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# Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms

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# Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms

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The American legal profession has a distinguished tradition of sensitivity to conflicts of interest, except when its own interests are at issue. This essay explores the compromises to integrity that arises when a profession controls its own regulatory structure. My particular focus is the conflicts of interest involved when lawyers regulate and oversee their own monopoly over the delivery and financing of legal services.

## I. The Structure of Regulation

Around the turn of the twentieth century, state courts began asserting that they had inherent and exclusive power to regulate the admission and conduct of lawyers.[1] That authority, rooted in constitutional requirements of separation of powers between the judicial, executive, and legislative branches, has foreclosed legislative intervention in key areas, including the scope of the professional monopoly.[2] The problem is compounded by the courts' inaccessibility to lobbying efforts by the public and by their willingness to let bar

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1. Laurel Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 Professional Lawyer 79, 111 (2012); *See generally* Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation, The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989).

2. Rigertas, *supra* note 1 at 112; Charles Wolfram, *Barriers to Effective Public Participation in the Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 636-41 (1978).

organizations make most of the decisions on issues of professional regulation.[3] Although the inherent powers doctrine has served some salutary purposes in guaranteeing the independence of the profession from political influence, the cost has been substantial. The effect has been to protect the profession from competition and public accountability. As law professor Charles Wolfram has put it, the doctrine "stands [as] a powerful barrier shielding the legal profession from any of its critics . . . The legal profession has in that way both identified and 'protected' the interest of clients and the public without permitting them to participate in any way in those processes."[4] This lack of participation has shielded the bar from disinterested insight into problems in its own regulatory framework.[5] Discussion here is on the particular difficulties that the inherent power doctrine poses for issues of nonlawyer competition in providing routine legal services and investing in law firms.

## II. Unauthorized Practice by Nonlawyers

Unlike many other countries, the United States generally bans legal assistance by nonlawyers regardless of their expertise. In most jurisdictions, such unauthorized practice of law is a misdemeanor, and violators are also subject to civil sanctions.[6] Although these prohibitions are frequently violated and only intermittently and inconsistently enforced, the ban on personalized assistance stands as a powerful barrier to low-cost assistance. For example, form-processing services may provide clerical help, but they may not answer questions about where and when papers must be filed or correct obvious errors.[7] A few courts have even held that online document assistance constitutes the unauthorized practice of law because the services go beyond clerical support.[8] Only a few states have considered or

3. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1200 (2003) (For inaccessibility); Wolfram, *supra* note 2 at 16 (for the role of the bar).

4. Wolfram, *supra* note 3, at 17.

5. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM L. REV. 129, 154 (2011).

6. Quintin Johnstone, *Unauthorized Practice of law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 806-07 (2003).

7. *Fifteenth Judicial District Unified Bar Association v. Glasgow*, 1999 WL 1128847 (Tenn.App. 1999); The Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978).

8. *In re Reynoso*, 477 F.3d 1117 (9th Cir. 2007) (Texas ruling was overturned by a

implemented licensing systems that enable nonlawyers to provide limited assistance in specified fields. However, some of these systems explicitly exclude legal advice.[9]

Legislative efforts to expand the contexts in which nonlawyers may act have generally proven unsuccessful, except with respect to administrative agency proceedings. In this area, some courts have allowed nonlawyer representation on the theory either that the individuals were not giving advice, and therefore not practicing law, or that public policy justified nonlawyer practice.[10] For example, the Colorado Supreme Court upheld a system enabling nonlawyers to represent claimants in unemployment proceedings on the ground that lay representation had been accepted by the public for fifty years and "poses no threat to the People of the State of Colorado. Nor is it interfering with the proper administration of justice. No evidence was presented to the contrary."[11] On similar reasoning, federal agencies have permitted nonlawyers to appear in representative capacities in many administrative proceedings, and the United States Code explicitly grants agencies that authority.[12] Efforts to challenge that federal authority have failed, but some courts have resisted state legislative efforts to authorize nonlawyer involvement in state administrative proceedings.[13]

Yet the demand for nonlawyer practice has considerably outstripped the bar's capacity to prevent it. As the chair of Tennessee's unauthorized practice committee put it,

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legislative exemption); *Committee v. Parsons Technology*, 179 F. 3d 956 (5th Cir. 1999); *Janson v. Legal Zoom.com*, No 2:10-Cv-04128 at 20-21 (D. Miss. 2011) (case was subsequently settled without banning the services altogether; *see* Tom McNichol, *Is LegalZoom's gain Your Loss?*, CALIFORNIA LAWYER, September 2010, at 20.

9. Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2011 JOURNAL OF THE PROFESSIONAL LAWYER 79, 114-15, 117-18 (for description of the California, Arizona, and Washington systems which prevent advice); Don J. DeBenedictis, *State Bar to Weigh Licensing Nonlawyers*, SAN FRANCISCO DAILY JOURNAL, Apr. 11, 2013 (for proposed expansion of the Washington system that would allow limited license legal technicians and for proposals in California and New York).

10. *See Perto v. Board of Review*, 654 N.E. 2d 232 (Ill. App. Ct. 1995) (for a decision finding no practice of law); *Unauthorized Practice of Law Committee of Supreme Court of Colorado v. Employers Unity, Inc.*, 716 P. 2d 460, 463 (Col. 1986) (for decisions carving out a public policy exception); *Hunt v. Maricopa County Employees Merit System Commission*, 619 P. 2d 1036, 1038-39 (Ariz. 1980).

11. *Unauthorized Practice of Law*, 716 P. 2d at 463.

12. 5 U.S.C. §555(b) (1966); *see* Rigertas *supra* note 9, at 121.

13. *See Turner v. Kentucky Bar Association*, 980 S.W.2d 560, 563 (Ky. 1998) (For resistance).

> In recent years, it seems every Tom, Dick, and Harriet have gotten into . . . businesses that either constitute the practice of law or the law business or that are so close, the border is invisible. Tax consultants, document production 'mills' such as 'We the People,' and numerous title insurance and closing companies have sprung up offering services or advice that cannot be differentiated from the services offered by licensed lawyers.[14]

Often with no meaningful supervision by lawyers, nonlawyers play an increasingly important role within organizations in areas like contracts and compliance.[15]

Despite complaints about unauthorized practice, document preparation services continue to thrive. For example, LegalZoom provides legal forms and simple instructions for a variety of legal needs. This includes business formation, employment agreements, tax forms, trademark registration, copyright registration, and real estate leases.[16] In 2012, the company filed a registration statement with the U.S. Securities and Exchange Commission in anticipation of going public.[17] According to that statement, the company has served more than two million customers since its founding in 2002, and nine out of ten of its surveyed customers reported that they would recommend LegalZoom to their friends and family.[18]

Although leaders of the organized Bar repeatedly insist that broad prohibitions on unauthorized practice serve the public's interest, there is little support for that claim.[19] Outside the context of

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14. William C. Bevender, *Treating the UPL Epidemic*, 42 TENN. B.J. 26, 26 (2006).

15. Thomas Morgan, *Calling Law a 'Profession" Only Confuses Thinking About the Challenges Lawyers Face*, 9 U. ST. THOMAS L.J. 542, 564 (2011); Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 616 (2002).

16. Our Products and Services, LegalZoom, http://www.legalzoom.com/prducts-and-services.html (last visited Oct. 9, 2015).

17. LegalZoom.com, Inc. Registration Statement (Form S-1) (May 10, 2012), http://www.sec.gov/Arhives/edgar/data/1286139/000104746912005676 3/a22090200zx-1.htm (last visited Oct. 9, 2015).

18. *Id.*

19. *See* Nicholas J. Wallwork, *UPL Harms Public, Lawyers and Consumer Confidence*, ARIZ. ATT'Y (February, 2002) (for bar claims).

immigration, it is rare for customers to assert injury or for suits to be filed by consumer protection agencies.[20] The vast majority of Unauthorized Practice of Law, or "UPL," lawsuits filed against cyber lawyer products, is brought by lawyers or unauthorized practice committees and generally settle without examples of harm.[21] In other nations that permit nonlawyers to provide legal advice and assist with routine documents, the evidence available suggests that their performance is adequate.[22] In a study comparing outcomes for low-income clients in the United Kingdom, nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction on a variety of matters, including welfare benefits, housing, and employment.[23] After reviewing their own and other empirical studies, the authors concluded that "it is specialization, not professional status, which appears to be the best predictor of quality."[24] In Ontario, Canada, which allows licensed paralegals to represent individuals in minor court cases and administrative tribunal proceedings, a five-year review concluded there were "solid levels of [public] satisfaction with the services received."[25] In the United States, studies show that lay specialists who provide legal representation in bankruptcy and administrative agency hearings generally perform as well or better than attorneys. Extensive formal training is less critical than daily experience for effective advocacy.[26]

