of legal and/or law-related services. This Article questions this consensus as it relates to the areas that straddle the line between business and law.

In the corporate context, many new types of law-related services provided by lawyers and nonlawyers challenge our understanding of what constitutes the practice of law, as well as the appropriate boundaries of UPL statutes. By exploring compliance and claim funding, two areas ripe for the UPL statute debate, I attempt to determine whether the services provided by lawyers and nonlawyers in these areas are considered the practice of law under a more traditional lens. Based on seventy interviews with general counsels and chief compliance officers and my own consultancy work for a claim funding start-up, I believe that the answer is yes—the work

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157. See DeStefano, *supra* note 12, at 83 (making a similar point).

158. See *id.*

159. This would be true if they clearly communicate to their clients that this is a law-related service that does not confer the benefits of the lawyer-client relationship. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2013); Remus, *supra* note 8, at 1261–62; Rostain, *supra* note 16, at 1399. See generally CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002) (examining effective strategies for corporate self-regulation).

160. DeStefano, *supra* note 12, at 86 (making a similar point that corporate separation of the compliance gatekeeping function from the legal department may harm the public interest). This leads to an interesting question: can someone trained as a lawyer, that is, not practicing law or presenting himself or herself as the client's lawyer, violate UPL statutes?

conducted by both compliance officers and claim funders would be considered the practice of law, even under a narrower definition of law practice than is adopted by many UPL statutes. Although neither job requires a law degree, compliance officers and claim funders alike interpret law, assess legal risks and strategies, and provide advice around litigation or regulations. Further, my research (along with secondary sources) demonstrates that compliance officers and claim funders are often lawyers, and having the experience and training of a lawyer may help them better perform in their jobs.

Thus, contrary to the common lore that abolishing UPL statutes will decrease lawyers' monopoly on legal and law-related services, I hypothesize that, in the corporate context, this may not be true—and the opposite may even occur. I posit that because of their training and experience, lawyers are better qualified to fill these mixed business-law consultant jobs. Further, these areas that straddle the border between business and law may help increase lawyers' monopoly on law-related services—if lawyers take advantage of the opportunity. For example, law schools (usually run by lawyers) could offer certificates and other types of training for these types of services. And law firms could offer ancillary consulting services in these areas. Lastly, and perhaps counterintuitively, I hypothesize that problems associated with unauthorized legal practice might be exacerbated because legally trained lawyers might be able to use their legal training to disadvantage the public in a way that is not regulated by the profession and does not carry the threat of UPL allegations. Ironically, it may be to the public's benefit to consider these areas that are on the margins *as* the practice of law, because then only lawyers bound by the rules governing professional conduct could provide the service.

The point of this Article, however, is not to prove the impact of abolishing UPL prohibitions. Indeed, I examine only two areas of law and with limited research. Instead, the purpose is to add another layer to the debate over whether to abolish or how to revise UPL prohibitions. Although eliminating UPL statutes should logically lead to a decrease in lawyers' monopoly on legal and law-related services, as a famous fabulist once said, things are “not always exactly what they seem.”<sup>161</sup>

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161. PHAEDRUS, *The Weasel and the Mice*, in THE FABLES OF PHAEDRUS 86 (P.F. Widdows trans., 1992).