Purism and Pragmatism in the Legal Profession

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ABSTRACT

The legal profession faces a crisis, and yet the roots of that crisis remain largely unexamined. Law schools, law firms, bar regulators, and courts are very much aware that the demand for legal services is no longer expanding, that client needs are changing rapidly, and that lawyers face increased competition for a limited pool of work. But the institutions that lawyers inhabit have failed to acknowledge an important component of the profession’s crisis: namely, a conflict between competing conceptions of lawyering. These institutions—including traditional law reviews—cling to a “purist” model of lawyering under which an attorney’s core function is to anticipate, and influence, judicial decisions. The purist model focuses on legal analysis and blinds itself to the other functions that attorneys perform. But there is an equally important competing model of lawyering, which recognizes that attorneys spend more time interacting with adversaries and counterparties than with judges and that in helping their clients navigate the world, attorneys engage in risk management and negotiation much in the way that other non-legal professionals might. In performing these real-world functions, a lawyer’s success depends less upon legal analysis and more upon his or her ability to understand a client’s business goals, risk tolerance, and negotiating leverage. This “pragmatic” model of lawyering acknowledges the commonality between lawyers and professionals in adjacent fields and considers the ways in which lawyers can not only advise clients on legal risk, but also relieve their clients of some of that risk. This Article urges law schools, law reviews, law firms, bar regulators, and courts to incorporate the pragmatic model of lawyering into their thinking. The practical consequences of such a shift in perspective could be quite significant, including (a) new courses of study for law professors and students, (b) doctrinal developments in how courts treat litigation risk transfers and litigation finance agreements, (c) a relaxation of bar rules regarding attorney fee sharing and law firm equity ownership, and, ultimately, (d) widespread changes in the capital structure of law firms and an elimination of barriers between the capital markets and the market for legal services. If the legal profession wants not just to

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survive, but to thrive, in the coming decades, it will need to make significant changes in its self-conception, its actions, and its fundamental structure.

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INTRODUCTION

The legal profession’s self-conception is plagued by an internal tension. There are two competing notions of what it means to be a lawyer. The two models ultimately are compatible, but we cannot reconcile them unless we fully understand the ways in which they conflict. The profession faces a number of fundamental choices about how best to integrate its competing conceptions, choices with far-reaching ramifications for the bar, the bench, and the academy.

The first model of the legal profession—one which tends to dominate law schools but informs law practice as well—focuses on the lawyer’s unique ability to anticipate and influence judicial decisions. Law schools devote the better part of three years of legal education to the analysis of judicial opinions. Law schools rely on the case method to educate students—and professors devote hour upon hour of class time to judicial decisions—because when law students graduate and go off into practice, their core professional undertaking will be to anticipate, and influence, the reactions of courts to their clients’ cases. In litigation, this is obvious: a litigator’s mission is to predict and influence outcomes in court. But it is also true of business lawyers, who try to anticipate judicial reactions to a variety of potential scenarios and to structure deals and draft contracts to improve the outcome in court if those scenarios come to pass. In either setting, the lawyer’s function is to anticipate judicial reactions, internalize the judicial perspective,
and try to influence judicial thinking in a manner that is beneficial to the client. When law schools teach students to “think like lawyers,” they are actually teaching them to think like judges.

But when students graduate from law school they learn very quickly just how much “they don’t teach you in law school.” Most practicing lawyers spend only a fraction of their professional time anticipating and influencing judicial decisions and much more of their professional time helping their clients navigate the world and deal with counterparties or adversaries. To be sure, a lawyer’s knowledge of the law is critical to winning a client’s trust and serving the client effectively. However, the law simply provides a backdrop for a good lawyer’s activities. The transactional lawyer’s core function is to structure and negotiate deals in a way that advances the client’s business goals.¹ The lawyer spends much more time negotiating with deal counterparties than anticipating judicial reactions, and negotiations between lawyers are more heavily influenced by the parties’ business goals, risk preferences, and relative bargaining leverage than by the law. Lawyers may have a comparative advantage over other advisors and negotiators because of their legal knowledge, but their role is in many respects similar to that of an investment banker, a financial advisor, or a broker. Like these other non-lawyer professionals, business lawyers are hired to structure and negotiate deals in a way that manages risk and advances their clients’ interests.

Even litigators devote more professional energy to dealing with adversaries than dealing with judges. Litigants may bargain in the “shadow of the law,”² but good litigators know that the shadow cast by the law is much weaker and smaller than law schools would have their students believe. The resolution of a lawsuit, just like a business deal, is driven largely by the relative bargaining power, resources, risk preferences, and business goals of the parties.³ The prospect of a judicial decision certainly plays a role, but litigators cannot effectively navigate litigation using only what they are taught in law school. To serve their clients effectively, litigators must understand their clients’ business goals and make use of tactical or strategic opportunities that have very little to do with the application of substantive law to the facts of a dispute.

These two models—the “purist” and the “pragmatic”—overlap a great deal. Law schools have come to recognize that simply reading and analyzing cases is inadequate preparation for practice and they have added a variety of more practical, hands-on courses into the mix, ranging from clinics, to simulation exercises, to externships. Law schools will never do as good a job as law firm partners at

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¹ See, e.g., Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 YALE L.J. 239, 255 (1984) (“[T]he tie between legal skills and transaction value is the business lawyer’s ability to create a transactional structure which reduces transaction costs and therefore results in more accurate asset pricing.”).


³ See infra note 24 and accompanying text.
teaching the practical aspects of lawyering, but they have made great strides toward rounding out their students’ educations. Law schools continue to place greater emphasis on judicial decision-making—which is entirely appropriate—but they know that their students’ efforts to influence judicial decision-making will be of little value if they do not also have a basic understanding of how to navigate a lawsuit or draft a contract.

Conversely, practicing lawyers do not leave behind everything they learned in law school when they enter law practice. Throughout their careers, practicing lawyers continue to distinguish themselves from bankers, brokers, and other non-lawyer negotiators by retaining legal analysis as a core part of their professional role. Lawyers may resemble other risk managers who try to advance their clients’ interests in the face of uncertainty or adversity, but they specialize in a particular type of risk: namely, legal risk. Litigators and deal lawyers alike must apply law to fact and engage in reasoned, legal analysis if they are to serve their clients effectively.

Although the two dominant conceptions of lawyers can co-exist, if we wish to harmonize them we must understand the tension between them and work to resolve that tension. It is not simply a matter of observing that lawyers sometimes serve as appliers of law and sometimes serve as risk managers or business negotiators. Rather, we must candidly acknowledge where those two roles conflict. Many of the ethics questions that lawyers confront—and legal academics study—are rooted in this fundamental conflict.

Consider, for example, the tax lawyer who believes there is a seventy-five percent chance that the Internal Revenue Service (IRS) and a court would rule against a taxpayer on an aggressive tax position, but whom also knows there is only a ten percent chance that the taxpayer will be audited. The tax lawyer is ethically prohibited from advising the client that he should enter the audit lottery and bear only a seven and a half percent chance of having to pay tax. But if the client’s position is a defensible one, he can advise the client on why he believes the aggressive position is defensible, even if unlikely to prevail after an audit, knowing that the client itself may take the audit risk into account in deciding how to proceed. Consider the litigator retained to defend a large corporation against a meritorious lawsuit. Although the litigator expects that the client will lose if the case proceeds to trial and is constrained by Rule 11 from asserting meritless defenses that are simply designed to burden or harass the opponent, he may also know that if he defends the case vigorously within the bounds of Rule 11, the plaintiff will lack the resources or stamina to hold out for trial and will therefore be willing to settle the case at a steep discount from its full legal entitlement. In circumstances like these, the realities of law practice may ultimately result in a misapplication of law to fact: the likelihood is that the IRS may not collect the

4. FED. R. CIV. P. 11(b).
full amount of taxes that are due, and the litigation plaintiff will not receive full compensation for its injuries.

I raise these examples not because I want them to be the focus of my analysis. To the contrary, I think legal ethicists are sometimes too eager to delve into the details of particular ethical dilemmas without connecting the specific conflicts lawyers face to a much broader tension between competing conceptions of the lawyer’s role. Nor do I mean to focus on the thoroughly explored tension between the lawyer as an officer of the court and the lawyer as a zealous advocate for his client. A pragmatic lawyer may just as often suggest a course of action that sacrifices the client’s legal entitlement because of a practical business goal—a circumstance in which zealous representation and fidelity to the law are not at all in conflict. In the litigation example above, consider the plaintiff’s attorney, who may well advise his client to settle the case for less than the merits warrant because he knows that full-blown pursuit of the litigation would undermine the plaintiff’s business goals by wasting time or valuable resources that could be put to better use in its business or perhaps by leaving a messy reputational dispute outstanding which could harm other business prospects. The tension I am focused on is not between lawyer as officer of the court and lawyer as zealous advocate. Rather, it is the tension between lawyer as law applier and lawyer as risk manager.

