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A Framework for Data-Driven Legal Regulatory Reform

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A Framework for Data-Driven Legal Regulatory Reform

Washington Supreme Court Practice of Law Board[1]

[1] The Practice of Law Board is a Washington Supreme Court board administrated by the Washington State Bar Association (WSBA). This paper reflects the Board's work for the Court to provide new avenues for the authorized practice of law. The Chair of the Board is Lesli Ashley. Michael Cherry is the Chair Emeritus. Public members of the Board who worked on this innovation include Pearl Gipson-Collier, Brooks Goode, Dr. David Sattler, Ellen Reed, Mir Tariq, and Dr. Joseph Williams. Legal professional members of the Board who worked on this innovation include Sarah Bove, Jeremy Burke, Michele Carney, Kristina Larry, Craig Shank, Drew Simshaw, Gary Swearington, and Michael Terasaki. The Board would like to also acknowledge the support of the WSBA staff including Kyla Reynolds, Thea Jennings, Julie Shankland, and Renata de Carvalho Garcia, and our liasions with the WSBA Board of Governors Sunitha Anjilvel and Jordan Couch.

I. INTRODUCTION

Under Washington Courts General Rule (GR) 25, the Washington Supreme Court charges its Practice of Law Board (POLB) with three key responsibilities: to educate the public, innovate, and coordinate allegations of the unauthorized practice of law.[2]

This paper focuses on the POLB's efforts under the responsibility to innovate by creating a framework for legal regulatory reform that is data-driven and based on the scientific method. The POLB developed the framework for data-driven legal regulatory reform as part of that GR 25 responsibility to innovate. This innovation responsibility calls for the POLB to "[c]onsider and recommend to the Supreme Court new avenues for persons not currently authorized to practice law to provide legal and law-related services that might otherwise constitute the practice of law as defined in General Rule 24."[3] Previously, this innovation role led the POLB and the Washington State Bar Association (WSBA) to propose the Washington Supreme Court's Admission and Practice Rule (APR) 28 and the Limited License Legal Technician (LLLT) licensure, which was adopted by the Washington Supreme Court in 2012.[4]

A. A Framework for Data-driven Legal Regulatory Reform

In January 2022, the POLB began developing a framework to leverage the scientific method for data-driven legal regulatory reform, which would thereby provide more timely innovation under GR 25. A "framework" is a basic conceptional structure.[5] Application developers use frameworks so they do not start each project from scratch; they can reuse components that are already tested and known to work, avoid duplicating work, and focus on what is unique about their project.[6] The POLB wanted to design a regulatory reform framework to see if the same goals of efficiency and consistency could be achieved while reforming legal rules and regulations.

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[2] *See GR 25 Practice of Law Board*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_25_00_00.pdf [https://perma.cc/93B3-WMB8] (last visited May 10, 2024) (which outlines the Practice of Law Board responsibilities to innovate as well as to "educate the public about how to receive competent legal assistance" and to "receive complaints alleging the unauthorized practice of law in Washington" and where complaints allege "harm to the public interest," refer such complaints "to appropriate enforcement agencies.).

[3] *Id*. at (b)(2).

[4] Thomas Clarke & Rebecca L. Sandefur, *Preliminary Evaluation of the Washington State Limited Legal Technician Program*, NAT'L CTR. FOR STATE CTS., AM. BAR FOUND. & PUB. WELFARE FUND, (Mar. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949042 [https://perma.cc/D7J8-KWXG] (Note that while the Practice of Law Board was involved in initial work on this program, a peer Supreme Court Board was formed to develop and manage the program.).

[5] *Framework*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/framework [https://perma.cc/C4HM-7KWX] (last visited Mar. 16, 2024).

[6] *What is a Framework?*, CODECADEMY, (Sept. 23, 2021), https://www.codecademy.com/resources/blog/what-is-a-framework/ [https://perma.cc/YY5A-WCNT].

Data about reform of legal regulations and the impact of such reform is scarce. It is not clear why, but it likely reflects, at least in part, legal professionals' responsibility of confidentiality. Moreover, determining what data should be collected to prove whether a regulatory reform has had the desired effect—that it improved access-to-justice—often proves difficult. In contrast to the world of big data, where large amounts of data are available to analyze, the scarce data about legal services means legal reform occurs in a small-data world. Nonetheless, "[c]orrelations are useful in a small data world."[7]

"A correlation quantifies the statistical relationship between two data values. A strong correlation means that when one of the data values changes, the other is highly likely to change as well."[8] In a small-data world, "statisticians often choose a proxy, then collect relevant data and run correlation analysis to find out how good the proxy was."[9] This leads to the use of "[h]ypothesis driven by theories—abstract ideas about how something works."[10] This connection between being in a small-data world and using hypotheses to test proxies led the POLB to examine whether hypotheses and the scientific method could be used to get to a big-data world and whether the Board could use a data-driven approach to legal regulatory reform.

The scientific method consists of "principles and procedures for the systematic pursuit of knowledge involving the recognition and formulation of a problem, the collection of data through observation and experimentation, and the formulation and testing of hypotheses."[11] One key advantage of the scientific method is that a different group, following the same hypothesis and study, should be able to produce similar data to further validate the hypothesis.[12]

In the framework for data-driven legal regulatory reform, the hypothesis is the proposed legal reform. For example, the POLB might consider a hypothesis such as: "Consumers would benefit from the unauthorized practice of law being a per se violation of the Washington Consumer Protection Act." It is a testable statement about the relationship between the reform and the intended outcome. To examine the hypothesis, the proposers of the reform design and conduct a study, including data collection, to examine the potential impact of the reform. The study should be conducted in a safe and managed environment, such

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[7] VICTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK 52 (2014).
[8] *Id.*
[9] *Id*.
[10] *Id*.
[11] *Scientific Method*, MERRIAM WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/scientific%20method#:~:text=Medical%20Definition-,scientific%20method,formulation%20and%20testing%20of%20hypotheses [https://perma.cc/Q25Z-HS5D] (last visited Mar. 16, 2024).
[12] COMMITTEE ON REPRODUCIBILITY AND REPLICATABILITY IN SCIENCE, REPRODUCABILITY AND REPLICABILITY IN SCIENCE 6 (National Academic Press, 2019), https://nap.nationalacademies.org/catalog/25303/reproducibility-and-replicability-in-science [https://perma.cc/HJM6-L8PF].

as a "sandbox" or "regulatory lab," to ensure no one is harmed or any harms are quickly mitigated. A sandbox or lab is a method of putting appropriate processes around the framework to manage its use.