Almost all of the experts and commissions that have studied this issue recommend increased opportunities for such assistance. Until recently, almost all judges and bar associations have ignored those

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20. Rigertas *supra* note 9, at 124; Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709,725 (2012) (Evidence of harm from internet legal provision of assistance is sparse).

21. Rotenberg *supra* note 20, at 722.

22. DEBORAH L. RHODE, ACCESS TO JUSTICE 89 (Oxford University Press 2005); Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something has to Give*, 2012 MICH. ST. L. REV. 415, 464 (2014). Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629, 1636 (2010) (discussing Swedish legal advice providers).

23. Richard Moorhead et al., *Contesting professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 785-87 (2003); *see* Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 888-90 (2004).

24. Moorhead et al, *supra* note 23, at 795.

25. David B. Morris, Report to the Attorney General of Ontario (November 2012) at 12.

26. HERBERT KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 76, 108, 148, 190, 201 (University of Michigan Press 1998).

recommendations.[27] There are, however, some signs of change. The ready access to online documents has fed desires for self-representation and for low-cost assistance in routine matters. New York and California are considering licensing structures, and Washington has implemented one for certain specialties.[28] Because the goal is to protect clients from incompetence, it makes sense to pursue regulation, rather than further prohibition of lay specialists.

The need for such a regulatory system is particularly apparent in the area of immigration, a field characterized by both pervasive fraud and pervasive unmet needs.[29] Individuals holding themselves out as notaries and immigration consultants have preyed on the ignorance of undocumented consumers who cannot afford attorneys. Many of these consultants capitalize on the status of notario publicos in some Latin American countries, where these legal professionals enjoy formal legal training and authority to provide legal assistance.[30] Undocumented residents who are victims of "notario fraud" are often unwilling to approach authorities to complain out of fear of exposing their illegal status and risking deportation. The situation would benefit from a licensing structure similar to that in Australia, Canada, and the United Kingdom. These systems allow for licensed nonlawyer experts to provide immigration-related assistance.[31] Although the United States allows accredited nonlawyers to represent individuals in immigration appeals, it permits only representatives who work for nonprofit

27. Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 LOY. LAW. REV. 869, 885-86 (2009).

28. *See* DeBenedictis *supra* note 9 at 1.

29. *See* Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 589 (2009) (for fraud); Jessica Wesberg and Bridget O'Shea, *Fake Lawyers and Notaries Prey on Immigrants*, N.Y. TIMES, Oct. 23, 2011 at A25; *see* Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 654-55 (2012) (for unmet need).

30. Ann E. Langford, *What's In a Name? Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 119-20 (2004).

31. *See* Information for Consumers, Australian Government Office of the Migration Agents Registration Authority, https://www.mara.gov.au/Consumer-Information/Information-for-Consumers/default.aspx (last visited Oct. 9, 2015); *see* Use an Authorized Immigration Representative, Citizenship and Immigration Canada, http://www.cic.gc.ca/english/information/representative/rep-who.asp (last visited Oct. 9, 2015) (For the role of authorized immigration consultants in Canada); *see* The Code of Standards: The Commissioner's Rules, Office of The Immigration Services Commissioner, http://oisc.homeoffice.gov.uk/servefile.aspx?docid=6 (last visited Oct. 9, 2015) (For the role of regulated immigration advisors in the United Kingdom).

organizations and who accept only nominal fees for their efforts.[32] Expanding the accreditation and oversight system would allow qualified lay experts to charge reasonable fees for assistance and would increase access to justice for a population in great need of assistance.[33]

Similar regulatory systems could be developed in other contexts to allow personalized assistance on routine matters. Various consumer protections could be required concerning qualifications, disclaimers, malpractice liability and insurance and so forth.[34] Consistent with their inherent powers, courts could approve or oversee the development of such systems in accordance with the public interest. A number of courts have already taken such approaches in evaluating unauthorized practice claims. After considering factors such as cost, availability of services, and consumer convenience, the Washington State Supreme Court held that it was in the public interest for licensed real estate brokers to complete standard form agreements.[35] This consumer-oriented approach is a more socially defensible regulatory structure, unlike the conventional ban on nonlawyer practice, which ignores quality and cost-effectiveness.

