



Board on the
Unauthorized
Practice of Law
2022 Seminar Materials



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2022 Seminar Materials

December 2022

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I. Agenda



2022 Unauthorized Practice of Law Seminar

UPL in Ohio: Where We've Been, Where We Are, and Where We May Be Going

December 20, 2022

11 – 11:45 a.m. "Where We've Been"

*David A. Kutik, Retired Partner,
Jones Day, Vice Chair of the
Supreme Court of Ohio Board
on the Unauthorized Practice
of Law*

Noon – 1 p.m. "Where We Are"

*Kelly Heile, Bar Counsel,
Ohio State Bar Association*

*Susan Choe, Executive Director,
Ohio Legal Help*

Tom Martin, Founder, LawDroid

1 – 2:15 p.m. "Where We May Be Going"

*Amy C. Stone, Senior Assistant
Disciplinary Counsel, Office of
Disciplinary Counsel*

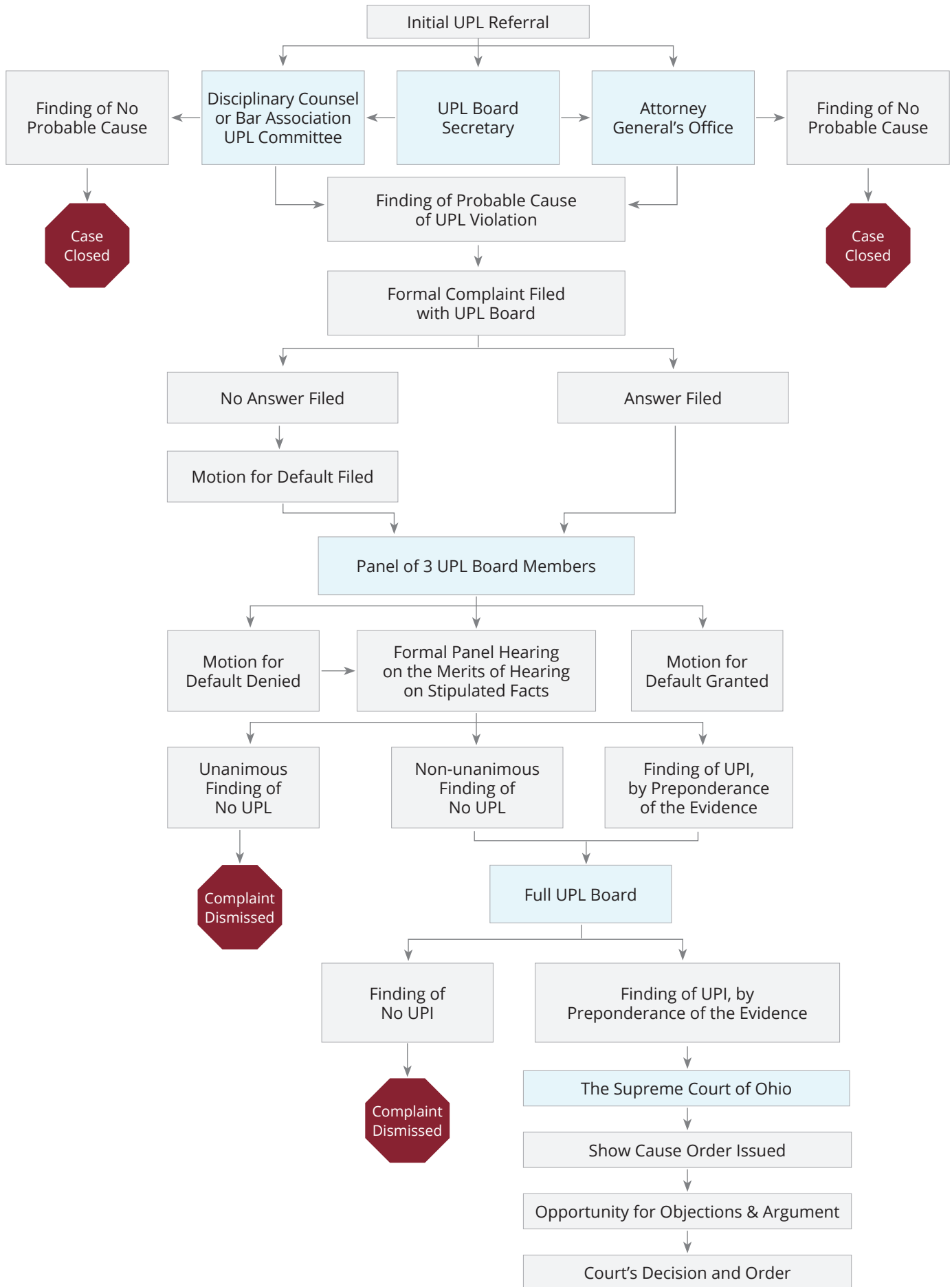
*Maret Vessella, Chief Bar Counsel,
State Bar of Arizona*