In the context of legal regulatory reform, the findings, as evidence, can inform whether the proposed legal reform warrants approval by the Washington Supreme Court, other high courts, or regulatory authority such as a bar association depending upon the jurisdiction. Using the scientific method in conjunction with the framework also allows for incremental changes to hypotheses and the study, and it allows reformers to refine the approach to ensure a full examination of the hypotheses and to provide tested evidentiary support for the reform.

The POLB acknowledges it began this work by attempting to model its laboratory based on the sandbox being implemented by the Utah Office of Legal Services Innovation. Utah's sandbox is operating under an order from the Utah Supreme Court.[13] The first iteration of the POLB's framework was introduced as a "Blueprint for a Legal Regulatory Sandbox in Washington State" in June 2021.[14] The blueprint began to follow the iterative approach of the scientific process, which resulted in a second version, entitled "Blueprint for a Legal Regulatory Lab in Washington State," which was published in February 2022.[15] Even though this version included substantial process improvements, many critics focused on the change in framing from a "sandbox" to a "lab." The term lab was substituted for sandbox after the POLB presented the original blueprint to the Supreme Court, and a lab appeared to resonate with some of the Justices as more serious—and therefore, more secure and safer—than a sandbox.[16] But, regardless of the name, a lab (or a sandbox) is nothing more than a safe environment or a set of guardrails consisting of protocols or rules for managing the use of the framework.

The number and extent of protocols that make up the lab will vary based on the type of reform being tested, the amount of data that needs to be collected, and any risk of harm to participants while the innovative service and data-driven legal regulatory reform is being evaluated in the safe environment. Lab protocols will also ensure that

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[13] UTAH SUPREME COURT ORDER NO. 15 (Amended Sept. 21, 2022), https://legacy.utcourts.gov/rules/urapdocs/15.pdf [https://perma.cc/P6UF-JFED].
[14] Practice of Law Board, *Blueprint for a Legal Regulatory Sandbox in Washington State*, WASH. STATE BAR ASS'N (Jun. 2021) https://wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/polb_legal-regulatory-lab_1.7_06-2021_superseded.pdf [https://perma.cc/ZL5U-L8GP].
[15] Practice of Law Board, *Blueprint for a Legal Regulatory Lab in Washington State*, WASH. STATE BAR ASS'N (Feb. 2022), https://wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/polb_legal-regulatory-lab_2.0_02-2022.pdf [https://perma.cc/4VUB-JVZP].
[16] *See* Washington Supreme Court and the Practice of Law Board, *New Avenues for Legal Services Progress Meeting*, TVW (Jul. 1, 2020, at 45:39), https://tvw.org/video/washington-state-supreme-court-practice-of-law-board-2021071018/ [https://perma.cc/G37W-6NP3].

evaluation is conducted in an ethical manner; that testing protocols respect current statutes, court rules and regulations; and that there is appropriate oversight by the supervising authority.

B. Why a Framework for Data-driven Legal Regulatory Reform is Needed

Under the status quo, legal regulatory reform takes too long to accomplish, is too bespoke, is rarely evaluated to ensure that the reform meets the desired goals of the reformation effort, and rarely involves the public (nonlegal professionals).

There are several possible reasons why legal regulatory reform currently takes too long. Although the legal profession often sees itself as socially progressive, it is generally conservative when it comes to fiscal and regulatory matters, especially with regards to changing processes by which the profession regulates itself. It is a profession that often defends the status quo by stating, "We have always done it this way." Legal professionals may be predisposed to conservativeness and preservation of the status quo because "[a]s lawyers, we are trained to question facts and hunt for the negative to protect our clients. We need to be skeptical of facts, look for fault, and question what could go wrong."[17]

How long does reform take? Consider the case of the relatively modest reform to the Washington Rules of Professional Conduct (RPC) that regulate how lawyers advertise their services. One of the most recent reforms to these rules arose because the rules in effect when reformation began dated back to an era when lawyers advertised on bus benches, billboards, and in the Yellow Pages.[18]

These rules were ripe for reform because legal professionals were asking bar association ethics professionals how to ethically advertise on the internet. Suggested reforms from various sources, mostly state bar associations, eventually made it to the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility. Following the work of the Committee, the ABA approved new model advertising rules in 2018.[19]

After the Association of Professional Responsibility Lawyers (APRL) issued its report in 2015 regarding the advertising rules for lawyers, state bar associations, including WSBA, used the APRL report as the basis for amending their state rules using their amendment processes.[20] In Washington, it was not until 2021 that rule amendments

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[17] Reid Trautz, *If Times They are a Changing, Why Aren't Lawyers Too?*, LAW PRAC. TODAY, (Dec. 14, 2016), https://www.lawpracticetoday.org/article/times-are-changing-why-arent-lawyers/ [https://perma.cc/5KF2-Q36R].
[18] *Explained: Update to Advertising Rules*, AM. BAR ASS'N (Jul. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/july-2019/explained--update-to-advertising--marketing-rules/ [https://perma.cc/WJ5C-R3DV].
[19] *Id.*
[20] *See GR 9 Cover Sheet*, WASH. COURTS, https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2698 [https://perma.cc/452P-JZXV] (last visited Mar. 5, 2024).

were adopted reforming the advertising rules for Washington authorized legal professionals.[21]

Therefore, from the time the ABA proposed model rules to the time when the Washington Supreme Court approved the amendments to the relevant Washington rules approximately three years had past, and if measured from the APRL report six years had passed.

This long timeline often means that by the time regulatory reform is enacted, the problem the reform was intended to solve is no longer the only problem that needs reformation. In the case of these advertising rules, lawyers, law firms, and other entities were moving beyond simple internet-based ads on websites to targeted social media platform-based ads by the time the updated rules went into effect.

Another reason legal regulatory reform takes a long time is that most regulatory reform is bespoke because the process for creating regulatory reform is not well understood. This is not to say it is bespoke because there is no process. Washington Court GR 9 outlines a process for reforming Washington's court rules.[22] Under GR 9, regulatory reform to a court rule can be initiated by a variety of different agencies or entities, including bar associations, the courts, and individuals (legal professionals or members of the public). However, most legal regulatory reform begins when a group of legal professionals concerned with a particular rule or regulation gets together, discusses the merits of the reform, and drafts a suggested court rule or amendment proposing the reform. Although GR 9 outlines some basic formatting and submission instructions, people proposing the reform are left to determine the best way to make a case for any reform.

As illustrated above, this process can take several months or years. It is hard to track actual times because the specific time the work originally begins is rarely noted.

Nothing in GR 9 addresses what evidence or data the court requires to decide about any reform, whether or how the effects of the reform will be measured, or whether the reform advances the goals of the judiciary in key areas, such as reducing the access-to-justice gap in Washington.