When one examines how the bar, the bench, and the academy have approached the tension between the purist and pragmatic approaches, one would expect the bar and bench to gravitate to the pragmatic model and the academy to gravitate to the purist model. But all three have emphasized the purist model over the pragmatic model, and, ironically, law schools may have made the most progress toward integrating the two. Law schools are working hard to incorporate the pragmatic model into their curricula; virtually all schools have embraced clinics and practical learning as an important complement to traditional Socratic courses, and some schools have used their practical offerings to improve their national standing markedly.

Courts understandably have a historical bias in favor of the purist model, though there have been some signs of effort to integrate the two, especially among progressive judges. Many judges continue to treat litigators as if their only mission is to frame legal disputes for the court; these judges tend to conceive of themselves as passive arbiters whose only job is to resolve legal disputes. They ignore much of the jockeying that goes on in litigation and the way in which that jockeying can interfere with justice. However, other judges understand that a lawyer is charged not only with framing disputes for judges, but also with managing risk and negotiating resolutions for clients. Rather than

simply ruling on motions presented by the parties—and conceiving of themselves as mere passive arbiters—these judges actively manage cases so as to contain expense and limit procedural maneuvering.⁷ Active judges understand that if their goal is to resolve disputes based on their merits, they must not only rule wisely on legal motions, but also grapple with litigant tactics that are designed to burden or harass opponents and induce settlements that stray from the merits. Moreover, courts by and large have been receptive to novel financing methods that lawyers and clients may use to manage the risk and expense associated with litigation—extending work product and attorney-client protection to third-party financing arrangements, for example.⁸ Again, the approach may vary from judge to judge, but at least there is a body of law developing on novel financing arrangements which acknowledges the importance of litigation risk management and forces judges to take into account the pragmatic model.

When one turns to state bar organizations, the glacial pace of progress is most surprising of all, given that those who regulate lawyers are themselves lawyers.⁹ One would expect in a regime of self-regulation that professional regulators would understand the ways in which changing client demands require a reconsideration of their traditional adherence to the purist model. There are some limited examples where this is the case, such as the District of Columbia’s decision to permit partnerships between lawyers and non-lawyer professionals so that they can provide integrated offerings to clients.¹⁰ But the District of Columbia (D.C.), is the exception, and elsewhere lawyers continue to be forbidden to partner with accountants, financial advisors, or lobbyists. Thus, it remains impossible in those jurisdictions for a client to retain a single firm to advise on tax matters, on corporate finance structuring, or on government relations, even though such arrangements would be far more efficient. State bars have also made it difficult for lawyers to raise capital in ways that would better enable them to manage risk for their clients.¹¹ Clients often want fixed fees or value billing so that the legal risks that lead them to retain lawyers in the first place are not compounded by the prospect of high, unpredictable legal fees. Clients know all too well that lawyer costs—whether for litigation, regulatory matters, or transactional work—can sometimes balloon to exceed the value of the legal services sought. Clients would much prefer to have lawyers bear the risk that a representation will cost more than budgeted. However, lawyers lack the investment capital and risk tolerance to absorb the risk that a lawsuit, a

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⁸. Courts have done so largely by using work product and privilege doctrines to protect against side-show discovery into litigation finance arrangements. See infra text accompanying notes 56–65.


regulatory filing or investigation, or a corporate transaction will cost more than anticipated. While there are avenues available for lawyers to use outside capital to bridge the gap between client needs and law firm offerings—and bar associations have accepted third-party financing in the litigation context as one such solution—there is a great deal more state bars could do to free lawyers up to raise the capital they need to serve clients better.

The place where the tension between the purist and pragmatic models is most acute—and the area where bar regulators in particular have tended to slow progress—is where lawyers need to depart from their traditional form of organization in order to meet clients’ changing needs. Although the ABA rules on professional independence are not intended to stand in the way of novel financial arrangements that could improve the delivery of legal services, bar regulators have tended to enforce the prohibition against fee splitting in just such a manner. Some regulators may throw around terms like “professional independence” and “client loyalty” as justifications for prohibiting lawyers from sharing fees with non-lawyers who help finance their operations. But I suggest that the ultimate motivation for this blind adherence to tradition is not an inherent tension between the purist and pragmatic models, as regulators might have once believed; rather, it reflects a failure on the part of the legal profession to train the pragmatic lens inward. Lawyers are all too willing to acknowledge the importance of risk management and pragmatism when it comes to helping their clients deal with other parties—whether litigation adversaries, deal counterparties, courts or regulators. Yet when it comes to the allocation of risk between lawyer and client, lawyers—and some bar regulators in particular—have a blind spot. Rather than acknowledge that innovations in law practice and novel financing arrangements can actually serve clients’ interests by relieving them of risk and expense, many bar regulators, and even some law firm managers, retreat into the purist model. I will argue that their professed ethical concerns about maintaining professional independence and client loyalty often mask their true motivations: economic self-interest and protectionism. Despite virtuous public justification, regulators may well prohibit lawyers from sharing fees with non-lawyers not because of any noble adherence to the purist model, but rather out of pure greed: lawyers simply do not want non-lawyers to eat into their 100 percent share of profits from the legal services industry.

In this Article, I urge the bar, the bench, and even the academy to do a better job at reconciling the pragmatic and purist models of lawyering—most notably by turning the pragmatic lens inward and candidly evaluating the ways that lawyers could better manage risk and expense for their clients. I provide some

12. Id. at 40–41.
concrete recommendations that would help to integrate and reconcile the two models and improve the manner in which legal services are delivered.

The Article is organized as follows. In Part I, I lay out the competing conceptions of lawyering. In Part II, I explore how the traditional conceptions of lawyering which prevail in law schools, courts, law firms, and bar associations fail to capture the actual demands placed on lawyers in practice today; although the pragmatic model has gained some traction, the legal profession has failed to turn the pragmatic lens inward and consider how lawyers could better respond to evolving client needs. Finally, in Part III, I offer suggestions for the bar, the bench, and the academy based on the lessons learned in Part II.

I. TWO MODELS OF LAWYERING

The purist model of lawyering is perhaps best captured by Lon Fuller’s work The Forms and Limits of Adjudication.14 Fuller described our legal system as one in which opposing lawyers are supposed to present their strongest arguments15 for their clients’ positions, and a passive judge is supposed to resolve the dispute by reference to a neutral body of law.16 In Fuller’s model, a lawyer can be both a zealous advocate for his client and an officer of the court; respect for the law—and appeal to a neutral arbiter—is key to effective advocacy.17 One cannot hope to convince a neutral judge to rule in one’s favor without first convincing the judge that this is the correct answer under the law. The lawyer’s role is to present his client’s story in a way that best fits the applicable law so that zealous advocacy and fidelity to law go hand in hand.

Although Fuller’s model of adjudication may best capture the purist model of lawyering, the purist model of lawyering does not depend upon law being determinate, or even very constraining.18 Legal realism and critical legal studies have undermined confidence in the constraining force of law and caused legal academics to question just how judges decide cases.19 Law professors have for years been disabusing their students of the notion that judges’ decisions are entirely constrained by law.20 Law is politics, or at least policy, and law schools highlight

15. See id. at 364; see also Molot, Old Judicial Role, supra note 7, at 64–69 (discussing institutional and Constitutional framework of litigants framing disputes).
16. Fuller, supra note 14 at 363–81; see also Molot, Old Judicial Role, supra note 7, at 62, 69–72.
17. Molot, Old Judicial Role, supra note 7, at 59.
for students just how much discretion judges have in deciding hard cases and just how much judges are free to make things up as they go along. But even if judges decide cases by reference to something other than law, that does not change the fact that a lawyer’s role is to anticipate and influence judicial decisions. Judges may make policy, rather than apply law, but under the purist model the lawyer’s role remains to influence judicial policymaking. Litigators continue to craft arguments they think are most likely to convince judges, and deal lawyers continue to advise their clients on how judges might evaluate their clients’ factual circumstances.

Thus, the purist model does not hinge on any particular model of judicial decision-making, but rather can accommodate a range of judicial conceptions. The purist model focuses instead on the centrality of judicial decision-making to the lawyer’s role. Under the purist model, it is a lawyer’s job to anticipate and influence judicial decision-making, regardless of how a judge ultimately will make the decision in question.