## III. Nonlawyer Investment in Law Firms

The financing of legal services is a second area where the involvement of nonlawyers makes increasing sense. Nonlawyer ownership of law firms is permitted in Australia, England, Wales, Scotland, Germany, the Netherlands, New Zealand, and parts of Canada.[36] However, the American Bar Association's Ethics 20/20 Commission tabled a modest proposal for similar nonlawyer investment in the United States. The proposal would have required that firms engage only in legal practice, nonlawyer investment be capped at twenty-five percent, nonlawyers be actively engaged in the

32. *See* 8 Code of Federal Regulation, §1292.1 (2012); Shannon *supra* note 29, at 602-03.

33. *See* Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425 (2011); Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437 (2001).

34. Steven Gillers, *How to Make Rules for Lawyers*, 40 PEPP. L. REV. 365, 417 (2013).

35. *Cultum v. Heritage House Realtors*, 694 P.2d 630 (Washington 1985).

36. ABA Commission on Ethics 20/0, For Comment, Issues Paper Concerning Alternative Business Structures 7-17 (Apr. 5, 2011).

enterprise, and nonlawyers pass a fit-to-own test similar to the character and fitness test required for entrance to the bar.[37]

Opposition to such investment rests on three concerns. The first is that shareholder preoccupation with profits would pose a threat to professional independence.[38] The American Bar Association's Model Rule 5.4, which prohibits sharing fees with nonlawyers, justifies the prohibition as necessary "to protect the lawyer's professional independence of judgment."[39] According to the Reporter for the Ethics 20/20 Commission, opponents' concern is that nonlawyers who are not subject to the bar's code of ethics might push lawyers "to chase the dollar rather than abid[e] by the rules of professional conduct."[40] Symbolic and status issues are also at stake. To some commentators, nonlawyer investment would mean "diluting the essence of what it means to be a lawyer."[41] If Wal-Mart could own law firms, law professor Lawrence Fox predicts that "it will be the end of the profession . . . We will become just another set of service providers."[42]

These arguments lack any evidence of such problems in the jurisdictions that permit nonlawyer ownership. The ABA's Ethics 20/20 Commission reviewed the experience of the District of Columbia, which has permitted nonlawyer ownership interests in law firms for over two decades, and found no record of disciplinary concerns.[43] Nor did it report any ethical difficulties in Australia or England, which have more recently permitted nonlawyer investment. Both countries require appointment of a legal director or head of

37. *Id.* at 7-19.

38. Katherine H. Reardon, *It's Not Your Business! A Critique of the UK Legal Services Act of 2007 and Why Nonlawyers Should Not Own or Manage Law Firms in the United States*, 40 SYRACUSE J. INT'L L. & COM. 155 (2012); New York State Bar Association, Report of the Task Force on Nonlawyer Ownership 73-74 (Nov. 17, 2012).

39. ABA Model Rules of Professional Conduct, Rule 5.4, Comment (2013).

40. John Eligon, *Selling Pieces of Law Firms*, N.Y. TIMES, Oct. 29, 2011, at B1 (quoting Andrew Perlman, reporter for Ethics 20/20 Commission).

41. Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, WALL ST. J., Apr. 2, 2012 at B1 (Quoting David J. Carr).

42. 'Trio of Federal Suits Challenge Ethics Rule That Stops Private Equity Investment in Firms,' 27 ABA/BNA Lawyers' Manual on Professional Conduct, 382 (2011) (quoting Lawrence Fox).