Another long-running regulatory reform effort involves WSBA's exploration of whether to require lawyers to hold lawyer liability

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[21] *See Washington Supreme Court Order No. 25700-A-1333*, WASH. STATE BAR ASS'N (Jan. 8, 2021) https://www.wsba.org/docs/default-source/about-wsba/25700-a-1333_rpcs-7-1-7-5-and-5-5.pdf?sfvrsn=94d515f1_7 [https://perma.cc/3ZJN-T3Y6].

[22] *GR 9 Supreme Court Rulemaking*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_09_00_00.pdf [https://perma.cc/D8DQ-TWTS] (last visited May 10, 2024).

(malpractice) insurance. Whether such insurance should be mandatory has been an ongoing debate among Washington's lawyers since at least 1986.[23] This example illustrates the problem with the current lack of data during and after a regulatory reform.

In September 2017, WSBA formed the Mandatory Malpractice Insurance Task Force to examine the issue. After studying the problem, the task force released its recommendation in March 2019. After consideration, in May 2019, the WSBA Board of Governors voted not to recommend to the Supreme Court a requirement that lawyers maintain malpractice insurance.

In January 2020, the Ad Hoc Committee to Investigate Alternatives to Mandatory Malpractice Insurance was formed to examine viable alternatives to mandatory malpractice insurance. The committee decided to recommend reformation of the rule of professional conduct regarding communication to ensure lawyers disclose to clients their insurance status (uninsured or underinsured). This reform was approved by the Washington Supreme Court, and a reformed RPC 1.4(c) became effective in September 2021.

This reform occurred faster than the advertising rules reform, but it is important to note that although the insurance rule was widely and actively debated, the debate was not data-driven. This is not to say there was no data, but it was hard to extrapolate claim rates, sources, and other data from jurisdictions in the United States and Canada to Washington State. Even authors of one of the best sources of data about lawyer malpractice at the time noted, "It is important to understand the limits of the data sources described above and those that we will describe in later chapters. We have nothing clearly representative of the entire legal profession or the entire universe of LPL claims."[24]

There is guidance that could help address these challenges. For instance, there are studies that focus on collecting data on specific issues. Examples of such studies include the "Washington State Civil Legal Needs Study" from 2003[25] and its subsequent update in 2015.[26] But two possible reasons for the persisting lack of data include the cost of conducting these studies and the overarching reluctance to collect data in case such collection violates RPC 1.6(a) regarding client confidentiality: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is

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[23] Hugh Spitzer, *Put it in Writing, Washington Supreme Court Enhances Malpractice Insurance Disclosure to Clients*, 75 WASH. ST. B. NEWS 35, 36 (2021).
[24] HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 68 (2018).
[25] Task Force on Civil Equal Just. Funding, *Washington State Civil Legal Needs Study*, WASH. STATE SUP. CT. (Sept. 2003), https://www.courts.wa.gov/newsinfo/content/taskforce/civillegalneeds.pdf [https://perma.cc/GG4F-N4NB].
[26] Civ. Legal Needs Study Update Comm., *Civil Legal Needs Study Update*, WASH. STATE SUP. CT. (2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf [https://perma.cc/7G26-E5EG].

impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."[27]

Even when a reform is implemented, the opportunity to examine the impact of the change is often missed. Rarely does anyone question or attempt to measure whether the regulatory reform or change had the desired effect. Since Washington RPC 1.4(c) was changed to require lawyers to disclose their insurance status to their clients, no study has been conducted as to whether more lawyers report and disclose. Did the reform affect the numbers of lawyers who had malpractice insurance, and if so, does this now better protect the public?

The POLB was also interested in whether anyone thought about how to measure whether a change impacted the access-to-justice gap. Here, the POLB observed a perception among many that measuring such data was too expensive and too hard. But the POLB felt any framework for reform would have to address this, as there had to be some effort to ensure the change's results were as intended.

This is also true of various efforts that have as an underlying goal reducing the access-to-justice gap. Many groups are working hard to make affordable legal services available. Often, as appears to be the case with the LLLT licensure in Washington State, concerns about client confidentiality and the difficulty and costs of collecting and analyzing data continue to be obstacles to measuring program effectiveness.

Finally, while the regulatory reform process under GR 9 allows for public comment, and even for the public to appear at hearings, generally the role of the public is passive rather than active. They may be members of committees and voice concerns at any public forum about the reform, but they are seldom listened to in drafting or evaluating the regulatory reform—that work remains most impacted by the voice of legal professionals.

II. THE NEED FOR INNOVATION IN THE MARKET FOR LEGAL SERVICES

In 2017, the POLB began thinking about the total market for legal services in Washington State to determine whether that market is being effectively regulated. The POLB was seeking an algorithm that could define the market. An algorithm is "a procedure for solving a mathematical problem (as of finding the greatest common divisor) in a

[27] *RPC 1.6 Confidentiality of Information*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_06_00.pdf [https://perma.cc/C9GY-MR95] (last visited May 10, 2024).

finite number of steps that frequently involves repetition of an operation."[28]

Here, the POLB realized it could not survey the market and would have to use a trial-and-error algorithm. In trial-and-error algorithms, the "amount by which a current approximation fails to satisfy the problem" is used to determine the next approximation.[29]

So, as a starting point, the POLB began to think of the total legal services market in Washington State as follows:

$$Legal\ services\ market = \sum auth.providers + unauth.providers + unmet\ needs$$

Fig. 1 An Algorithm for The Legal Services Market in Washington

That is, the legal services market in Washington State is equal to the summation of all the authorized legal service providers, plus all of the unauthorized legal service providers (the met needs) plus the unmet needs of the public for legal services.[30]

A. Authorized Legal Service Providers

Authorized legal service providers in Washington State include Attorneys and Counselors at Law (lawyers), LLLTs, and Limited Practice Offices (LPOs). The Supreme Court authorizes these legal service providers to practice law under its plenary authority to regulate the practice of law in Washington, and it delegates some of its responsibility for administering their admission, licensing, and discipline to WSBA under GR 12.2.[31] Generally, the Supreme Court does not authorize entities to practice law in Washington.[32]

WBSA provides only limited demographic information about authorized legal service providers. For example, such statistics show the numbers of lawyers who work in solo practices or small firms versus

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[28] *Algorithm*, MERRIAM WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/algorithm#:~:text=Kids%20Definition-,algorithm,divisor)%20or%20accomplishing%20a%20goal [https://perma.cc/3GEC-HLB2] (last visited Mar. 16, 2024).

[29] FRANCIS G. GUSTAVSON & C. WILLIAM GEAR, ALGORITHMS IN BUSINESS A5, (Robert L. Safran, Jay Schauer & Stephen B. Chernicoff eds., 1978).