The pragmatic model of lawyering, in contrast, recognizes that judicial decision-making is largely irrelevant, or of marginal importance, to many of a lawyer’s functions. When a lawyer negotiates contract terms with a business counterparty, he may take into account that if something goes wrong between the parties, they may end up in litigation, and a judge may ultimately be the one to read the contract and allocate risk and harm based on its terms. Yet contract negotiation is much more a matter of business than law. Each party tries to anticipate future business realities: e.g., will prices go up or down, will markets expand or contract, what sorts of external events could make the business endeavor more or less profitable than expected? Then they negotiate over which party will reap more of the benefits from positive developments and bear more of the risks from negative developments. There is always the small chance that the ultimate allocation of benefits or risks will be decided by a court in the event that circumstances unfold in a way that leads to litigation. But ordinarily, the chances of that happening are remote. Much more important than anticipating a judge’s reaction to changed circumstances will be anticipating the changed circumstances themselves and the counterparty’s likely response to those changes. When allocating benefits and risks between the parties, lawyers’ negotiations will be driven much

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more by their perceptions of the parties’ relative bargaining leverage (who needs the deal more) than by their perceptions of a judge’s likely reactions.

Moreover, even where a matter does result in litigation, a judge’s perception of a dispute may not loom quite as large as the purist model would have one believe. When a complaint is filed, opposing lawyers will likely have different views on the likelihood that the litigation will result in a plaintiff recovery. The plaintiff may be confident of making it past a motion to dismiss and summary judgment and obtaining a favorable jury verdict, while a defendant may hope, or expect, to get the case knocked out by the judge or to win before the jury. But, almost as important as the likely outcome on the merits, is the time and expense it will take to get to a resolution. If a plaintiff expects to have to devote years and millions of dollars to motion practice and discovery, that expectation will make the prospect of even a successful outcome on the merits much less attractive. Conversely, a defendant that expects a lawsuit to result in little or no liability may nonetheless take a lawsuit very seriously if it knows that it will have to spend millions of dollars defending the suit, that the suit may serve as a distraction, or be harmful to its reputation for quite some time. In addition to anticipating and seeking to influence judicial reactions to their clients’ cases, litigators spend a great deal of time anticipating and seeking to influence their opponents’ reactions. Indeed, litigators spend much more time sparring with their opponents over scheduling, document disputes, lines of questioning in depositions, and much more than they do interacting with judges.

Over time, the pragmatic model has become more and more important to the professional lives of lawyers. Litigation and deal-making alike have become more expensive, complex, and time consuming. These changes have made the lawyer’s risk management role increasingly prominent. The duration and expense of litigation in an age of full-blown discovery and document production make interactions with opponents relatively more important than interactions with judges. Because judicial intervention in the discovery process is comparatively limited, and discovery is an ever larger part of litigation, litigators tend to

23. See Molot, Procedure Skews Incentives, supra note 21, at 95–96; see also Lucian A. Bebchuk, Suing Solely to Extract a Settlement Offer, 17 J. LEGAL STUD. 437, 439 (1988).

24. See David Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 102 (1983); see also Molot, Procedure Skews Incentives, supra note 21, at 69–73 (using Trubek’s findings to argue how litigation costs sometimes outweigh the merits in settlement decisions); Molot, Changes Reflect Procedure, supra note 21, at 995.

25. See Molot, Procedure Skews Incentives, supra note 21, at 96–97 (noting that defendants often settle frivolous lawsuits under conditions of informational asymmetry but a “defendant nonetheless may offer a nuisance settlement in some cases to avoid the costs of responding”); David Rosenberg & Steven Shavell, A Model in Which Suits Are Brought for Their Nuisance Value, 5 INT’L REV. L. & ECON. 3 (1985) (modeling “nuisance value” suits that both parties view to be meritless, but which may nonetheless profit plaintiffs because the timing and extent of litigation effort favors them).

26. See Molot, Changes Reflect Procedure, supra note 21, at 997.


interact much more with their opponents than with judges. Moreover, as litigation has become more expensive, its cost in many cases can approach, or even exceed, the dollars at stake in the underlying litigation. Plaintiffs and defendants alike have experienced pyrrhic victories, in which the benefits of winning a suit may be outweighed by the costs of litigating it. Increasingly, a lawyer’s ability to manage risk for the client entails management of litigation costs as much as improving the client’s case on the merits.

In transactional practice as well, the costs of papering a deal—particularly one that involves public markets and SEC regulation—have grown substantially over time. If lawyers historically thought that their job was to protect clients from adverse legal outcomes, clients today increasingly emphasize that they want their lawyers to stay within budget in performing that function. This is particularly true for transactions that may not close. It is one thing for a client to pay exorbitant legal fees in order to close a sizeable, and potentially quite profitable, business deal. However, for a client to pay fees only to see the deal fall apart is unacceptable from the client’s perspective. For this reason, clients may want lawyers to take risk, and accept alternative billing arrangements, in transactional, and not just litigation, settings.

To meet a client’s needs, then, lawyers cannot simply focus on the law. Their job is to navigate a deal, a regulatory problem, or a litigation dispute in a way that minimizes risk and expense for their clients. Given that legal fees can loom large in this calculus, the lawyer’s ability to manage his or her own fees can end up being as important as his or her ability to manage underlying legal risk. Fee arrangements have become central to good lawyering.

In sum, lawyers cannot serve their clients effectively without engaging in both “purist” and “pragmatist” lawyering. Transactional lawyers and litigators alike must be able to engage in purist legal analysis and advise their clients of the likely application of law to their circumstances. They must also manage costs and risk and engage with counterparties or adversaries in a manner that is much more pragmatic than the purist tradition historically has taken into account.

II. A DISCONNECT BETWEEN INSTITUTIONAL CONCEPTIONS OF LAWYERING AND ACTUAL LAWYERING

Although practicing lawyers understand perfectly the ways in which their actual day-to-day roles depart from the purist model, the institutions that lawyers inhabit have failed to keep up with this reality. Law schools, courts, the bar, and even law firms have struggled to incorporate the pragmatic model into their conceptions of lawyering.

29. See id. at 1022–23.
30. See infra text accompanying notes 67–68.
Ironically, the institution that is probably least well-suited to incorporate the pragmatic role—the law school—is the one that tries the hardest to do so. Law professors will never be as good as law firm partners at teaching students the skills needed to litigate cases or negotiate and structure deals. Law professors often conceive of themselves as scholars first and teachers second. The amount of time they spend in practice between graduating from law school and entering the academy is also often limited. However, law schools have listened intently to their alumni about the shortcomings of a traditional legal education. For several decades, law schools have been adding clinics, simulation courses, practicums, and externships to their curricula, with some schools like New York University making these additions central to their programs and using them to bolster their reputations. Moreover, the recent tightening of the legal market has forced schools to redouble their efforts on these fronts in the hope of increasing the chances that their graduates will find jobs.

There is, of course, still much more that can be done to incorporate the pragmatic model of lawyering into the fabric of legal education. Consider, for example, the trajectory of law reviews. Whereas law reviews long ago published predominantly doctrinal pieces designed to guide judges and practicing lawyers in their resolution of difficult cases—just the sort of pieces that would fit the purist model—law reviews no longer follow that model. Law review articles today less often consist of legal arguments in favor of doctrinal change and more often attempt to provide perspective on the evolution of the law or its role in society. But, with few exceptions, the social perspective brought to bear by law reviews focuses on the law rather than on the legal profession. The pragmatic model of lawyering rarely appears, which is not surprising given that law review articles are written by professors, edited by students, and largely ignored by practitioners. The constituency within the academy that best understands and embraces the pragmatic model of lawyering, clinical faculties and the subset of students who take the most clinical courses, devote much less of their energy to publishing law review articles and pour more of their energy into their caseloads and students. But, given the trends in non-clinical faculty toward hiring scholars who are also trained in adjacent fields such as economics or sociology, there is no

34. Cf. Sandefur & Selbin, supra note 6, at 87 (noting recent graduates find clinical experience to be the most helpful law school experience for transition to practice).
35. Cf. id. at 77.
reason why we could not develop a rich body of scholarship on the market for legal services, both its internal workings and its broader social and economic impact. Thus, while the academy has made great strides toward incorporating the pragmatic model into legal education, more could be done to elevate and explore the pragmatic model, particularly in legal scholarship.