*Steve Little, Senior Bar Counsel,
State Bar of Arizona*

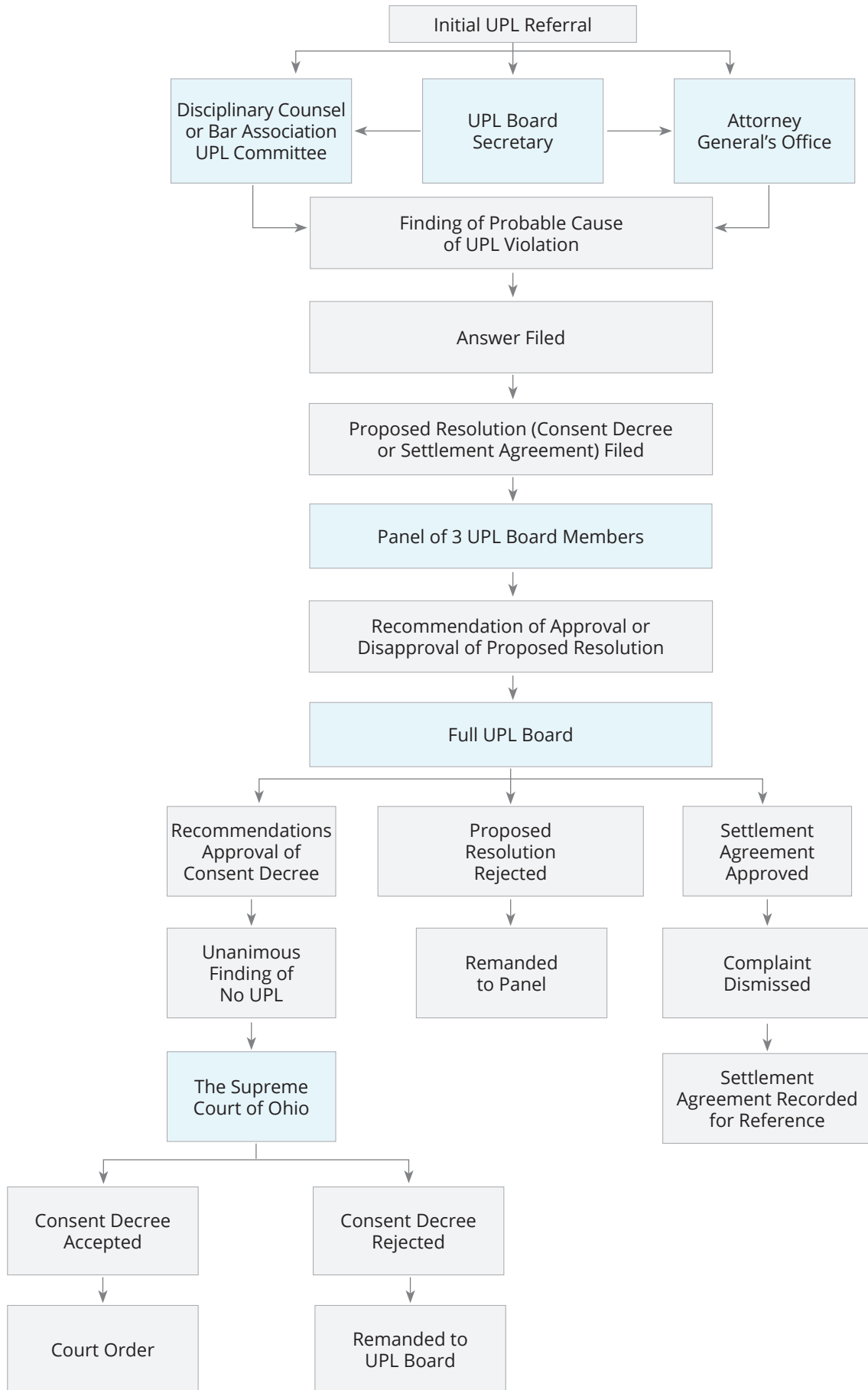
*Dr. James Teufel, Director of Data,
Utah Supreme Court's Office of
Legal Services Innovation, Data
Analyst, Law Society of Ontario's
Access to Innovation*

II. UPL Intake Process and Samples

Ohio UPL Case Process: Adjudicated Cases



Ohio UPL Case Process: Proposed Resolution Cases



III. Where We've Been

UPL in Ohio – Where We’ve Been
UPL Case Law Update
December 20, 2022
David A. Kutik¹

I. INTRODUCTION

A. Ohio lacks any unified definition of what constitutes the practice of law.

1. The Supreme Court, through its plenary authority to regulate the practice of law has defined the practice of law through case law.
2. The oft cited definition:

“The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal documents of all kinds, and in general advice to clients and all actions taken for them in matters connect to the law.” *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23 (1934)

B. In the 14 cases decided since March 2018 (the last three-hour seminar sponsored by the UPL Board), the Ohio Supreme Court has largely maintained long held understandings regarding what constitutes the practice of law.

1. Representing entities before tribunals is practicing law.
2. Preparing and filing legal documents on behalf of others is practicing law.
3. Providing legal advice to an individual or entity regarding that individual’s or entities specific circumstances is practicing law.
4. Negotiating legal matters on behalf of others is practicing law.
5. Paralegals doing any of the above without supervision of an attorney are practicing law.

¹ Vice Chair, Ohio Board of Commissioners on the Unauthorized Practice of Law; Retired Partner, Jones Day; Adjunct Professor of Law, Case Western Reserve University School of Law. Any views or opinions expressed in this presentation are solely the views or opinions of this speaker and are not to be construed as the views or opinions of the UPL Board, the Jones Day law firm or CWRU School of Law.

C. In some cases, the Court has “clarified” its view.

1. Specifically, when a person negotiates a debt for another, the Court now requires that some legal advice or legal argument be used for the negotiation to be considered the practice of law.
2. At least one justice has suggested that legal skill be involved before considering preparing legal documents or giving legal advice the practice of law.
3. Another justice has questioned the constitutionality of Rule 5.5 of the Model Rules of Professional Conduct as that rule might be applied to bar attorneys licensed in states other than Ohio from working or practicing in Ohio. This justice has also opined that constitutional free association and free speech rights, as well as anti-competitive concerns, should “highlight the need for care” in determining when UPL has occurred.

D. Below the recent cases are discussed. They are organized based on the type of activities that were alleged and, in most cases held to be, UPL.

II. REPRESENTATION OF CLOSELY HELD ENTITIES

A. *Ohio State Bar Ass’n v. Ross*, 154 Ohio St. 3d 328, 2018-Ohio-4247 (Oct. 23, 2018)

1. Representing entities he owned, respondent filed 171 complaints for eviction and monetary damages against and former tenants in buildings owned by the entities.
2. Reviewing a consent agreement, the Court observed:
 - a. Non-attorneys cannot file complaints for forcible entry and detainer and recovery of unpaid rent or other money damages on behalf of a property owner. *Cleveland Bar Assn. v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio- 3995, 772 N.E.2d 1187.
 - b. Non-attorneys, including trustees, cannot engage in legal representation of trusts or other separate, legal entities. *Cleveland Bar Assn. v. Woodman*, 98 Ohio St.3d 436, 2003-Ohio- 1634, 786 N.E.2d 865
3. Injunction ordered, \$2500 civil penalty assessed. Respondent ordered to vacate judgments obtained.