[30] *See Summation Notation*, KHAN ACADEMEY, https://www.khanacademy.org/math/ap-calculus-ab/ab-integration-new/ab-6-3/a/review-summation-notation [https://perma.cc/P37U-CN9X] (last visited Mar. 16, 2024) (Describing how summation notation allows for the writing of a long sum of numbers in a simple expression. Here summation is useful as the total number of things to be added is difficult to measure or potentially infinite.).

[31] *GR 12 Regulation of the Practice of Law*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_12_00_00.pdf [https://perma.cc/2EFL-VQ6Q] (last visited May 10, 2024).

[32] *See Assurance of Discontinuance for LegalZoom.com*, THURSTON CNTY SUPER. CT., https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf [https://perma.cc/R62S-WNXU] (last visited Mar. 16, 2024).

large firms.[33] However, legal professionals are not mandated to provide such data, so the demographic data does not represent the entire universe of authorized practitioners in Washington State.

Under common law, an individual is also authorized to practice law on their own behalf as a pro se litigant. "A person 'may appear and act in any court as his own attorney without threat of sanction for the unauthorized practice'… but a layperson's right of self-representation applies 'only if the layperson is acting solely on his own behalf' with respect to his own legal rights and obligations."[34] "However, a limited liability company (LLC) must be represented by a lawyer to litigate."[35]

Pro se litigants introduce an interesting question when attempting to measure the market for legal services. Although they can be counted as authorized by common law, should they be counted as authorized or as unmet needs? Did they choose to represent themselves because they felt they were competent to do so, or were they effectively forced to represent themselves because they could not afford or find an authorized legal service provider willing to take their case?

B. Unauthorized Legal Service Providers

It is harder to quantify the unauthorized legal service providers in Washington State. The unauthorized practice of law in Washington is defined by statute and court rules. The Revised Code of Washington (RCW) §2.48.180 defines the unlawful practice of law as a gross misdemeanor.[36] However, one has to look to Washington GR 24 for a definition of the practice of law, as well as a series of exceptions permitted by the Washington Supreme Court.[37] For example, under GR 24(b)(8), the "[s]ale of legal forms in any format" is not the unauthorized practice of law.[38] Nor, per GR 24(d), does anything in the rule "affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public."[39]

Each year, approximately 20 to 25 allegations of the unauthorized practice of law are reported to the POLB. Such reports detail the activities of paralegals, formerly authorized legal service

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[33] *WSBA Member Licensing Counts*, WASH. STATE BAR ASS'N (Mar. 4, 2024) https://www.wsba.org/docs/default-source/licensing/membership-info-data/countdemo_20190801.pdf [https://perma.cc/TM7B-NLE4].
[34] Dutch Vill. Mall v. Pelletti, 162 Wn.2d 531, 536, 256 P.3d, 1251, 1253 (2011).
[35] *Id.* at 534.
[36] RCW 2.48.180.
[37] *GR 24 Definition of the Practice of Law*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_24_00_00.pdf [https://perma.cc/P45H-XZQ9] (last visited May 10, 2024).
[38] *Id.*
[39] *Id.*

providers, Notario Publicos,[40] and other people who have allegedly provided legal advice pertaining to another individual's legal rights, responsibilities, and the facts of a situation that may constitute contravention of Washington unlawful practice of law statute and General Rule 24. Approximately half of the reports are forwarded by the POLB to county sheriffs, prosecutors, the Attorney General Office, and other enforcement agencies for further investigation.

However, the POLB has also observed a significant number of entities providing legal services to legal professionals and consumers, generally as online legal service providers. The POLB has chosed to divide these legal service providers into three categories: services targeting people authorized to provide legal services, services targeting consumers, and services targeting both.

For example, the POLB categorized online legal service providers targeting products to people authorized to provide legal services as including traditional providers such as Thomson Reuters Westlaw and LexisNexis. They also include newcomers to this market such as Microsoft, which offers eDiscovery as part of its Microsoft 365 online services.[41] The POLB does not actively monitor such legal services as it presumes such tools are used by trained legal professionals, who must supervise their use under the RPCs. However, recent cases of lawyers filing briefs citing non-existent cases recommended by large-language model AI tools such as Chat-GPT may indicate a need for closer observation of how lawyers use such services.[42]

Online legal services that appear to target consumers—although not limited specifically to consumers in Washington State—include services that offer consumers assistance with divorce, immigration, handling of misdemeanors, and even filing of arbitration cases. The POLB does not have any information or data regarding the extent to which Washingtonians use such online legal services for their legal matters, whether these services are covered by an exemption to GR 24, or whether consumers are harmed by such services. The internet, which is the basic underlying platform for the delivery of these services, provides such services to people irrespective of state lines.

Some online legal service providers deliver services to both legal professionals and consumers. For example, many online legal service directories, provide services to lawyers to advertise and promote their services, and services to consumers to help them find legal help and

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[40] Marcy Tiberio, *What is a Notario Publico?,* AMERICAN ASS'N OF NOTARIES (Aug. 22, 2016), https://www.notarypublicstamps.com/articles/what-is-a-notario-publico/ [https://perma.cc/ZV7S-YLF6].
[41] *Microsoft Purview eDiscovery Solutions*, MICROSOFT PURVIEW (Sept. 14 2023), https://learn.microsoft.com/en-us/purview/ediscovery [https://perma.cc/WNP9-B4QH].
[42] *See generally* Dan Mangan, *Judge Sanctions Lawyers for Brief Written by A.I with Fake Citations*, CNBC (Jun. 22, 2023, 2:34 PM) https://www.cnbc.com/2023/06/22/judge-sanctions-lawyers-whose-ai-written-filing-contained-fake-citations.html#:~:text=A%20New%20York%20federal%20judge%20on%20Thursday%20sanctioned%20lawyers%20who,court%20opinions%20and%20fake%20quotes [https://perma.cc/Z3HC-LY6B].

obtain general information about the law (the last of which could be a valid exception to the practice of law under GR 24(d)).