The institutions that should be best suited to acknowledge the practical realities of lawyering—bar regulators that are staffed by lawyers—have been much slower to stray from the purist model. Although in the abstract one might expect, and perhaps fear, that self-regulation would lead to a relaxation of standards and great permissiveness, in fact the opposite has been true. Rather than acknowledge and embrace the changes that have taken place in law practice, bar regulators have tended to adhere rigidly to older conceptions of lawyering. Even though lawyers for years have been performing functions analogous to those of other professionals in adjacent spaces, such as financial advisors, bankers, or brokers, state bars have sought to erect and maintain sharp divisions between the practice of law and the professional activities of those in adjacent professions.39 Moreover, state bars have made it relatively difficult, though not impossible, for lawyers to raise the risk capital they need to be able to meet their clients’ needs by relieving their clients of some of the risk associated with their professional services.40

D.C. is the most progressive bar when it comes to breaking down artificial barriers between the services offered by lawyers and other professionals. In D.C., a lawyer can partner with a non-lawyer to offer an integrated set of professional services tailored to the overlapping needs of clients.41 Clients that need help navigating a complicated regulatory apparatus may need good lawyers to represent them in administrative and court proceedings but also good lobbyists to make their case to legislators and senior executive branch officials. Likewise, a client seeking tax advice ideally would rely on the same firm to provide both structural advice regarding planned transactions or organizational changes and advice when it files tax returns. In D.C., unlike other jurisdictions, lawyers are permitted to partner with lobbyists, accountants, financial advisors, and other professionals to offer the integrated services that clients desire. Rather than spending money to educate two entirely distinct organizations on their needs, clients in D.C. can pay a single organization to handle a range of professional services.

39. See, e.g., Erin J. Cox, An Economic Crisis is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future, 57 UCLA L. REV. 511, 526 (2009) (“The ABA Model Rule of Professional Conduct 5.4(d), implemented through state-promulgated rules, provides that a ‘lawyer shall not practice with or in [an entity] authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein . . . ; (2) a nonlawyer is a corporate director or officer thereof . . . ; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.’” (quoting MODEL RULES OF PROF. CONDUCT R. 5.4(d) (2003)); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 10 (2000).


Outside of D.C., however, this is impossible. Moreover, even in D.C., it is not clear that lawyers are permitted to partner with anyone other than a professional that is offering services in an adjacent field.\(^{42}\) The historical prohibition against sharing fees with non-lawyers makes it more difficult for lawyers to relieve their clients of risk by offering alternative, or contingent, billing arrangements.\(^{43}\) Whereas other service providers can raise money from outside investors to bolster their financial ability to meet client needs, lawyers have limited financing options available.\(^{44}\) Service providers of all sorts—whether home builders, management consultants, or computer support/information technology providers—can raise equity or debt capital from outside investors and use that risk capital to offer clients the fixed-fee or contingent contracts that clients desire without forcing their employees to absorb that risk or take a significant pay cut if they end up mispricing a job. From a client or customer’s perspective, the availability of outside financing is a clear positive, as it enables the service provider to meet the client’s needs by absorbing the risk that a given project will cost more or take longer than anticipated. State bars thus far have not facilitated such arrangements for lawyers.

This is not to say that it is impossible for law firms to take advantage of outside capital to help them relieve clients of financial risk. A law firm can work with a third-party litigation funder to offer a synthetic contingent fee arrangement.\(^{45}\) Law firms can also rely on third-party capital to manage the costs of many law firm expenses. By getting a third party to finance the various law firm functions that do not entail the practice of law (such as real estate, furniture, non-lawyer employees, document costs, etc.), lawyers may free up resources and be better equipped to offer clients alternative billing arrangements. Law firms can also rely on outside firms to provide a host of adjacent services, such as document retention and discovery programs. However, it would be much simpler for clients if law firms were permitted to offer legal and ancillary services for fixed fees or value billing and to finance those operations in whatever way the law firms find most efficient, whether by issuing equity, debt, or structured financial products. Law firms tend to underinvest in their clients because any investment made by a firm requires its partners to take a current pay cut—a state of affairs that would lead to underinvestment by any business, whether legal or otherwise.\(^{46}\) This is why law firms should have the same access to the capital markets that other enterprises of comparable size and sophistication long have had.

Nor can bar regulators any longer defend their resistance to financial innovation as somehow necessary to protect clients against undue influence of non-

\(^{42}\) D.C. Rule 5.4 permits “an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients.” D.C. RULES OF PROF’L CONDUCT R. 5.4(b) (2015).

\(^{43}\) See Molot, What’s Wrong, supra note 11, at 39; see also Cox, supra note 39, at 544–45.

\(^{44}\) See Molot, What’s Wrong, supra note 11, at 40.

\(^{45}\) See Molot, Litigation Finance, supra note 40, at 98–100.

\(^{46}\) See Molot, What’s Wrong, supra note 11, at 42.
lawyers over the professional conduct of lawyers. In the United Kingdom (U.K.), regulators have permitted non-lawyer equity ownership of law firms and there have been no adverse consequences for clients.\textsuperscript{47} To the contrary, the availability of outside capital and management resources can improve the delivery of legal services. The reluctance of lawyer-regulators to permit lawyers to partner with, and share fees with, non-lawyers may be motivated at least in part by protectionism.\textsuperscript{48} Lawyers today own 100 percent of a multi-billion-dollar industry. If it were to become routine for lawyers to partner with, and accept equity investments from, non-lawyers, then lawyers would no longer retain 100 percent of the profits from that market. Clients might well benefit because outside risk capital would encourage lawyers to absorb risk from their clients and deliver legal services in a more efficient manner, but it is not clear that lawyers themselves would ultimately earn more money from those gained efficiencies. Firms owned wholly by lawyers would have to compete with firms that bring in outside management and capital, and they might not fare well in that competition.

Whether motivated by protectionism or by more noble motives, the bar’s prohibition of non-lawyer ownership of law firms is attributable to its failure to incorporate the pragmatic model into its thinking, and more specifically, its refusal to turn the pragmatic lens inward. If lawyers were confined to the purist model—and their entire function was to apply law to fact and internalize the judicial perspective—then they would not need outside help to finance or manage their operations. But, this simply is not the case today, if it ever was. Lawyers perform a host of risk management functions, serving as negotiators, brokers, and business advisors. A good lawyer today is not simply the brilliant law student with the brightest mind (though that, of course, is a plus). Rather, a good lawyer has to understand a client’s business goals and manage his or her team to achieve those goals as efficiently as possible. Lawyers are risk managers, project managers, and business managers. Once a lawyer is asked not only to apply law to fact, but to manage a team of associates, and teach them to perform tasks efficiently rather than simply to bill as many hours as possible, then there is absolutely no reason that the lawyer would not be able to look for outside help to finance and manage his or her operations. Yet every bar other than D.C. has failed to acknowledge this reality, thereby depriving lawyers of the flexibility they need to


\textsuperscript{48} See Cox, supra note 39, at 527 (discussing the ABA’s commission for amending the Model Rules of Professional Conduct in 1981 and its recommendation to eliminate the ban on non-lawyer ownership of law firms).
provide clients with the suite of services they want on pricing terms that make business sense.

If law schools are more progressive than bar associations, judicial attitudes probably occupy a middle ground between the two. One would expect that because most judges practiced law for years before taking the bench, they would be all too familiar with the pragmatic aspects of lawyering and would not adhere rigidly to the traditional, purist model. However, judicial attitudes toward the competing models vary significantly from judge to judge. Some judges believe that once they cease to serve clients and are out of the rough-and-tumble of litigation, they should focus solely on the law. They revert to trying to be the judges whose opinions they read in law school. They sit back passively and confine themselves to ruling on the motions presented to them. That a plaintiff has a very strong case on the merits but lacks the resources or patience to fight for years with an overwhelmingly powerful adversary is simply not the judge’s concern. That a defendant has a very strong case on the merits but is likely to settle after a plaintiff pleads enough to get by a motion to dismiss also is not the judge’s concern.

Other judges take a more active, managerial role in litigation. They refuse to ignore as judges what they know as lawyers: that judicial decisions on dispositive motions are just one factor influencing litigation resolutions and that the course of litigation will depend as well upon the resources, risk preferences, and strategic behavior of the parties and their lawyers. The actions of these so-called “managerial” judges can be divided yet further into two broad categories: those designed to speed resolutions and clear dockets49 versus those designed to offset non-merits factors and promote fair resolutions.50 In some instances, judges will manage a case with a view toward prodding the parties to settle, without considering the extent to which the settlement is driven by the merits of the case and the extent to which it is driven by non-merits factors, such as bargaining imbalances or resource inequalities between the parties.51 In other instances, a judge may have a clear view on what a case is worth and believe that a litigant is using the threat of protracted, expensive litigation to induce the other party to settle for an unjust amount. In these cases, the judge may cajole one party more than the other, foreshadowing important procedural rulings that will bear upon the course of the litigation. By so doing, the judge would essentially threaten the party that if it does not settle for a fair amount it will suffer adverse consequences.52


50. See Elliot, supra note 49, at 321; Miller, supra note 49, at 26; Molot, Old Judicial Role, supra note 7, at 38; Resnik, Changing Practices, supra note 49, at 191.