B. *Ohio State Bar Ass’n v. Cohen*, 155 Ohio St. 3d 492, 2018-Ohio-5084 (Dec. 19, 2018)

1. Representing entities he owned, respondent filed 32 complaints for eviction and related money damages against tenants or former tenants in buildings owned by these entities.
2. “Non-attorneys cannot file complaints for forcible entry and detainer and recovery of unpaid rent or other money damages on behalf of a property owner. *Cleveland Bar [Assn.] v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio-3995, 772 N.E.2d 1187.” Opinion, ¶ 11.
3. Injunction ordered, no civil penalty. In cases where money judgments had been obtained, those judgments had never been collected upon. Respondent agreed to take no further action on cases in which he obtained a money judgment.

C. *Ohio State Bar Ass’n v. Naumov*, 157 Ohio St. 3d 398, 2019-Ohio-4381 (Oct. 28, 2019)

1. On behalf of entities he owned, respondent filed 50 actions for eviction and monetary damages against tenants or former tenants in buildings owned by these entities.
2. Using same language in *Cohen*, the Court noted: “Non-attorneys cannot file complaints for forcible entry and detainer and recovery of unpaid rent or other money damages on behalf of a property owner. *Cleveland Bar [Assn.] v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio-3995, 772 N.E.2d 1187.” Opinion, ¶ 9.
3. Injunction against representing entities and respondent ordered to have an attorney vacate any outstanding judgments and dismiss any pending actions within 60 days.

III. PREPARATION AND/OR FILING LEGAL DOCUMENTS ON BEHALF OF OTHERS

A. *Disciplinary Counsel v. Ward*, 155 Ohio St. 3d 488, 2018-Ohio-5083 (Dec. 19, 2018)

1. On behalf of Marie Petroff-Kline, respondent filed a pleading styled, “Emergency Motion for Continuance for File Report,” in a matter pending in Medina County Probate Court. Respondent signed the document, “Henry J. Ward, Jr. Running Wolf, Native American Indian, Attorney-in-Fact, Next Friend, Officer of the Court.”

2. Also on behalf of Ms. Kline, respondent filed a malpractice and wrongful death case in U.S. District Court for the Northern District of Ohio. Case was dismissed for lack of subject matter jurisdiction.
3. Respondent held himself out as “Legal Investigative Journalist and Tort Class Action Litigator with CJO NEWS MEDIA WIRE SERVICES INTERNATIONAL,” and described his “Active Occupation” as “That of actively suing, lawyers, judges, county governments, court personnel and politicians & in excess of 60 years experience in piercing corporate entities & then suing the principles therein and thereabouts, no defeats whatsoever in courtroom litigation in excess of 65 years & ongoing”
4. “We have defined the unauthorized practice of law to include both the ‘rendering of legal services for another’” and the ‘[h]olding out to the public or otherwise representing oneself as authorized to practice law in Ohio’ by any person who is not admitted or otherwise certified to practice law in Ohio. Gov.Bar R. VII(2)(A)(1) and (4).” Opinion, ¶ 9
5. “‘We have consistently held that the practice of law encompasses the drafting and preparation of pleadings filed in the courts of Ohio and includes the preparation of legal documents and instruments upon which legal rights are secured or advanced.’ *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio- 1430, 904 N.E.2d 885, ¶ 17; *see also Akron Bar Assn. v. Greene*, 77 Ohio St.3d 279, 280, 673 N.E.2d 1307 (1997); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934), paragraph one of the syllabus.” *Id.*, ¶ 10.
6. Respondent enjoined from practicing law and assessed a \$5000 penalty (\$2500 for two instances).

B. *Disciplinary Counsel v. Spicer*, 160 Ohio St. 3d 466, 2020-Ohio-3020 (May 26, 2020)

1. Respondent charged a non-refundable retainer of \$2100 to Elisa Kraus in return for respondent’s preparation of certain legal documents for Ms. Kraus’ business. Specifically, respondent prepared: (1) articles of organization for Ms. Kraus’ new limited-liability company, Healthy Pooch, L.L.C., (2) an operating agreement for Healthy Pooch, (3) a certificate designating a registered office and agent for the company, and (4) a “Confidentiality, Non-Competition, and Non-Solicitation Agreement.”

2. Ms. Kraus paid respondent another \$1000 for respondent to prepare wills, living wills and a durable power of attorney. Respondent never prepared these documents and did not return Ms. Kraus' money.
3. Respondent held himself out as a "Senior Paralegal" for "SPI Legal Services" and claimed he subcontracted work with 26 attorneys. Although respondent claimed that his work was supervised by an attorney, there was no evidence that any attorney supervised respondent's work for Ms. Kraus.
4. "We have consistently maintained that the rendering of legal services includes 'the preparation of legal instruments and contracts by which legal rights are preserved.' *Ohio State Bar Assn. v. Miller*, 138 Ohio St.3d 203, 2014-Ohio-515, 5 N.E.3d 619, ¶ 14, quoting *Ohio State Bar Assn. v. Allen*, 107 Ohio St.3d 180, 2005-Ohio-6185, 837 N.E.2d 762, ¶ 7. And the drafting of a contract or other legal instrument on behalf of another constitutes the practice of law 'even if the contract is copied from a form book or a contract previously prepared by a lawyer.' *Ohio State Bar Assn. v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St.3d 107, 2006-Ohio-6511, 858 N.E.2d 372, ¶ 23." Opinion, ¶ 9.
5. "[W]e have explained that although an unlicensed person may assist in the provision of legal services, 'the individual's actions must be closely supervised and approved by a licensed attorney.' *Disciplinary Counsel v. Casey*, 138 Ohio St.3d 38, 2013-Ohio-5284, 3 N.E.3d 168, ¶ 10. 'Without such supervision, the individual's legal services constitute the unauthorized practice of law.' *Id.*; see also *Columbus Bar Assn. v. Thomas*, 109 Ohio St.3d 89, 2006-Ohio-1930, 846 N.E.2d 31 (a legal assistant engaged in the unauthorized practice of law by drafting pleadings and other legal documents and providing legal advice to litigants without a licensed attorney's supervision). Finally, '[n]onlawyers also engage in the unauthorized practice of law when they accept legal fees for legal representation and advice.' *Disciplinary Counsel v. Pratt*, 127 Ohio St.3d 293, 2010-Ohio-6210, 939 N.E.2d 170, ¶ 17." *Id.*, ¶ 10.
6. Injunction ordered and maximum \$10,000 civil penalty assessed. Maximum penalty based on respondent's "deceit and thievery," including "misrepresenting to Krauss that his work would be reviewed by an attorney, accepting \$1,000 for estate-planning work that he failed to complete, and refusing to refund Krauss's money." *Id.*, ¶ 13.