C. Unmet Legal Needs

The POLB proposes that any attempt to provide a complete summation of the legal services market must account for not only the authorized and unauthorized legal service providers, but also those people who are unable to get their legal needs met. For example, this group could include individuals who choose to represent themselves as pro se litigants, whether or not their efforts achieve justice, and many more individuals who receive no assistance whatsoever for their legal needs.[43]

D. Spontaneous Deregulation

Apart from looking at the players in the market of legal services in Washington State, the POLB has observed that this market has an interesting anomaly. On the one hand, there are consumers who do not appear to be able to find the legal services they need at a price they are willing or able to pay. Again, this is evidenced by the Washington Courts Civil Legal Needs study.[44]

On the other hand, many authorized legal professionals are not fully utilized. A legal professional's utilization rate calculates or measures how many hours an individual legal professional puts towards revenue-generating work.[45] "The utilization rate for Washington law firms (which includes both lawyers and non-lawyers) is 34%."[46] In contrast, "[m]ost consultancies will expect you to bill 70-95% of your 40 hours per week, depending upon the industry and your level of seniority."[47] This likely means that Washington legal professionals either are extremely inefficient or cannot find consumers willing to pay the price the legal professional is charging for their services.

This type of market mismatch, where consumers cannot find a service of a suitable quality, price, or time is an attribute of a market that is ripe for spontaneous disruption. According to authors of a Harvard Business Review article, spontaneous disruption occurs when "[m]any successful platform businesses—think Airbnb, Uber, and YouTube—

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[43] Civ. Legal Needs Study Update Comm., *supra* note 26.
[44] KRITZER & VIDMAR, *supra* Note 24; Task Force on Civ. Equal Just. Funding, *supra* note 25.
[45] "*How Much Should I Charge as a Lawyer in Washington*?, CLIO, https://www.clio.com/resources/legal-trends/compare-lawyer-rates/wa/ [https://perma.cc/P4C6-XQXF] (last visited Mar. 16, 2024).
[46] *Id.*
[47] *Employee Billable Utilization at Professional Services Organizations Worldwide from 2020 to 2021, by Industry Segment*, STATISTA (Sept. 5, 2022), https://www.statista.com/statistics/1013412/employable-billable-utilization-professional-services-organizations-industry-segment/ [https://perma.cc/JS5Y-YRRK].

ignore laws and regulations that appear to preclude their approach."[48] According to the authors of an article on spontaneous deregulation in the Harvard Business Review, "[a] striking variety of firms face potential threats from spontaneous private deregulation. For example, many lawyers perform services that don't really require the personal engagement of an expensive trained professional. Consider routine real estate transactions, uncontested divorces, and small-business contracts."[49]

This examination of the market for legal services led the POLB to begin to think about how a framework for timely legal regulatory reform might complement the sandboxes being proposed in other jurisdictions.

E. How Much Regulation is Enough Regulation?

When it comes to the regulation of legal services in Washington State, the Washington Constitution, Article 4, § 1 provides "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.[50]" This judicial power vests in the Washington Supreme Court "an exclusive, inherent power to admit, enroll, discipline, and disbar attorneys."[51] This exclusive power over legal professionals is necessary "for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients"[52]

The practice of law has long recognized legal professionals, in particular lawyers, as members of one of the "learned" professions. Practicing such learned professions generally requires a license or authorization from a state's executive branch or the courts. It has been considered necessary to limit membership in learned professions to protect the public because "[w]hen a person engages the services of a doctor, a dentist, or an optometrist, he is entering a realm of which he knows practically nothing. Of necessity, he must rely upon the skill and training of the expert to whom he goes."[53] This public policy originated in an earlier time, as evidenced by the gendered language such as "he," and long before the internet when knowledge about medicine or the law for example, was tightly held within the profession. This raises the question as to whether in today's online world consumers need the same degree of protection, or whether the specialized treatment of these learned professions has become too patronizing, paternalistic, and condescending.

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[48] Benjamin Edelman & Damien Geradin, *Spontaneous Deregulation: How to Compete with Platforms That Ignore the Rules*, HARV. BUS. REV. (Apr. 2016), https://hbr.org/2016/04/spontaneous-deregulation [https://prema.cc/9RSU-PUGL].
[49] *Id.*
[50] WASH. CONST. art. § 1.
[51] Short v. Demopolis, 103 Wn.2d 52, 62, 691 P.2d 163, 169 (1984).
[52] *Id.*
[53] State v. Boren, 36 Wn.2d 522, 525, 219 P.2d 566, 568 (1950).

The Washington Supreme Court has also held that "[t]he practice of the law is not a business that is open to a commercial corporation."[54] This sentiment continues to be reflected in statutes [55] and RPC 5.4 and 5.5[56] that prohibit non-lawyer investment in a law firm or splitting fees for legal services with non-lawyers. Many of these prohibitions have been subject to study for reform under the concept of alternative business structures, with the Arizona Supreme Court having decided to strike its RPC 5.4 so that "[n]onlawyers may partner with lawyers, "[n]onlawyers may own, have an economic interest in, manage, or make decisions in, an Alternative Business Structure that provides legal services," and "[l]awyers will be permitted to split fees."[57] Similarly, Utah has amended several of its RPCs for lawyers associated with approved entities participating in its sandbox.[58]

To answer the question of how much regulation is enough, the POLB conceived a framework to help people promoting legal regulatory reform focus on truly protecting the public with just enough regulation at the right time, versus over-defining how legal professionals do their work.

F. Protecting the four C's + IOLTA

Although many regulations and rules may be ripe for reform, the POLB heard from many stakeholders that there is a core set of RPCs that should only be changed—if ever—after the highest level of scrutiny and evaluation. The POLB came to refer to these core rules as the four C's + IOLTA. The four Cs are: competence, conflicts, confidentiality, and communication. IOLTA refers to an interest in lawyers' trust accounts, and in this case, it is a proxy for the requirement to protect and hold

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[54] State v. Merchants' Protective Corp., 105 Wash. 12, 17, 177 P. 694 696 (1919).
[55] RCW 2.48.180(2).
[56] *See generally RPC 5.4 Professional Independence of a Lawyer*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_05_04_00.pdf [https://perma.cc/7CUC-4R4Q] (last visited May 10, 2024) (RPC 5.4(a) prohibiting fee-splitting with a non-attorney and 5.4(b) prohibiting formation of a partnership with a nonlawyer); *RPC 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_05_05_00.pdf [https://perma.cc/YSW5-ANFM] (last visited May 10, 2024) (5.5(a) prohibiting a lawyer from helping a nonlawyer practice law), and *RPC 1.5 Fees*, WASH. COURTS, HTTPS://WWW.COURTS.WA.GOV/COURT_RULES/PDF/RPC/GA_RPC_01_05_00.PDF [HTTPS://PERMA.CC/6A2J-2LJN] (1.5(e) on fee splitting between lawyers in different firms).
[57] *Alternative Business Structures (ABS) Questions & Answers*, ARIZ. JUDICIAL BRANCH, https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs [https://perma.cc/MM43-5FZS] (last visited Mar. 16, 2024) (quote under "The Court unanimously adopted the elimination of Rule 5.4 What does this allow?").
[58] *See, e.g., Rule 5.4. Professional Independence of a Lawyer*, UTAH STATE COURTS, https://legacy.utcourts.gov/rules/view.php?type=ucja&rule=13-5.4#:~:text=Rule%205.4.,Professional%20Independence%20of%20a%20Lawyer.&text=(b)A%20lawyer%20may%20permit,render%20legal%20services%20for%20another.&text=(4)%20the%20lawyer%20or%20law,fees%20from%20an%20existing%20client. [https://perma.cc/DZ4T-FGKP] (Rule 5.4B)*; see also Utah Court Rules Approved*, UTAH COURTS (Jan. 28, 2021), https:/legacy.utcourts.gov/utc/rules-approved/category/rpc05-04/ [https://perma.cc/7PTM-KHLM].

client assets and property separately from a legal professional's own property.