51. Resnik, Managerial Judges, supra note 7, at 379.
The three styles of judging I describe—one ignoring non-merits factors, and
two acknowledging those factors but employing different strategies to manage
them—do not co-exist happily. The first style that we learn about in law school
fails to consider just how much judges can do, aside from ruling on motions, to
influence litigation and settlement dynamics. The second, which seeks to clear
dockets, does not necessarily achieve justice for litigants,\textsuperscript{53} although it does seek
to limit expense and combat delay, which may indirectly advance justice. The
third style, which acknowledges and seeks to address non-merits factors so as to
promote merits-based resolutions, seems the most promising at first glance, but
has its drawbacks as well. While it is admirable that judges would try to guide set-
tlements toward a fair, just outcome, there is the risk that a judge’s perception of
what is fair during pre-trial skirmishing may rest on a relatively uneducated first
impression of the case.\textsuperscript{54} Judges know a great deal less about the merits early on
in a case than they do later, and know much less than the lawyers and parties.\textsuperscript{55}
Indeed, it is this risk of misunderstanding a case early on that probably leads pas-
sive judges to refrain from heavy handed efforts to influence settlements.

Ultimately, the best way for judges to promote just outcomes and prevent prag-
matic lawyering from crowding out purist lawyering is to acknowledge candidly
the ways in which non-merits factors can affect the course of litigation and to
empower parties to protect themselves. Although judges can try to protect weaker
parties from being coerced into unfair resolutions by a sharp, powerful adversary,
judges can never be certain early on in a case whose version of the merits is more
accurate, and so the wiser course may be to permit the weaker party to enlist the
help of a third party to try to level the playing field. Market forces, and the grow-
ing litigation finance market in particular, may be better equipped than the judici-
ary to assist a weaker party trying to obtain justice.

It is precisely when a litigant decides to take advantage of third-party financing
that judicial attitudes toward the purist and pragmatic models of lawyering may
become most evident. As lawyers and clients make greater use of outside finance
to manage litigation risk and expense, discovery disputes have arisen over litiga-
tion finance contracts and other related communications between third-party fun-
ders, lawyers, and clients.\textsuperscript{56} Where a defendant learns that a plaintiff has utilized
third-party financing to help cover the costs of litigation, the defendant may seek

\textsuperscript{52} Id. at 427 (noting effect of lack of impartiality).
\textsuperscript{53} Molot, Changes Reflect Procedure, supra note 21, at 1025 (“Justice comes to depend upon the manage-
rial skills of particular judges, rather than judicial application of substantive law rules.”); Elliot, supra note 49,
at 316–17.
\textsuperscript{54} See Resnik, Managerial Judges, supra note 7, at 428–29.
\textsuperscript{55} See Molot, Changes Reflect Procedure, supra note 21, at 1024.
\textsuperscript{56} See, e.g., Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014); Doe v. Soc’y of Missionaries of Sacred Heart, No. 11–cv–02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014); Devon IT, Inc. v.
discovery into the terms of the litigation finance arrangement and into communications between the client or lawyer and the third-party litigation financier. Most courts that have grappled with the question have come to the conclusion that work product doctrine and common interest privilege protect against such discovery.57 When a litigator summarizes a case for a litigation funder from whom his client is seeking funding, these are “materials prepared in anticipation” “by or for a party or a party’s representative” and therefore qualify as work product.58 Moreover, when a litigator or client shares what would otherwise be work product materials with a litigation funder, the sharing of those materials does not constitute a waiver of the protection.59 Waiver only occurs when materials are shared with someone who increases the likelihood of disclosure to the litigation adversary, but does not arise where materials are shared with an ally.60

Common interest privilege also has been held to apply to communications between litigation funders, litigants, and lawyers.61 The common interest doctrine generally applies where two entities share a common legal interest, permitting them to share attorney-client communications with each other, and to communicate with each other through their attorneys, without losing the protection of the attorney-client privilege. A number of courts have held that litigation funders and litigants share such a common legal interest so that the privilege covers their communications.62

But if many judges have followed the clear trend toward protecting a litigant’s financing arrangements from discovery by the other side, some judges have been slower to treat litigation finance as a natural component of a party’s litigation strategy.63 Whereas nobody would ever question that work product and attorney-client privilege would of course protect from discovery a conversation among a company’s in-house counsel, its outside litigation counsel, and its CFO over a litigation budget, some judges treat the introduction of a third-party financier into the mix as somehow altering the fundamental nature of that strategic conversation. Although the pragmatic model of lawyering considers the financing of litigation to be an essential component of the lawyer’s role—and recognizes that a litigator can and should present his or her client with a variety of financial options, which may include alternative billing arrangements and third-party financing—a judge who adheres to the purist model of lawyering may be less respectful of a financial, as opposed to, legal, ally.64 Interestingly, courts in the

57. See Miller UK, 17 F. Supp. 3d at 735; Doc, 2014 WL 1715376, at *1; Devon, 2012 WL 4748160, at *1 n.1; Charge, 2015 WL 1540520, at *5.
60. Id.
63. See Leader, 719 F. Supp. 2d at 376–77.
U.K. are more progressive on this front, in large part because parliament has embraced third-party litigation finance as a central component of access to justice.\footnote{See generally David Neuberger, President, Supreme Court of the United Kingdom, Lecture at Gray’s Inn: From Barretry, Maintenance and Champerty to Litigation Funding (May 8, 2013), \url{https://www.supreme court.uk/docs/speech-130508.pdf} \[https://perma.cc/FM9L-5UME\].}

Progress in U.S. courts has been more incremental, though the trend is clear and the exceptions dwindling.

While law schools, bar associations, and courts have all struggled with changes in the lawyer’s professional role, perhaps the epicenter of this struggle can be found in law firms. On one hand, law firms are much more progressive in their efforts to integrate the purist and pragmatic models of lawyering. While some lawyers, such as appellate and Supreme Court specialists, continue to focus principally on framing cases for judges, even those lawyers recognize that an appeal’s importance may often lie not in its potential disposition of a case, but rather in the manner in which it alters settlement dynamics. A partial reversal and remand in favor of a defendant, for example, may enable the defendant to negotiate a reduced settlement based on the risk that the plaintiff may lose a retrial or have to wait additional years for a recovery. In other areas of practice, the pragmatic approach dominates a great deal more. It is an essential function of transactional lawyers, regulatory lawyers, and litigators alike to negotiate deals, the terms of which may be only tangentially affected by the prospect of a judicial ruling sometime in the future.\footnote{Gilson, supra note 1; see also supra text accompanying notes 21–23.} Lawyers may specialize in a particular kind of risk management and may focus on negotiations that have some legal element to them, but their function resembles that of other risk managers and deal negotiators.

Moreover, in the course of managing risk and negotiating deals, lawyers understand the importance to their clients of adhering to budgets and ensuring that the costs of legal representation do not ultimately outweigh the benefits provided.\footnote{Cox, supra note 39, at 544.} Companies retain lawyers to negotiate and close business transactions, to ensure compliance with applicable regulations, and to handle disputes that may arise with suppliers, customers, competitors, or employees. Managing legal risks in these contexts is a valuable service that corporate clients need, and legal fees are thus an essential cost of doing business. However, if law firms do not effectively manage the costs associated with the functions they perform, or if law firms exceed the clients’ budgets, then the underlying legal risks faced by the client are compounded by the risk of incurring exorbitant legal fees. Gone are the days when a corporate client will stick with a single law firm for all of its legal work, regardless of price.\footnote{See Bernard A. Burk & David McGowan, \textit{Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy}, 2011 COLUM. BUS. L. REV. 1, 65 (2011); Robert K. Vischer, \textit{Big Law and the}
kinds of work, comparing the levels of cost and service that particular firms can provide for a particular set of legal services. For bet-the-company litigation or a major mergers and acquisitions transaction, the company may use a high-priced firm without imposing significant price constraints. But for routine employment work or regulatory filings, the client will demand cheaper pricing and likely resort to a less expensive law firm for what is sometimes regarded as “commodity-type” work. Billing rates can differ dramatically at different law firms, depending on where the firms fall in the pecking order of lawyers and on other cost drivers, such as geography.