C. *Disciplinary Counsel v. Schwab*, 164 Ohio St. 3d 29, 2021-Ohio-283 (Feb. 4, 2021)

1. Respondent told her then fiancé, James Gudaitis, that she was an attorney and that she could assist him to prepare certain legal documents relating to his work as an airplane pilot. She prepared certain contract documents for Gudaitis, signing them, “Erica L. Deberadinis-Schwab, Esq.” and “Pilot’s Legal Counsel.”
2. Respondent advised Gudaitis’ stepfather Ray Baker that respondent was an attorney and prepared the following documents for Mr. Baker: living will, advanced healthcare directive, last will and testament. Respondent signed all documents, “Erica L. Schwab, Esq.”
3. Respondent, claiming that she was Mr. Baker’s attorney, obtained information from Mr. Baker’s insurance company about his insurance coverage.
4. Respondent was indicted and pled guilty to receiving stolen property taken from the Bakers’ residence.
5. Respondent held herself out as an attorney on two forms of social media.
6. “We have consistently held that the preparation of wills, powers of attorney, and other legal documents by an individual not admitted to the practice of law constitutes the unauthorized practice of law. *See, e.g., Disciplinary Counsel v. Goetz*, 107 Ohio St.3d 22, 2005-Ohio-5830, 836 N.E.2d 556, ¶ 9, citing *Toledo Bar Assn. v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St.3d 356, 2003-Ohio-6453, 800 N.E.2d 29, ¶ 7; *Akron Bar Assn. v. Miller*, 80 Ohio St.3d 6, 8-9, 684 N.E.2d 288 (1997); *Trumbull Cty. Bar Assn. v. Hanna*, 80 Ohio St.3d 58, 59, 61, 684 N.E.2d 329 (1997).” Opinion, ¶ 11.
7. Finding at least two instances of UPL, the Court issued an injunction and assessed a penalty of \$10,000 (\$5000 for each instance).

D. *Disciplinary Counsel v. Nordic Title Agency, Inc. and Hall*, 166 Ohio St. 3d 49, 2021-Ohio-2210 (July 1, 2021)

1. Respondent Hall was the president, chief executive officer and sole owner of respondent Nordic Title.

2. Nordic Title prepared 514 deeds that falsely purported to have been reviewed by an attorney. This was contrary to company policy which required that all deeds prepared for company clients had to be reviewed by an attorney. Indeed, the company had an agreement with an attorney to pay \$50 per document reviewed.
3. The misconduct was discovered when the Franklin County Recorder's Office called the attorney shown as having prepared one of the company's deeds regarding an error with the deed. The attorney had not reviewed the deed. Another incident arose when the Morrow County Recorder's Office called the attorney regarding an error on a deed that he had purportedly prepared.
4. Respondent Hall was unaware of his employees' activities and their failure to follow company policy. There was no evidence that Hall prepared any of the deeds in question.
5. Recognizing that the practice of law includes the preparation of legal documents (citing *Akron Bar Assn. v. Greene*, 77 Ohio St.3d 279, 280, 673 N.E.2d 1307 (1997); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 28, 193 N.E. 650 (1934)) and that a nonattorney's preparation of documents conveying real property without a lawyer's supervision constitutes UPL (citing *Toledo Bar Assn. v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St.3d 356, 2003-Ohio-6453, 800 N.E.2d 29, ¶ 7; *Lorain Cty. Bar Assn. v. Kennedy*, 95 Ohio St.3d 116, 766 N.E.2d 151 (2002)), the Court held that Nordic Title had engaged in UPL. Opinion, ¶ 19.
6. The Court held that Hall was not responsible for the company's actions, noting, "a corporate officer may be held personally liable for actions of the corporation if the officer was a participant in the wrongful act. *See, e.g., Young v. Featherstone Motors, Inc.*, 97 Ohio App. 158, 172, 124 N.E.2d 158 (1954)." Given that there was no evidence of Hall's knowledge or participation of conduct that violated company policy, Hall was not responsible for the unlawful conduct at issue here.
7. The Court accepted the parties' stipulation to an injunction against Nordic Title and imposition of a \$10,000 civil penalty. The Court noted that Nordic had refunded a \$50 fee that had paid by the affected customers.