Of course, any legal service should be performed competently. All legal service providers should apply the correct legal principles and laws to the facts and circumstances in a timely manner. As stated in the current Washington RPC regarding competency, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[59] Comment 8 to this rule speaks to the need to stay abreast of technological changes to remain competent. Therefore, any framework should ensure that a rule or regulation being reformed still results in competent legal services.

As important as competency is the need to consider conflicts, although conflicts in the eyes of the public may be more nuanced. Here, the Washington RPC regarding conflicts states in part: "[a] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client."[60] Conflicts arise in many matters, such as with a legal service designed to help people obtain a divorce. Although both parties might want the divorce and want to keep it as amicable as possible, the reality is that the parties in a divorce may not share the same interests. Without realizing it, they may be the very definition of adverse parties. So, should a legal service provider be able to represent both parties even with a waiver of the conflict? And what constitutes an informed waiver ensuring the parties understand the conflict and the potential consequences of the conflict? Any framework should ensure that a rule or regulation being reformed using the framework must result in a legal service that does not create or ignore impermisible conflicts of interest.

Confidentiality may be the C of most concern. It has been argued that data is the new oil. Information is driving a rush to monetize information as organizations learn to leverage data.[61] Organizations are utilizing data to know more about who their customers are and what they need. For example, a data analyst at Target Corporation analyzed data in a manner that allowed assignment of "a 'pregnancy prediction' score. More important, he could also estimate her due date to within a small

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[59] *RPC 1.1 Competence*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_01_00.pdf [https://perma.cc/JUJ9-MGZ9] (last visited Mar. 16, 2024).

[60] *RPC 1.7 Conflict of Interest: Current Clients*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_07_00.pdf [https://perma.cc/RVP5-4V2D] (last visited Mar. 16, 2024).

[61] *The World's Most Valuable Resource is No Longer Oil, But Data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gad_source=1&gclid=EAIaIQobChMIvOzplavJgwMVKR-tBh08XwB1EAAYASAAEgLIwPD_BwE&gclsrc=aw.ds [https://perma.cc/AW6Z-VEUS].

window, so that Target could send coupons timed to very specific stages of the pregnancy."[62]

Compared to most other service providers, legal service providers are stuck in the world of small data. This is likely due to the rule of professional conduct on confidentiality, which states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[63] Paragraph (b) includes eight instances where a lawyer might reasonably believe they must break the bond of confidentiality, such as "to prevent reasonably certain death or substantial bodily harm"; "to prevent the client from committing a crime"; "or to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[64] Nothing in this rule, including paragraph (b) would appear to allow a legal service provider to sell or share data with a third-party who would mine such data in a manner similar to Target to discover other legal or non-legal services the client might need.

Anonymizing, or removing personally identifiable information from the data, may be a partial solution. However, there are problems with anonymizing data. For example, thoughtless anonymization can be easily undone.[65] Nevertheless, legal service providers are likely starting to think about how to preserve client confidentiality and attorney client privilege while extracting data to provide better representation. And others may be looking at ways to monetize data to reduce the costs of legal service.

The fourth C is communication. Lack of communication is an extremely common RPC violation for legal professionals in Washington.[66] Under Washington's RPC regarding communications:

A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules; (2) reasonably

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[62] Charles Duhigg, *How Companies Learn Your Secrets*, NEW YORK TIMES (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.
[63] *RPC 1.6 Confidentiality of Information*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_06_00.pdf [https://perma.cc/F63E-5989] (last visited May 10, 2024).
[64] *Id*.
[65] Bruce Schneier, *Why 'Anonymous' Data Sometimes Isn't*, WIRED (Dec. 12, 2007, 9:00 PM), https://www.wired.com/2007/12/why-anonymous-data-sometimes-isnt/ [https://perma.cc/UN5U-TALS].
[66] *Washington Discipline System 2022 Annual Report* 18, WASH. STATE BAR ASS'N (2022), https://www.wsba.org/docs/default-source/licensing/discipline/2022-discipline-system-annual-report.pdf?sfvrsn=2d3b12f1 [https://perma.cc//DN4N-P7AH].

consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.[67]

Lack of communication may result from heavy workloads, difficulty explaining complex legal matters in an understandable way, or the fear of presenting bad news to the client. Legal service providers must overcome these issues to ensure clients are aware of the state of their matters, and adequately informed to make all the key decisions.

Finally, legal professionals must safeguard clients' property.[68] This includes the duty to hold money or funds that belong to the client and third parties in a trust account.[69] A governing principle of the IOLTA trust-account ethics rules is legal professionals must segregate and protect "client and third-person funds and property."[70] Problems with lawyer trust accounts make up the third most common violation found in legal professional discipline in Washington.[71]

In designing the framework, and even with focusing on the four C's + IOLTA, the POLB is not implying a hierarchy of RPCs. Rather, it is attempting to make a framework that might allow for new types of legal services, while at the same time attempting to ensure a level playing field. Rules that apply to people providing legal services should generally apply to other forms of legal services, including online legal service providers. So, if a rule was found to be necessary for protection of the public if provided by a person, the rule would necessarily apply when the service is provided by another legal service provider, including online service providers. And vice versa for a rule that is found to be unnecessary. This is why the POLB began to keep the Four Cs and IOLTA in mind with the framework. This is not to say that these rules can never be reformed using the framework, it is just that such reformation will require more stringent examination and testing, with truly, valid data-backed tests to ensure reform accomplishes the intended goals while protecting the public.

III. THE FRAMEWORK

[67] *RPC 1.4 Communication*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_04_00.pdf [https://perma.cc/9VNA-VTPL] (last visited Mar. 16, 2024).
[68] *RPC 1.15A Safegaurding Property*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_15A_00.pdf [https://perma.cc/5R4D-6X9A] (last visited Mar. 16, 2024).
[69] *RPC 1.15B Required Trust Account Records*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_15B_00.pdf [perma.cc//AY6Q-2WPA] (last visited Mar. 16, 2024).
[70] TOM ANDREWS ET. AL., THE LAW OF LAWYERING IN WASHINGTON 9-27 (2012).
[71] RPC 1.1, *supra* note 59.