But, even if different law firms offer different billing rates geared to different client demands, law firms generally have refused to take the further step of giving up hourly billing altogether. From a client’s perspective, hourly billing makes little sense. It prevents clients from adhering to fixed legal budgets and it provides lawyers with all the wrong incentives: to spend more time and charge more money, rather than to work efficiently and complete tasks with a minimum of effort and cost. Moreover, given that lawyers are typically better positioned than clients to predict the course of a legal representation—and to evaluate and manage the risk that it will take more or less time than anticipated—it makes little sense that the extra cost of a representation would fall entirely on the client. From a client’s perspective, value billing would make much more sense. Law firms should bill a fixed amount for expected work with extra bonuses for a job well done or some measure of success. Of course, defining success outside the traditional contingent fee context may be difficult. It is comparatively easy to negotiate a contingent fee arrangement under which plaintiffs’ lawyers are deemed to succeed and collect a fee, if there is any recovery at all. In contrast, defense-side litigators and corporate and regulatory lawyers might have to negotiate with


69. See Gillian K. Hadfield, Legal Infrastructure and the New Economy, 8 I/S: J.L. & POL’Y FOR INFO. SOC’Y 1, 33 (2012) (“Low satisfaction with performance resulted in companies hiring more ‘secondary’ firms, increasing from an average of seven firms accounting for 30% of total expenditures in 2004 to fifteen firms accounting for 50% in 2006.”).


71. See Molot, What’s Wrong, supra note 11, at 7 (“[T]he billable hour persists as the underlying currency of the firm, which means that every nonhours structure will be evaluated against its hours comparable”); Stuart L. Pardau, Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of Its Demise May Be Greatly Exaggerated, 50 IDAHO L. REV. 1, 18 (2013). But see Cox, supra note 39, at 545 (noting partner’s recent observation that “more clients are paying Cravath flat fees for handling transactions and success fees for positive outcomes, as well as payments for meeting other benchmarks”).

72. Molot, What’s Wrong, supra note 11, at 7–8. See Pardau, supra note 71, at 6. see generally Cox, supra note 39, at 544–45.

73. Cox, supra note 39 at 545; Peggy Kubicz Hall, I’ve Looked at Fees from Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services, 39 WM. MITCHELL L. REV. 154, 220 (2012); Molot, What’s Wrong, supra note 11, at 38.
clients in advance on the realistic goals of the representation and what would count as success for purposes of a bonus fee.

Negotiations over success fees would not be unduly difficult, provided the lawyer and client could agree upon a fixed fee that would be paid regardless of success, which is high enough to cover the lawyers’ cost base. Yet, such negotiations over fixed fees and success bonuses rarely proceed in such a simple manner. Rather than commit to complete legal work for a fixed amount that may end up lower than what they would bill by the hour, law firms continue to bill by the hour. They may offer discounts off their regular hourly fees for a good client, but law firms continue to measure their services based on the number of hours worked rather than the quality of the work completed.74 Even in the face of stiff competition for clients, the hourly fee reigns supreme. Indeed, given lawyers’ risk aversion, if a client insists on being given the option of a fixed fee arrangement, the lawyer will often quote such a high fixed fee—one which reflects the lawyer’s risk aversion and anticipates the worst possible outcome—that clients are better off accepting discounted hourly billing instead.

Why do law firms avoid offering value billing on a price competitive basis? I have argued elsewhere that this reluctance is due not only to lawyers’ natural risk aversion, but also to the way in which the law firm’s capital structure aggravates their risk aversion.75 Although the lawyers who inhabit law firms are very much aware of client demands for pragmatic lawyering, the institutional organization of law firms often interferes with their ability to meet those client demands.76 Law firms are cash-in, cash-out organizations77 that measure their success, and the success of any individual partner, based on the revenue they generate in a year. Although value billing could mean greater long-term profitability by promoting client loyalty, generating future success premiums, or incentivizing lawyers to manage time and expense efficiently so that each lawyer can generate greater revenue in fewer hours, it also carries with it the risk of lower revenue in the short run. If the success kicker does not come in, if the client stays loyal but only because of reduced billings, or if the legal team cannot figure out how to get the same work done in fewer hours, then the firm may end up with less cash rather than more. Moreover, even if value billing is likely to lead to greater profitability in the long run, the likelihood of a decline in short-term revenue makes value billing unattractive to many constituencies within a law firm.78 Partners may simply be unwilling to take a pay cut in the short run in the hopes of making more money in the long run. This is particularly true for senior partners who are closer to

74. See Molot, What’s Wrong, supra note 11, at 7 (“Whereas clients view a ‘successful’ outcome as one that is achieved quickly and with minimal expense, law firm partners are more ‘successful’ in the eyes of their partners (and in their annual share of firm profits) if they bill more hours.”).
75. See id. at 38–39.
76. Id. at 23.
77. See id. at 21.
78. Id. at 5.
retirement and will not be around to enjoy the later profitability. But it may also
be true for high earning partners who can move laterally to another firm and earn
more in the short run if they do not receive enough current compensation. The
firm that focuses on long-run profitability may find itself losing its star “rain-makers” to lateral moves and therefore never be in a position to capitalize on the shift
from hourly billing to a more sensible billing structure.

The greatest impediment to the rise of the pragmatic model of lawyering may
lie not in any principled, professional attachment to the purist model, but rather
simply in risk aversion and greed for current cash. Just as bar regulators’ true
motivation for clinging to the purist model may be the profession’s economic
self-interest—and desire to keep all profits for lawyers—so too may economic
target be the true motivator for law firms. The lawyer who says to a client
“my job is to do legal work, not manage your legal budget,” may rationalize to
himself that he is a lawyer, rather than a banker or businessman, precisely
because he wants to focus on the legal, professional tasks at hand rather than to
manage risk or expense for his clients. But in reality, he is doing it out of financial
self-interest and a desire to maximize his current compensation. This is true even
if, as I argue below, he misunderstands his true self-interest.

Perhaps the best way to capture lawyers’ resistance to change is to consider
that there might ultimately be three, rather than just two models of lawyering, or
at least that there may be a sub-component of the pragmatic model that deals
specifically with the economics of lawyering. The first two models are the ones
explored above: (1) the purist model, which focuses on legal analysis and the
application of law to fact, and (2) the pragmatic model, which focuses on the
tasks lawyers perform for their clients, only some of which involve the application
of law to fact, and which include drafting, negotiation, and risk management.

But then, perhaps within the pragmatic model, there is the question of how specifically lawyers function as economic actors in the market for legal services. The
institutions that lawyers inhabit seem to be especially blind when it comes to an
evaluation of the economics of lawyering—a form of professional introspection
if you will. While law schools may be getting better at teaching about pragmatic
lawyering on behalf of clients, they typically do not educate their students about
law firm economics or the market for legal services.

The bench, the bar, and even law firms seem to withdraw to their purist conceptions of lawyering when confronted with the competing economic desires of cli-
cents and lawyers with respect to attorney-client billing arrangements and risk
allocation. Lawyers are very pragmatic when it comes to navigating the world for
their clients and helping them deal with third parties, but when it comes to the

79. Id. at 30.
80. But see Heidi Garner, Understanding Law Firms as Businesses, HARV. L. SCH. COURSE CATALOG,
(describing Dr. Heidi Gardner’s course entitled “Understanding Law Firms as Businesses”).
attorney-client economic relationship, pragmatism seems to retreat, and lawyers withdraw into their purist model. When it affects their own pocketbooks, lawyers tend to return to the traditional view that their role is to give clients the best legal representation possible, not to absorb the client’s risk or expense.

III. TURNING THE PRAGMATIC LENS INWARD

What can law schools, bar regulators, law firms, and courts do to integrate the pragmatic model into their conceptions of lawyering not just to help clients navigate interactions with third parties, but also to help them manage the risk and expense of legal representation itself? How can we lead the institutions that lawyers inhabit to turn inward and re-examine the economic relationship between lawyer and client? I suggest that the answer lies in a candid re-evaluation of the pragmatic model that focuses on risk allocation between lawyer and client and broadens its economic account of the market for legal services. I recommend changes for law schools, bar regulators, law firms, and courts.