IV. PROVIDING LEGAL ADVICE

A. *Ohio State Bar Ass'n v Beem*, 166 Ohio St. 3d 230, 2021-Ohio-2851 (Aug. 19, 2021)

1. Respondent engaged in ongoing communications with Charles McCoy, a prisoner located at London Correctional Institution, regarding McCoy's lawsuit in Licking County Common Pleas Court against the Licking County Prosecutor. The lawsuit sought to have the prosecutor removed from office.
2. McCoy sought to participate in upcoming depositions and, accordingly, wanted all of the depositions to be done via videoconference. Respondent did legal research and prepared a motion for McCoy to allow McCoy to participate in the depositions and to have the depositions taken by videoconference. Respondent filed the motion and signed it with her name, but noted it was done on McCoy's behalf and at his direction. She also submitted a document entitled, "Document in Support of Affidavit of Kimberly R. Beem," in support of the motion. Along with these documents, Respondent sought to file audio and video materials purporting to support the motion. Respondent claimed that she filed the document and other materials instead of McCoy because McCoy wouldn't have been able to do so in a timely manner. McCoy never reviewed her "Document in Support."
3. When the motion was denied, respondent discussed possible disqualification of the judge. After researching judicial disqualification in Ohio, respondent offered McCoy advice about what arguments he could make and when he should make them. Respondent also discussed what might happen if the judge recused himself. She also discussed strategies about what witnesses to call and when they should be called to testify.
4. Respondent also met with McCoy's family members who were due to be deposed and advised them about issues relating to their testimony.
5. The Court concluded, "Beem engaged in the unauthorized practice of law by (1) preparing and filing documentation in support of her own affidavit in McCoy's case against the prosecutor, (2) preparing and filing a motion seeking authorization for McCoy to participate, by videoconference from prison, in depositions conducted in that case, (3) providing legal advice and counsel to McCoy regarding his alleged right to be present at depositions in that case, which legal arguments he should make and when he should make them, and which evidence he should submit to the court, and (4) providing legal advice and counsel to McCoy's family after the court struck her motion to permit videoconferencing of their depositions. In short, Beem advised McCoy how to handle and prosecute his case against the prosecutor, though she was not qualified to do so." Opinion, ¶ 21.

6. Although there were a number of things that Respondent did that constituted UPL, the Court found that they all took place in a single matter over a period of several months and thus constituted a single offense of UPL. *Id.*, ¶ 25.
7. The Court issued an injunction and assessed a \$5000 civil penalty.
8. Justice Kennedy concurred. In her opinion, she stated that in light of the lack of a single definition of the practice of law, “the focus of our inquiry in matters in which a layperson, that is, a person who lacks a valid Ohio law license, is charged with engaging in the unauthorized practice of law by providing legal advice to others should be on whether the person exercised professional judgment in giving the legal advice.” *Id.*, ¶ 30. Justice Kennedy believed that respondent only engaged in UPL when she provided advice regarding what arguments McCoy should make. According to Justice Kennedy, the affidavit prepared and filed was merely respondent’s statement of facts. Justice Kennedy also believed that respondent’s role in preparing the motion was taking the information that McCoy gave her and typing it up. Thus, respondent “merely provided clerical assistance that requires nothing more than ordinary intelligence.” *Id.*, ¶ 39. The advice given to McCoy’s family was not UPL, per Justice Kennedy, because respondent basically told them to tell the truth and said that, in response to McCoy’s mother’s request, respondent would see if the prosecutor would reschedule the deposition. Justice Kennedy said that both of those things “remain common everyday issues that do not require even elementary knowledge of the law.” *Id.*, ¶ 41.
9. Chief Justice O’Connor and Justice Fischer concurred with the opinion of the Court but said that they would impose a penalty of \$10,000.

B. *Disciplinary Counsel v. Deters*, 165 Ohio St. 3d 537, 2021-Ohio-2706 (Aug. 10, 2021)

1. Respondent had been licensed to practice law in Ohio and Kentucky. He permanently retired from the practice of law in Ohio in 2014 following the suspension of his license in Kentucky. He transferred ownership of his law firm to his father but continued to work for the firm as an “officer manager” and “client manager.”

2. Clinton Pangallo and his wife Jillian, Ohio residents, sought counsel to represent their interests following an automobile accident involving Clinton. Having heard respondent speak, the Pangallos contacted respondent's firm. They met with an investigator employed by the firm and thereafter signed a retainer agreement that included a contingent fee. The Pangallos were informed that attorney Collins would be handling their case but within a month learned that attorney Collins had left the firm. They were then advised that a second attorney with the firm, attorney Romeo, would take their case, but soon discovered that attorney Romeo was not licensed to practice law in Ohio. The Pangallos emailed Romeo to terminate the firm's representation.
3. Respondent immediately emailed the Pangallos and promised to review their file, make sure that everything would be "done right," and asked to have an opportunity to speak with them. The Pangallos agreed to meet with respondent. At their meeting the next day, respondent advised them about the "stacking" of insurance policies, the differences between Ohio and Kentucky law on that issue, and how those differences could affect their recovery. Both of the Pangallos testified that respondent advised them to file a claim against Clinton's employer because it had higher insurance limits—and that respondent called their refusal to do so "stupid." During this meeting, the Pangallos assumed that respondent was a lawyer. They were unaware that he was no longer licensed to practice law.
4. Respondent also advised the Pangallos about the possibility of obtaining a presettlement loan and explained how the loan would work – specifically, that it would not have to be repaid unless the Pangallos recovered any money as a result of their litigation or claims. Based on respondent's advice, the Pangallos agreed to take out a \$3000 loan.
5. Respondent and the Pangallos continued to communicate regarding efforts being made to determine the tortfeasor's policy limits. Respondent opined that an insurer's refusal to state the limits of its policy "usually means high limits."
6. Four months later, the Pangallos emailed respondent to terminate their representation. Respondent replied that he had not "handled" their case (identifying two attorneys who were doing so but who the Pangallos had never heard of) and that the Pangallos would owe his firm the full contingency fee if their claims were resolved in some payment to them.
7. Noting that a "key element in the practice of law is the tailoring of legal advice to the needs of a specific person," the Court found that respondent "offered the Pangallos legal advice and counsel tailored to the specific facts and circumstances of their case." Opinion, ¶¶ 21-22. This advice included:

- a. His opinion of the value of their case and how long it would take to settle it.
 - b. His view that the practice of “stacking” insurance policies was not permitted under Ohio law.
 - c. His recommendation to sue Clinton’s employer in addition to the tortfeasor.
 - d. During his discussion of presettlement loans, his view about how long settlement would take and thus the anticipated length of the loan.
 - e. His statement that the Pangallos would be required to pay the entire contingent fee after termination of the representation should the Pangallos recover anything on their claims. *Id.*, ¶¶ 22, 25-27.
8. The Court also believed that respondent had held himself out as a lawyer by:
- a. Failing to clarify his role in the firm and advising that he was no longer a licensed attorney.
 - b. Working in a firm that bore his name.
 - c. Meeting with the Pangallos outside the presence of any attorney.
 - d. Giving the Pangallos advice regarding their specific circumstances, based on his experience and knowledge. *Id.*, ¶ 30.
9. Addressing respondent’s claim that he was merely acting as a paralegal, the Court said that his actions were not those of a paralegal conveying general information or relaying case- specific information under the supervision of an attorney. Rather, they were the actions of a nonlawyer engaging in the practice of law. *Id.*
10. The hearing panel recommended a civil penalty of \$6500 (\$1500 for three of the violations, \$2000 for the fourth). The UPL Board recommended double that amount, i.e., \$13,000. The Court assessed a penalty of \$6500.

11. Justice Kennedy concurred in the judgment only. She expressed concern about a rule which would hold that giving legal advice is always the practice of law, given that “[m]ost people acquire some legal knowledge throughout their lives” and “they are not engaging in the unauthorized practice of law if they share that information with others.” She favored a rule that would hold that a layperson engages in UPL when that person “has exercised professional judgment about a specific issue.” *Id.*, ¶ 47.
12. Chief Justice O’Connor responded to Justice Kennedy’s opinion with a separate concurring opinion, noting that Justice Kennedy’s “professional judgment” standard “would not provide clarity in this area of the law and would be potentially harmful.” *Id.*, ¶ 38. Chief Justice O’Connor also said that such a standard is unnecessary for this case. Regarding potential harm that Chief Justice O’Connor believed might arise from adopting Justice Kennedy’s proposed test:

Were we to adopt that standard, at what point would a nonlawyer’s knowledge of the law tip the scale such that he or she would be deemed to possess enough legal knowledge to be able to exercise professional judgment and thus able to engage in the unauthorized practice of law? The proposed standard would insulate people from the prohibition on the unauthorized practice of law simply because they lack a sufficient but undefined quantum of legal training. [*Id.*, ¶ 45.]

V. NEGOTIATING LEGAL MATTERS ON BEHALF OF ANOTHER

A. *Ohio State Bar Ass’n v. Klosk*, 155 Ohio St. 3d 328, 2018-Ohio-4247 (Oct. 23, 2018)

1. Respondent, an attorney licensed only in California, provided advice to an Ohio resident regarding the potential resolution of a debt and contacted counsel for the creditor (also located in Ohio) while holding himself out as counsel for the debtor.

2. The Court observed, “we have held that the unauthorized practice of law also includes “representation by a nonattorney who advises, counsels, or negotiates on behalf of an individual or business in the attempt to resolve a collection claim between debtors and creditors.” *Ohio State Bar Assn. v. Kolodner*, 103 Ohio St.3d 504, 2004-Ohio-5581, 817 N.E.2d 25, ¶ 15, citing *Cincinnati Bar Assn. v. Cromwell*, 82 Ohio St.3d 255, 256, 695 N.E.2d 243 (1998), and *Cincinnati Bar Assn. v. Telford*, 85 Ohio St.3d 111, 707 N.E.2d 462 (1999). Therefore, an individual who is not licensed to practice law in Ohio who negotiates legal claims on behalf of Ohio residents or advises Ohio residents of their legal rights or the terms and conditions of settlement is engaged in the unauthorized practice of law. *Disciplinary Counsel v. Brown*, 121 Ohio St.3d 423, 2009-Ohio-1152, 905 N.E.2d 163.” Opinion, ¶ 1.
3. Injunction ordered and civil penalty of \$2000 assessed.

B. *Ohio State Bar Ass’n v. Watkins Global Network, LLC*, 159 Ohio St. 3d 241, 2020-Ohio-169 (Jan. 23, 2020)

1. Respondent Mario Watkins owned respondent Watkins Global Network, LLC, which did business as Jones, Marco & Stein. Respondents represented small business in debt-settlement negotiations with creditors. Respondents represented 31 clients between 2008 and 2013.
2. Recognizing its previous decision in *Ohio State Bar Ass’n v. Kolodner*, the Court observed that in that case, “we stated that the unauthorized practice of law also ‘includes representation by a nonattorney who * * * negotiates on behalf of an individual or business in the attempt to resolve a collection claim between debtors and creditors.’” Opinion, ¶ 9.
3. The Court set out to “clarify” *Kolodner* saying, “our statements in *Kolodner* do not amount to a per se rule that any person who negotiates a settlement of a debt on behalf of another but who does not have a license to practice law in the state of Ohio engages in the unauthorized practice of law. Instead, whether a person engages in the unauthorized practice of law turns on the specific actions a person takes while attempting to negotiate a settlement and whether those actions constitute the rendering of legal services.” *Id.*, ¶ 10.

4. The Court reasoned that the facts of *Koldner* and similar authority were distinguishable from most of the respondents' actions here because, in those cases, "respondents ... used legal tactics and methods during negotiations to effect results for their clients. Here, for the most part, respondent engaged in "business mediation." Respondent discusses the debt with the client, proposes an offer to make to the creditor and, if the client agrees, relays the offer to the creditor. The Court observed, "Nothing about this behavior involves the rendering of legal services." *Id.*, ¶ 15.
5. In one instance, respondents agreed to represent a client in a mortgage foreclosure matter where a final judgment had been obtained. In negotiations with counsel for the bank, Watkins suggested that the matter need to be mediated not litigated. He also advised the client to raise the requested funds and provide them to the bank even though the bank was not the noteholder. Knowing that the bank was not the noteholder, Watkins used this fact as leverage to get the bank to accept a lower mortgage reinstatement payment. By doing this, the Court said, respondents were using "legal tactics" to negotiate a lower settlement. *Id.*, ¶ 28.
6. An injunction was issued and a civil penalty of \$1000 was assessed. Respondents were also ordered to advise the client and the bank in the foreclosure matter that respondents had engaged in UPL.
7. Justice DeWine dissented in with an opinion with which Justice Kennedy concurred. He believed that none of respondents' activities were UPL. Noting that the Court's authority to regulate the practice of law is limited by the associational and free speech rights guaranteed by the U.S. and Ohio Constitutions, and that there were potential anticompetitive issues arising from such regulation based upon complaints by market participants, such considerations "highlight the need for care in this area." *Id.*, ¶¶ 35-36 citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *North Carolina State Bd. of Dental Examiners v. Federal Trade Comm'n*, 574 U.S. 494 (2015). "We must be mindful to interpret and apply our rules in a manner that is reasonable, that provides fair notice to nonlawyers, that is adequately connected to the legitimate purpose of protecting the public from incompetent or unethical legal representation, and that curtails speech only in a way that is reasonably necessary to accomplish this goal." *Id.*, ¶ 36.