A. Data-driven Regulatory Reform

The POLB was looking for a way to move from reforming legal regulations and rules based on expert but largely anecdotal data, to an expert but largely data-driven model. Such a model would also focus on measuring the risk to the public from potential unintended consequences of the reformed rule and the benefits.

Considering ways to measure both risks and benefits originally led to a two-dimensional model for the framework. It compared risk on the x-axis, and benefits on the y-axis. Having watched its sibling LLLT Board struggle to quantitatively measure and convincingly communicate to program opponents the objective benefits of its innovative program, the POLB decided to measure benefits based on whether the change reduced the access-to-justice gap. So, the next change to the model was making the y-axis a measurement of impact (positive, negative, or none) on the access-to-justice gap rather than a generic benefit.

Observations of and discussions with the Utah Office of Legal Services Innovation, which was implementing its sandbox for legal regulatory reform, showed that risk occurred and had to be measured not only in the present but also in the future. Consider for example, a legal service that drafts a will. A will is drafted, reviewed with the client, and signed in the present, allowing for an estimation of the risks at the time of drafting. However, the will is likely put in a place for safekeeping and not thought about for some time. During that time, laws and the client's situation may change. The will, though, remains as originally written. All the while, there is a growing risk that this document no longer adequately represents the situation and wishes of the client for their estate. It is not until such a will is probated that these new risks come to light or fruition.

This led the POLB to add a third z-axis to the model. This axis is to remind users of the framework to estimate the risk into the future. This three-dimensional model is shown in Fig. 2.

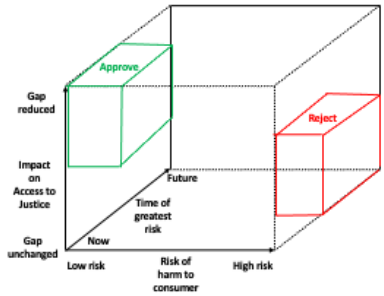

Fig. 2 The 3-D Regulatory Reform Framework

Before using the framework, it is necessary to use the scientific method to create a hypothesis about the desired reform to the legal regulation or rule. From this hypothesis, tests are designed to measure risks, costs, and benefits (in the POLB proposed framework this would be access-to-justice impact). Depending on the type of regulation being reformed, processes that create the appropriate guardrails (a lab or sandbox) should be built around the framework to monitor the process and collect data on an ongoing basis. This leads to the next problem the framework must address: how to adequately estimate risk.

B. Measuring Risk Generally

Risk is generally defined as, "merely the chance of incurring an injury or a loss, like the chances a passenger will die when flying in a plane or that a homemaker will lose a home in a fire."[72] Since many of the legal services that might be evaluated using the framework would likely be technology-based, the framework must be capable of estimating technological risks, which are risks that "arise specifically from the use and operation of human-made instruments or systems."[73]

In measuring risk, the POLB was aware of a bias in favor of change that can affect these processes. "[E]xpert risk assessment tends to value change more than continuity, short-term safety over persistent, longer-term impacts on environment and quality of life, and economic benefits to developers more than justice to other members of society."[74] This bias will need to be guarded against.

It is quite feasible that there are different models to estimate risk. For example, the Utah Office of Legal Innovation's sandbox identified

[72] SHIELA JASANOFF, THE ETHICS OF INVENTION: TECHNOLOGY AND THE HUMAN FUTURE 33 (Kwame Anthony Appiah ed., 2016).
[73] *Id.* at 34.
[74] *Id.* at 36.

three categories of consumer harm: the consumer achieves an inaccurate or inappropriate legal result, the consumer fails to exercise legal rights through ignorance or bad advice, or the consumer purchases an unnecessary or inappropriate legal service.[75]

Wanting to assign more precise values to risk, the POLB found a model for evaluating legal risk in a publication from Boise State on Business Law.[76] This model creates a matrix comparing the likelihood of an event, categorized as low, medium, or high, against the severity of outcome measured as slight, manageable, or severe.[77] The POLB cannot state who invented this matrix. It may have started in the U.S. Airforce, but many people and organizations have adapted this matrix, by extending the number of cells in the matrix or assigning numbers and colors to help assess risk.[78]

The POLB felt a 3x3 matrix would be sufficient and added values and colors to its risk matrix to help assign a data value to the estimation of risk. The resulting matrix is shown in Fig. 3.

		Harm		
		Negligible (1)	**Manageable (2)**	**Catastrophic (3)**
Likelihood	**All most certain (3)**	**3**	**6**	**9**
	Possible (2)	**2**	**4**	**6**
	Very Unlikely (1)	**1**	**2**	**3**

Fig. 3 A 3x3Risk Analysis Matrix

A low score (1, 2 green) does not necessarily mean no- or low-risk, but rather, that only a few risk mitigations might be needed to manage the risk. Similarly, a high-risk score (6, 9 red) does not mean the

[75] *What We Do*, UTAH OFFICE OF LEGAL SERVICES INNOVATIONS, https://utahinnovationoffice.org/what-we-do/ [https://perma.cc/8ZND-BHZY] (last visited Mar. 7, 2024).
[76] JEFF LINGWALL, BUSINESS LAW: A RISK MANAGEMENT APPROACH 5-14 (Boise State University, 2022).
[77] *Id.*
[78] Patricia Guevara, *A Guide to Understanding 5X5 Risk Matrix*, SAFETYCULTURE (Feb. 29, 2024), https://safetyculture.com/topics/risk-assessment/5x5-risk-matrix/ [perma.cc/XQ8R-KMCQ].

risk is too high, but rather, it means that more and stronger risk mitigation may be needed.

C. Measuring Current Risks

It will be hard, if not impossible to build a single matrix to assess the risk for the proposed reform. Instead, the framework will work best when first, a list of risks is compiled; second, each risk is scored separately; third, a summation of all the risks is calculated; and lastly the sum or estimate of total risk is applied to the framework. There is a benefit here of forcing the reform proposers to determine a complete picture of the current risks.

$$\sum_{i=1}^{n} current\ risk\ i = current\ risk\ 1 + current\ risk\ 2 + \cdots + current\ risk\ n$$

Fig. 4 Summation of all the current risks

Current risks in regulatory reform evaluation could include a breach of confidential information, applying the wrong law, or missing a court date or statutorily imposed deadline. Some individual risks may be common to many regulatory reform efforts. Others will be unique. The value of the framework and the risk matrix is that it forces people proposing the reform to evaluate the impact and unintended consequences and think about what mitigations can help manage the risk, particularly the risk of harm to consumers of the legal service.