A. LAW SCHOOLS

Law schools certainly need to play a central role in any re-adjustment of the legal profession’s self-perception. Law schools should make a number of curricular and scholarly changes as they continue to incorporate the pragmatic model into a system of education that has long focused on the purist model. First, I recommend that law schools teach, and law professors study, the economics of law practice and encourage their students to examine, and re-examine, the market for legal services. For all the progress law schools have made toward incorporating practical instruction into their curricula, there remains too sharp a divide between the traditional classroom courses that embody the purist model and the clinics, practicums, and externships that are supposed to train lawyers more practically.81 Law schools do well teaching the purist model and are even willing to focus the purist lens inward so that future lawyers understand their role in the legal system. The purist model not only teaches students to think like judges, but also prepares them to translate their clients’ practical aims into the legal arguments that are most likely to be accepted by a neutral judge.82 Law professors and students are quite adept at considering the attorney-client relationship within the confines of the purist model.

The same is not true of the pragmatic model presented by law schools. Law schools have made great progress at introducing their students to the practical elements of lawyering.83 They offer pragmatic training on how to brief a case, depose a witness, draft a contract, or negotiate a deal. But each of those skills

81. Carasik, supra note 32, at 809 (noting that “in many schools, the balkanization of faculty continues to engender a destructive dynamic within the academy, and deep divisions persist among doctrinal, clinical, and [legal research and writing] faculty”).

82. See Note, Sympathy as a Legal Structure, supra note 19, at 1961.
entails a lawyer’s actions on behalf of the client vis-à-vis some third party: whether a court, a litigation adversary, or a deal counterparty. The pragmatic model taught by law schools utterly fails to consider the real-world economic problems embedded in the attorney-client relationship and the market for legal services. Law schools do not typically teach courses on law firm billing arrangements, competition among law firms in the market for legal services, or the capital structure of law firms. As a result, when students graduate, they have only a superficial understanding of the economic relationship between lawyer and client and how different billing arrangements can lead to aligned or divergent interests between the two.

I suggest that during the second and/or third year of law school, students should take at least one course on the economics of law practice and the market for legal services. Such a course would teach students that when they graduate from law school, they will no longer engage in legal analysis in a vacuum. Rather, they will do so on behalf of clients whose principal activities consist of something other than law, but who find themselves in need of lawyers to help them achieve their goals. Lawyers are called upon to structure, negotiate, and document a wide array of business transactions, ranging from mergers and acquisitions, to executive employment agreements, loan agreements, and supply contracts. Lawyers are called upon to help businesses and advocacy groups navigate regulatory issues, whether the goal is to obtain regulatory approval of a new plant or business or trigger a regulatory enforcement action against such a plant or business. And lawyers are called upon to help individuals, businesses, non-profits, and governments when disputes arise. To fulfill their clients’ goals, lawyers have to rely on their capacity for legal analysis, something developed in traditional law school courses, as well as the practical skills that they learned in newer, pragmatic courses that teach students how to draft contracts or briefs, negotiate with counterparties and adversaries, or litigate in court.

If they truly are being prepared to serve their future clients, law students will have to understand how their retention as lawyers may fit into their clients’ broader goals and understand their place in the broader market for legal services. Very quickly after law school, those students will realize that law firms measure their young lawyers’ contributions based as much on the number of hours they bill as on the quality of the work performed during those hours. It will be some time before these young lawyers come to understand that clients value lawyers very differently—and that clients want lawyers to perform good work efficiently and bill the fewest hours possible to perform that high quality legal work.

Law schools should ensure their graduates understand that in the long run, law firm and client alike benefit most if lawyers perform quality legal work as

83. Sandefur & Selbin, supra note 6, at 78 (noting up to two-thirds of recent law grads report having a clinical internship or field experience while in law school).
84. But see Garner, supra note 80.
efficiently as possible and win more client business as a result, thus keeping their lawyers fully occupied and profitable. If law firm associates do not understand the economics of law practice, they may not see the ways in which the interests of client and law firm diverge (e.g., on the size of current billings) and how those otherwise divergent interests can ultimately be reconciled (e.g., through greater efficiency leading to client loyalty and additional legal business). Law schools should not only train students to engage in legal reasoning and to exercise the practical skills they will need in law practice, but they should also educate them about law firm staffing and billing decisions that can affect a client’s business interests.

Students today certainly pay attention to cultural issues at law firms when they interview and make job decisions. Before selecting a firm, students will research such things as its commitment to pro bono work, the firm’s internal culture (collegial versus competitive), the expectations regarding billable hours, and how much responsibility and client contact junior lawyers can expect. Each of those factors will in turn be influenced by economic arrangements that may be opaquers to a second-year student applying for a job. For example, what is the firm’s formula for sharing profits among partners and who within the firm sets partner compensation? An eat-what-you-kill firm will have a very different culture—and very different relationships among its lawyers and between its lawyers and clients—than a firm that engages in more egalitarian profit sharing. What are the firm’s billing and realization rates and what is the trend of its profits-per-partner? A firm’s profitability and billing practices will inform its culture and attitudes toward alternative billing arrangements and pro bono work. A course on law firm economics and the market for legal services will not only help students make more informed career decisions early on, but it would also educate them so that as they rise up within a firm later in their careers, they can make more informed decisions about how law firms should be managed.

B. THE BAR

Bar regulators too often retreat behind the purist model when presented with ways to innovate and improve the delivery of legal services. Consider, for example, the law firm that would like to accept risk capital from third-party investors so as to enable it to absorb more risk from clients and offer alternative billing arrangements. A regulator viewing such an innovation only through the lens of the purist model may tend to focus on the remote possibility that third-party capital could somehow interfere with the attorney-client relationship and use this as an excuse to hinder innovation, even though such innovation would clearly be in the interests of clients. But if the regulator would incorporate the pragmatic perspective into its thinking, it would see that the infusion of third-party investment capital willing to absorb some risk is precisely what lawyers need if they are to relieve their clients of risk. There is a balance to be struck between the purist
desire to protect the professional independence of lawyers and the pragmatic desire to equip lawyers to manage risk and expenses for their clients.

As noted above, it is my considered view that bar regulators often use the purist model as cover for a very pragmatic desire to preserve the bar’s economic control over the legal services industry. Bar regulators claim to prohibit lawyers from sharing fees with third-party investors based on the unsupported assertion that fee-splitting would interfere with the attorney-client relationship or the lawyer’s professional independence. But if professional independence really were the issue here, why would the bar permit lawyers to accept fees from a third-party who is not the client? A third-party who is paying the lawyer’s fees is just as likely to exert sway over the lawyer as a third-party who is accepting a portion of those fees from the lawyer, and yet there are no ethical prohibitions against a law firm accepting payment from an entity that is not its client. If we can rely on the lawyer’s professional independence and good judgment to prevent a third-party fee-payer from unduly interfering in the attorney-client relationship, then why can we not rely on the same in the case of a third-party law firm investor?

If the market for legal services is going to serve clients effectively, then bar regulators must stop standing in the way of novel financing arrangements designed to achieve that goal. The legal industry is enormous by any metric, and individual law firms have grown to be sizeable global businesses. Yet the capital markets have largely ignored the legal sector based on the perception (perhaps erroneous) that bar regulators have rendered it impossible to invest in law firms. A closer analysis may reveal that bar regulations are not, in fact, a complete impediment; with careful structuring, law firms already may be able to tap the financial markets without running afoul of the ethical prohibitions against fee splitting or non-lawyer ownership of law firm equity. But a change in attitude among bar regulators certainly would remove a perceived hurdle and help to facilitate law firm access to the capital markets. If law firms hope to modernize and improve their services for clients, there will have to be a change in the way bar regulators treat financial innovation by law firms.

C. LAW FIRMS

Openness among bar regulators to law firm innovation will achieve nothing if law firms do not use this regulatory space to make much needed changes in their billing arrangements, their staffing practices, and their capital structure. If lawyers are to serve their clients effectively, they must not only manage risk surrounding client interactions with third parties and courts, but also manage the risk inherent in legal representation itself. It makes no sense that the people who are best suited to evaluate and bear legal risk are themselves unwilling to relieve their clients of this risk. Yet lawyers continue to bill by the hour, leaving their clients to bear not only the risk of an adverse legal outcome, but also of the lawyers’ work taking longer and costing more than it should. Lawyers should change this practice and bill for the work done, rather than the time it takes to do the work.
Billings might depend in part upon the task to be performed (whether a regulatory application, a litigation filing, or a transactional document) and in part upon the result achieved. That is a matter for the lawyer and client to negotiate, based upon the goals and risks specific to the matter, and upon the ease or difficulty of defining “success” in a representation (for example, establishing a benchmark settlement that would count as “success” in defensive litigation).