8. “This court should be careful to not too quickly draw the conclusion that a person’s legally laden opinions count as the practice of law. As should be obvious, many people express opinions with legal implications in a great many situations. A journalist trying to get access to public records might tell a city- council member that the law is on her side. Hospital employees might discuss what practices are necessary to comply with privacy laws. And one nonlawyer citizen might tell another that what he is doing is against the law and that she will take legal action if he keeps it up. But this court has never said that activities like these count as the practice of law. And for good reason. None of these activities plausibly count as the provision of legal services that pose a threat to the public if not constrained.” *Id.*, ¶ 38.
9. Similarly, Justice DeWine reasoned, the fact that other professions provide opinions with legal implications (e.g., an accountant on tax issues; a human resource director on discrimination or harassment issues) doesn’t mean that providing those opinions are the practice of law. “The law infuses a great many parts of life. Lawyers don’t have a monopoly on something just because the law touches it.” *Id.*, ¶ 39.
10. Here, according to Justice DeWine, Watkins’ suggestion that the parties seek a nonlitigated resolution was “workaday business advice.” *Id.*, ¶ 40. “All that the bar association has demonstrated is that Watkins provided a debt-negotiation service during which he voiced a few ancillary opinions with legal implications. That’s not good enough.” *Id.*, ¶ 43.

C. *Disciplinary Counsel v. Smidt*, 161 Ohio St. 3d 73, 2020-Ohio-3258 (June 11, 2020)

1. Doing business as an entity called, “A Perfect Solution,” respondent represented that she was a paralegal who worked for attorney Stark. Respondent was engaged by Deborah Krantz to modify the terms of a mortgage that was the subject of a foreclosure proceeding in Franklin County Common Pleas Court. Krantz paid respondent \$1000. The contract for services entered into provided that respondent was to prepare and negotiate a loan modification, “along with, attending any/all mediation hearings, written statements, telephone conferences.” Respondent represented that she was a “knowledgeable, fully committed professional ... preparing Loan Modifications and Bankruptcy petitions under the direct supervision of Consumer Bankruptcy Attorneys.”
2. Respondent sent two letters to the mortgage lender in an attempt to negotiate a modification of the loan. The letters bore the letterhead of attorney Stark. Respondent also spoke to lender’s counsel. Respondent further emailed Krantz’s counsel in the foreclosure case. In this letter, respondent said that she had spoken with the underwriter on the loan. Respondent further suggested that they should try to get more time to negotiate and that, to do so, they should file a motion to vacate judgment under Rule 60(B) of the Ohio Rules of Civil Procedure. Respondent also said that he had spoken with the supervisor of the court’s mediation department and opined about the chances of getting the case referred back to the court’s mediation program.
3. Noting the “clarification” of the rules relating to debt negotiation outlined in *Watkins Global*, the Court said, “whether a person engages in the unauthorized practice of law turns on the specific actions a person takes while attempting to negotiate a settlement and whether those actions constitute the rendering of legal services,’ ... such as giving legal advice, drafting legal documents, or asserting legal defenses as part of the negotiation process.” Opinion, ¶ 16 quoting *Watkins Global*, ¶ 11.
4. Here, the Court found that respondent “gave litigation advice to Krantz’s counsel of record in an effort to delay the foreclosure proceeding and to buy more time to negotiate a modification of the loan with Krantz’s lender. She also contacted a court representative on Krantz’s behalf.” *Id.*, ¶ 18.
5. The Court issued an injunction ordered and assessed a \$5000 civil penalty.

6. Justice DeWine concurred, with Justice Kennedy concurring in his opinion. Justice DeWine believed that simply because respondent “voiced a legal opinion” such conduct does not necessarily constitute UPL. Further, he believed, debt negotiation, even in the context of a foreclosure is also not necessarily UPL. However, because respondent used an attorney’s letterhead without the attorney’s permission (and, indeed, after being told to stop), Justice DeWine believed that respondent engaged in UPL.

D. *Ohio State Bar Ass’n v. Pro-Net Financial, Inc.*, 168 Ohio St. 3d 115, 2022-Ohio-726 (Mar. 15, 2022).

1. Respondent Pro-Net Financial contracted with respondent Nationwide Support Services to solicit services for Nationwide’s debt negotiation business. Once a client was signed up, Pro-Net would enter certain information regarding the client into a database and would forward that information to Nationwide. At least six Ohio clients were signed up and used these services.
2. Respondent Pro-Net and relator stipulated that Nationwide had counseled customers and negotiated the resolution of the customer’s debts with creditors. They also stipulated that Nationwide had charged one customer \$300 to refer that customer to an attorney. Notably, the principal of respondent Pro-Net did not have any personal knowledge regarding what Nationwide might have done.
3. Noting its *Watkins Global* opinion, the Court said, “the determination whether Nationwide and the Pro-Net respondents engaged in the unauthorized practice of law depends on the evidence of the *specific acts* that they undertook on behalf of their customers.” Opinion, ¶ 17 (emphasis original).
4. Here, the Court found that there was no evidence of any specific negotiations, or of any advice given. Notwithstanding stipulations that the respondents had engaged in UPL, the Court was not bound to accept those. Accordingly, the Court dismissed the case.