43. ABA Commission on Ethics 20/20, Discussion Paper on Alternative Practice Structures 4 (Dec. 2, 2011).

practice to ensure compliance with ethical obligations.[44] Both countries also subject alternative business structures to the same ethical rules as those governing legal professionals, including confidentiality.[45] Slater and Gordon, the Australian law firm that was the first in the world to become a publicly traded company, made clear in its prospectus that obligations to courts and clients take precedence over the interests of shareholders.[46] Moreover, there are already many American contexts in which nonlawyers are involved in a managerial capacity where strategies have emerged to preserve professional independence and confidentiality: government agencies, insurance defense, group legal service plans, and in-house corporate legal departments.[47]

Also missing from opponents' arguments is adequate consideration of the benefits that might follow from the infusion of capital and talent. Equity financing holds a number of advantages over traditional financing approaches, which rely on the capital contributions of partners or outside borrowing. As law professor Milton Regan notes, a "partnership's capital base is limited to the wealth of its partners, and its assets are mobile."[48] In an era of increasing lateral movement, partners who are uncertain about their own or their colleagues' future plans may be reluctant to invest in firms' long-term needs. These partners may be equally wary of assuming loan obligations that will leave them liable for firm debt if others depart. Excessive reliance on loans is one of the precipitating causes of law firm dissolution.[49] At the same time, the demand for alternative sources of capital is growing in light of globalization, nationalization, and technological advances. The need to service clients in multiple locations has fueled expansion that depends on additional resources. So too, developing information technology is

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44. ABA Commission on Ethics 20/20, Issues Paper Concerning Alternative Business Structures 15 (Apr. 5, 2011).

45. *Id.* at 9, 15.

46. Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535, 555 (2009).

47. Guttenberg *supra* note 22, at 1, 473-74.

48. Milton C. Regan, *Tr. Lawyers, Symbols and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 422 (2008).

49. *See* Tyler Cobb, *Have Your Cake and Eat It Too: Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765, 777 (2012); DEBORAH L. RHODE, LAWYERS AS LEADERS 167-172 (Oxford University Press 2013).

highly capital intensive.[50]

Initiatives to better serve consumer interests would benefit from collaboration with professionals in marketing, finance systems, engineering, project management and similar occupations.[51] Research shows, innovation is often the result of interactions among those in related fields.[52] As Richard Susskind notes, just as librarians did not create Google, lawyers may not create tomorrow's breakthroughs in the delivery of legal services.[53] The desire to attract and retain outside investors may also "tend to impose financial. . .discipline on law firms whose members have not experienced serious pressure to exercise it."[54]

The need for outside capital and expertise is particularly acute in the marketing of routine assistance. The prospect of legal services at Wal-Mart prices, however distasteful to lawyers, is likely to be appealing to many consumers. The chain already offers a variety of professional services; including medical, dental, and eye care; and law would be a logical next step. A similar evolution has already begun in England. WH Smith, a London-based chain, offers legal advice on divorce, wills, real estate transactions, and basic contracts through legal kiosks run in partnership with QualitySolicitors.[55] Co-operative Legal Services (CLS), an offshoot of a supermarket, offers legal assistance often packaged with other related services.[56] As Renee Knake puts it, outside investment may "democratize" the delivery of legal services in ways that dramatically expand access to justice for underserved consumers.[57] This claim is also the underlying basis for a recent lawsuit challenging the ban on outside investment. Law firm Jacoby and Meyer needs external capital to

50. Rotenberg *supra* note 21, at 729, 738-741.

51. William D. Henderson and Rachel M. Zahorsky, *Paradigm Shift*, ABA JOURNAL, 40, 45-47 (2011).

52. STEVEN JOHNSON, WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION, 41, 58, 166, 246 (Penguin 2010).

53. RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES, 254 (Oxford University Press, 2008).

54. THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER, 170 (Oxford University Press 2010).

55. Renee Newman Knake, *Democratizing the Delivery of Legal Services* 73 OHIO ST. L.J. 1, 7 (2012).

56. John Flood, *Will there be Fallout from Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007,* 2012 MICH. STATE L. REV. 537, 557 (2012).

57. Knake *supra* note 55, at 557.

finance its efforts to realize economies of scale in delivering affordable routine assistance.[58]

In an era where four-fifths of low-income consumers and a majority of middle-income consumer have unmet legal needs, we urgently need more innovative delivery and financing structures.[59] "Equal Access Under Law" is a slogan we put on courthouse doors; it by no means describes what goes on behind them. That needs to change and the profession's control over its own monopoly is part of what stands in the way.

58. *Jacoby & Meyers, LLP v. Presiding Justices of the App. Div.*, 847 F.Supp.2d 590 (2nd Cir. 2012).

59. DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS, 30 (Oxford University Press 2015).

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