Lawyers would have to change the way they staff projects and train and manage associates. Under the prevailing hourly billing regime, the goal is to bill as many hours as the client is willing to pay. Once lawyers transition to billing a flat fee for the job with a success bonus, it will be up to the lawyer to manage the work as efficiently as possible. The goal would be to staff matters in a manner that maximizes the utility of every hour spent. The emphasis would be on quality, rather than just quantity, of work and on the efficiency and productivity of a legal team. In the long run, this would likely mean larger profits for successful lawyers, even if it meant that each client would pay less for work done. If a law firm can handle work more efficiently, then even if it charges clients less for each task performed, it should be able to attract more client business and earn more money.

Today, under the hourly model, the amount that law firms can earn is capped at the number of hours that its lawyers can work and the amount per hour that clients will pay. But if law firms, like other industries, instead billed for the end-product they delivered, they would reap the additional profits that come along with improvements in productivity. Indeed, greater productivity could lead to improvements in quality of life as well as profits—for a lawyer’s success would no longer be measured by the number of hours he or she spends in the office, away from family and friends. In a regime of increased productivity, lawyers could choose to work as many hours as they do currently and earn more money, or they could choose to earn the same amount they do today for fewer hours worked. Either way, in the long run, not only clients but also lawyers would be better off.

To achieve these client-facing ends, law firms would have to change the way they are organized. Today, a law firm partner risks a pay cut if he or she offers a client fixed fee billing and the representation ends up generating less revenue than hourly billing. It is difficult to ask employees to take pay cuts anytime an enterprise chooses to make an investment. Even though in the long run, value billing has the potential to increase a firm’s profitability by increasing efficiency and enabling firms to earn more money for each hour worked, the short run risk of lower compensation makes it difficult for law firms to make such investments. This is particularly so given that some portion of a law firm’s partnership will not be around to reap the benefits of future profitability, notably senior partners who are close to retirement and high-earning rainmakers who may move laterally to a different firm during the lean years, rather than await future profits. I have argued elsewhere that the solution to this problem is for law firms to adopt a traditional capital structure with permanent equity, similar to what other non-law enterprises...
use. This would re-orient partners so as to embrace the firm’s long term interests and would enable the firm to raise outside investment capital so that the firm’s managers could make new profitable investments without having to take pay cuts for themselves and the firm’s other employees.

One might question whether the wholesale reforms I advocate in law firm capital structure are realistic. Those who today cling to the purist perspective could be expected to be especially hostile to a proposal that transforms law firms into ordinary companies owned by shareholders rather than lawyer-employees. Law schools might be willing to teach courses on the topic and bar regulators might be willing to allow innovative firms to experiment, but the question remains as to whether conservative partners at established law firms will ever be willing to give up their ownership and control and become corporate employees.

Although I concede that my vision for the legal profession is not one that could be implemented overnight, I have two causes for optimism, both of which stem from the financial self-interest of those who would benefit from my proposals. First, the established lawyers who, by nature, might oppose my proposed changes also are the ones who stand to benefit the most financially from them. The senior law firm partner who is nearing retirement, after decades of building an established and profitable practice group, loses a great deal of economic value under our current system. Any other entrepreneur or corporate employee would be able to accumulate permanent equity in the business he or she helps to create—through outright ownership in the case of a small enterprise or stock grants and options in the case of a large one. However, when a law firm partner retires, his or her equity is swallowed up by the remaining partnership (except for a small repayment of whatever “equity contribution” the partner made upon making partner). The practice group he or she created over decades, and its roster of loyal clients, may account for tens of millions of dollars of annual firm revenue on an ongoing basis. This is something that in any other economic sector would have an equity value worth multiple times its annual earnings. Only in the law is a retiring partner who built that business forced to walk away, without any remaining stake in that ongoing profit stream. If, however, the legal sector was integrated into the capital markets, and law firms were structured as ordinary corporations with conventional permanent capital, then the retiring partner would walk away with some accumulated equity value. This financial benefit may help to overcome the cultural conservatism that might otherwise lead senior, successful law firm partners to resist a change of the magnitude I am proposing.

A second reason for optimism stems from the financial interest of outside investors. Some lawyers might fear that converting to a conventional corporate form with a conventional capital structure would subject them to the greed of rapacious financial investors. But this fear fails to take into account that outside investors are making an investment in human capital, not plant and machinery. If

85. See Molot, What’s Wrong, supra note 11, at 40.
law firms were to adopt an ordinary corporate form, outside investors would never be willing to purchase the vast majority of the equity or to structure the business so that most of firm revenue flows to them. Outside investors, after all, would be relying on current law firm employees—the senior “rain-makers” who are today law firm partners—to generate the firm’s revenue. Only by rewarding those lawyers could the company expect to remain profitable and continue to grow. Thus, my proposed change in law firm capital structure would not radically transform the law firm management style or profit allocation. Law firms could use outside capital to manage risk and improve their client offerings. Yet lawyers would remain in charge and continue to reap the fruits of their labor.

D. COURTS

While the most significant changes I propose would be up to law firms to implement, bar regulators to approve, and law schools to study, the courts could help facilitate change by making the quantity and duration of legal work more predictable and easier for lawyers to manage, at least when it comes to litigation. Hands-on case management would become yet more important if we are trying not only to save litigant resources, but also to encourage lawyers to represent parties for fixed fees. A litigator asked by a client to charge by the month or the job, rather than the hour, will be reluctant to do so if he cannot predict how the court or his opponent will handle discovery, motion practice, and the other drivers of cost in complex litigation. If, however, courts can make litigation more predictable, this would help remove an impediment and clear the way for lawyers to offer their clients more sensible billing arrangements.

Fortunately, there should be a positive feedback loop between sensible billing by litigators and sensible case management by judges. Indeed, case management should, at least in theory, become easier for judges if lawyers were to work for fixed, rather than hourly, fees.

Today, judicial efforts to manage the time and expense parties devote to lawsuits are complicated by lawyers’ claims that scaling back discovery or cutting corners will deprive their clients of information they need to achieve a just outcome. It is very difficult for judges to evaluate how much lawyers’ desires to leave no stone unturned are motivated by the merits of the case and how much they are motivated by strategic desire to inflict cost on an opponent or their own self-interested desire to bill more hours. If, however, both sides’ lawyers were working for fixed fees and success kickers, they would be more focused on the merits and motivated much more to resolve disputes as efficiently as possible. This would, in turn, make it easier for judges to keep costs manageable and predictable.

Courts could also elevate the pragmatic model of lawyering, and facilitate progress, by acknowledging the ways in which litigators and litigants must manage risk and expense through contracts with third-parties. Courts should continue the trajectory they are on toward accepting, and indeed embracing, third-party
financing of litigation by protecting such arrangements from unwarranted discovery. 86 Just as communications between a general counsel and a CFO over litigation finance are protected from discovery by the opponent, so too should work product and common interest doctrine apply to protect communications with third-party litigation finance providers. Recognizing that risk preferences and resources may influence litigation as much as judicial rulings, judges should allow lawyers and clients the tools they need to level the playing field and protect themselves against non-merits factors that could otherwise skew outcomes. Indeed, judicial decisions may have an outsized influence on the perspectives of practicing lawyers, and so a powerful opinion from a well-respected judge on the virtues of litigation finance and risk management would certainly encourage lawyers to tap new resources on behalf of their clients.

But, to be clear, while I am suggesting that judges could help facilitate change, I do not mean to overemphasize the role of the judiciary in my proposed reforms. My overall thesis, after all, is that the institutions that lawyers inhabit have historically been too focused on judges and have clung too tightly to a purist model of lawyering that emphasizes a lawyer’s ability to anticipate and influence judicial decisions. My goal is to elevate and incorporate a pragmatic model of lawyering that emphasizes risk management and focuses on how lawyers can help their clients navigate interactions with counterparties and adversaries who are not judges. Although judges may help facilitate this shift in thinking, the judiciary’s contribution will necessarily be limited. If the legal profession is to find a way through its current crisis—so that it can thrive, and not just survive, in the coming decades—lawyers will have to focus less on influencing judges and more on restructuring their relationships with clients and with each other.

CONCLUSION

Law schools, law firms, bar regulators and courts may understand that the legal profession is in crisis, but they have failed to acknowledge an important component of the crisis: namely, a conflict between competing conceptions of lawyering. I would urge these institutions to reconsider traditional notions of lawyering, to incorporate the pragmatic model of lawyering into their thinking and, most importantly, to train the pragmatic lens inward. Only by re-examining the lawyer-client relationship and the lawyer’s place in the market for legal services will we free lawyers of the shackles that today prevent them from innovating and responding to ever changing client demands.

86. See supra text accompanying notes 54–60.