D. Measuring Future Risks

"As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know."[79]

In general, the longer a developer waits to fix a problem in software, the costlier in time and money it is to fix.[80] The POLB believes this is true with harms that arise in regulatory reform, and that mitigating the harm in the future may be significantly harder and more expensive than mitigating it today. Therefore, the framework provides the opportunity to try to identify future harms—the unknown unknowns—as soon as possible in the reform process. The summation algorithm for future risk remains fundamentally the same as present risk and is shown in Fig. 5.

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[79] David A. Graham, *Rumsfeld's Knowns and Unknowns: The Intellectual History of a Quip*, THE ATLANTIC (Mar. 27, 2014), https://www.theatlantic.com/politics/archive/2014/03/rumsfelds-knowns-and-unknowns-the-intellectual-history-of-a-quip/359719 [perma.cc//2AU3-8NFA].

[80] JOEL SPOLSKY, JOEL ON SOFTWARE: AND ON DIVERSE AND OCCAISSIONALLY RELATED MATTERS THAT WILL PROVE OF INTEREST TO SOFTWARE DEVELOPERS, DESIGNERS, AND MANAGERS, AND TO THOSE WHO, WHETHER BY GOOD FORTUNE OR ILL LUCK, WORK WITH THEM IN SOME CAPACITY 22 (Apress, 2004).

$$\sum_{i=1}^{n} future\ risk\ i = future\ risk\ 1 + future\ risk\ 2 + \cdots + future\ risk\ n$$

Fig. 5 Summation of the future risks

Here, while the exercise is fundamentally the same, it is also harder. The considerations will be about trying to convert the unknown unknowns to known unknowns. Risks may include unforeseen changes in statutes or other laws, changed social norms, and changed client circumstances, as well as technological obsolescence and the introduction of new technologies.

Consider again the case of a will for a client drafted with the current statutes in mind. The will is drafted based on the individual's situation including health and finances at a particular point in time. It attempts to anticipate what might be in the future. But hopefully it does not come into effect until sometime in the future when any or all such considerations may have changed or unanticipated events may have occurred. The risk that something about the will could be problematic in the future is high. It is uncertain that mitigations can be created now for future risks or that a legal service be designed to monitor for such changes and redraft proposed changes to improve the will over time and ensure it remains a competent document.

IV. MEASURING BENEFITS

While designing the framework for data-driven legal regulatory reform, the POLB was consumed with the challenge of measuring benefits. The POLB did not want to use the "if you build it they will come" approach to measure reform benefits, and the POLB was also wary of assuming benefits exist in the absence of harm.[81] Perhaps this was because the POLB was aware of continued and growing pushback against the LLLT licensure, with opponents pointing out the costs of the program versus its numeric results (number of technicians), combined with the lack of a metric to determine the impact of the LLLT license. The POLB felt the need to build into its model a method to measure benefits.

The most interesting and valuable regulatory reform projects in the POLB's opinion would be those that reduce the access-to-justice gap. It is arguable that the LLLT licensure reduces the access to justice gap in Washington because it increased the number of legal service providers,

[81] Martin Lassen, *If You Build It, They Will Come – Meaning, Origin & Usage (10+ Examples)*, GRAMMARHOW, https://grammarhow.com/if-you-build-it-they-will-come-meaning/ [https://perma.cc/BGN7-UUTL] (last visited February 27, 2024).

and such providers may charge less for their services and work with low- and moderate-income communities most impacted by the gap. However, this argument is largely anecdotal as it does not address whether there is data to prove such an assertion.[82]

Here, the POLB punted when creating the framework. It did not try to develop its own instrument to measure changes to the access to justice gap. It chose to simply incorporate a tool developed for the National Center for State Courts to:

(1) assess the magnitude of an access problem that could be solved by a specific capability; (2) identify strategic planning about hurdles and barriers that must be surmounted or reduced to achieve program objectives; and (3) prioritize the tasks that must be performed and the capabilities that must be implemented to close the targeted gaps. [83]

The tool works by essentially filtering down data from the target population for the reform to attempt to calculate the number of people helped by the reform.

$$Targeted \mid Accessible \mid Found \mid Recieved\ Benefits \mid Had\ Positive\ Outcome$$

Fig. 6 A tool for accessing Access to Justice impact.

The targeted population might start with the Washington State census data of people over 18 who might benefit from the regulatory reform. This could be filtered down to the number of people who can access the reform, such as the number of the target population with broadband, then further filtered down to the number of people with broadband who find the reform, then those who use the reform, and, finally, the number who benefited from the reform.

As alluded to earlier, in this framework the use of this tool is not mandatory. What is mandatory is that if the proposers of a regulatory reform do not use this algorithm for measuring access-to-justice, they substitute their own methodology or data, with the point being that some analysis of benefits needs to be performed before and after the regulatory reform is enacted. For example, a 3x3 matrix could also be adapted to attempt to measure the impact of access-to-justice by comparing the

[82] The National Center of State Courts "was in the midst of a full-scale evaluation of the [Limited License Legal Technician] program…, but that evaluation came to a halt with the sunsetting" of the program by the Washington Supreme Court. *See* Jason Solomon & Noelle Smith, *The Surprising Success of Washington State's Limited License Legal Technician Program*, STANFORD CENTER ON THE LEGAL PROFESSION (Apr. 2021) https://law.stanford.edu/publications/the-surprising-success-of-washington-states-limited-license-legal-technician-program/ [https://perma.cc/8QFJ-NEPQ].

[83] Thomas M. Clarke & Paula Hannaford-Agor, *Measuring the Impact of Access to Justice Programs: An Assessment Tool for Funders and Policy Makers*, NATIONAL CENTER FOR STATE COURTS (2020), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/859 [https://perma.cc/3CAV-S5E3].

probability of an effect on a particular group (either above or below the poverty line), with the degree of such an impact.

V. CONCLUSION

The POLB hopes that people and organizations involved in legal reform will examine this data-driven reform framework and consider adopting and adapting it to help with their regulatory reform efforts. Additionally, the POLB hopes that such reformers will appreciate that the goal of the framework is not to regulate how reform is enacted, but rather, the goal is a flexible approach that will be modified and improved as it is used, and the improvements will be turned back to the community of reform advocates to benefit future reform efforts. It is also hoped that the use of this, and additional frameworks, will lead to collection of data about reforms and whether they achieve the intended goals with minimal unintended consequences, as well as more timely reforms that improve access-to-justice.