E. *Cleveland Metropolitan Bar Ass’n v. Hennesey*, 164 Ohio St. 3d 437, 2021-Ohio-667 (Mar. 10, 2021)

1. “T.M.” engaged respondent to represent his interests arising from an automobile accident. T.M. executed a power of attorney in favor of respondent along with a promissory note and a services contract in which respondent agreed to “provide services such as such as follow, telephone calls, messenger, driver, postage, photos, copies, mileage, investigations, communications, negotiations” in exchange for “25% of the final injury settlement of the motor vehicle collision that occurred on August 5th, 2016.”

2. T.M had already retained two other lawyers: one to represent him regarding an earlier automobile accident and one to represent him in a bankruptcy proceeding. He advised respondent that he did not want respondent to tell the lawyers what respondent was doing.
3. Respondent ultimately obtained a settlement regarding the accident for T.M. However, T.M.'s share of the proceeds became part of the bankruptcy estate.
4. The Court stated, "We have held that 'one who purports to negotiate legal claims on behalf of another and advises persons of their legal rights and the terms and conditions of settlement engages in the practice of law.' *Cleveland Bar Assn. v. Henley*, 95 Ohio St.3d 91, 766 N.E.2d 130 (2002); accord *Cincinnati Bar Assn. v. Cromwell*, 82 Ohio St.3d 255, 256, 695 N.E.2d 243 (1998); *Cleveland Bar Assn. v. Moore*, 87 Ohio St.3d 583, 722 N.E.2d 514 (2000)." Opinion, ¶ 10.
5. The Court issued an injunction and assessed a civil penalty of \$5000.

IV. Where We Are

An example self-help app

workers' champion

Select Language

Powered by Translate

A CHAMPION FOR WORKERS' RIGHTS

Need help filling out forms for a Workers' Compensation case? I can help.

Get Help

A program of Tennessee Alliance for Legal Services. www.TALS.org

HERE'S HOW I CAN HELP

- I have paperwork to help you start the process to get help from the Tennessee Bureau of Workers' Compensation. Here's how the process typically works:

Available Completed

Causation Letter
Interview to complete a Causation Letter for your Tennessee Workers' Compensation claim

Medical Records Certification
Interview to complete a Medical Records Certification for your Tennessee Workers' Compensation claim

Petition for Benefit Determination
Interview to complete a Petition for Benefit Determination for your Tennessee Workers' Compensation claim

Request for Hearing
Interview to complete a Request for Hearing for your Tennessee Workers' Compensation claim

example self-help app

Review And Edit Answers - Tom@Lawdroid.Com Causation Letter

Questions	Answers
NOTE: If you wish to change your answers to Yes or No questions, you will have to redo the interview.	
<p>1. I can help you prepare a causation letter for your doctor to fill out and return to you.</p> <p>A causation letter can help you prove that your injury and need for medical treatment was caused by something that happened at work. It can also help you show what your work restrictions are or have been in the past. This can be helpful during mediation or at an expedited hearing.</p> <p>If you want to write this letter yourself without my help, you can use the template found here: click for template.</p> <p>I'm not a lawyer, and I can't give you legal advice. If you need live assistance you may request the services of a workers' compensation Ombudsman by contacting the Tennessee Bureau of Workers' Compensation at its toll-free phone number: (800) 332-2667. There is also an excellent beginner's guide to TN Workers Compensation available here: click for guide.</p> <p>To create your causation letter, I will ask you some questions about yourself, your injury, and your doctor. Please have your doctor's contact information handy as you complete the interview.</p> <p>You can respond by typing or by talking to me.</p> <p>Would you rather talk to me using your microphone or type your answers?</p>	<p>Continue with text ▼</p>
<p>2. Thanks! Remember, if you need to take a break, you can save your information and log in later to finish. Use your email address and the password you created to log back in. You need to come back to finish your interview within 2 weeks. All of your personal information is secure and will not be shared with anyone.</p> <p>Let's get started! What is your full name?</p>	<p>Thomas Glenn Martin</p>

Thomas Glenn Martin, 123 Spring Street, Davidson, Tennessee 37011

October 1, 2022

Dr. William Osler, 345 Prescription Lane, Nashville, Tennessee 37011

Re: Patient: **Thomas Glenn Martin** DOB: **01-01-1971** Date of Injury: **10-01-2020**

Dr. William Osler,

You have treated me for an injury to my **back and shoulders**. I believe my injury and subsequent disablement and/or need for medical treatment was primarily caused by **lifting bags of cement that were too heavy** while working for **ACME Cement** on **10-01-2020**.

To help me better understand my workers' compensation claim, and assuming that my medical history is accurate, please respond to the following questions and return this form to me via **in-person pick up at your office**.

1) Please state your diagnosis of my work injury and the time period during which you have treated me for that diagnosis.

Please state your diagnosis, if any, of my non-work injury medical conditions, co-morbidities and other health factors that affect my work injury.

How do I?

workers' champion

Select Language

Powered by Translate

**A CHAMPION FOR
WORKERS' RIGHTS**

Need help filling out forms for a Workers' Compensation case? I can help.

Get Help

A program of Tennessee Alliance for Legal Services. www.TALS.org

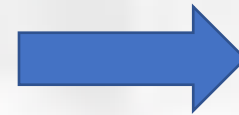
HERE'S HOW I CAN HELP

- I have paperwork to help you start the process to get help from the Tennessee Bureau of Workers' Compensation. Here's how the process typically works:

- Handle users personal identifying information?
- Ensure users privacy and security in transmitting their personal data?
- Include stakeholders and lawyers early on in the process to define the scope of the service?
- Phrase questions to obtain intelligible answers?
- Phrase questions to that they are intelligible to most readers?
- Disqualify those unsuitable for the service and set expectations for users who do qualify?

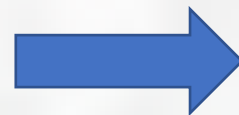
Legal Information ≠ Legal Advice

I tell you what you can do.

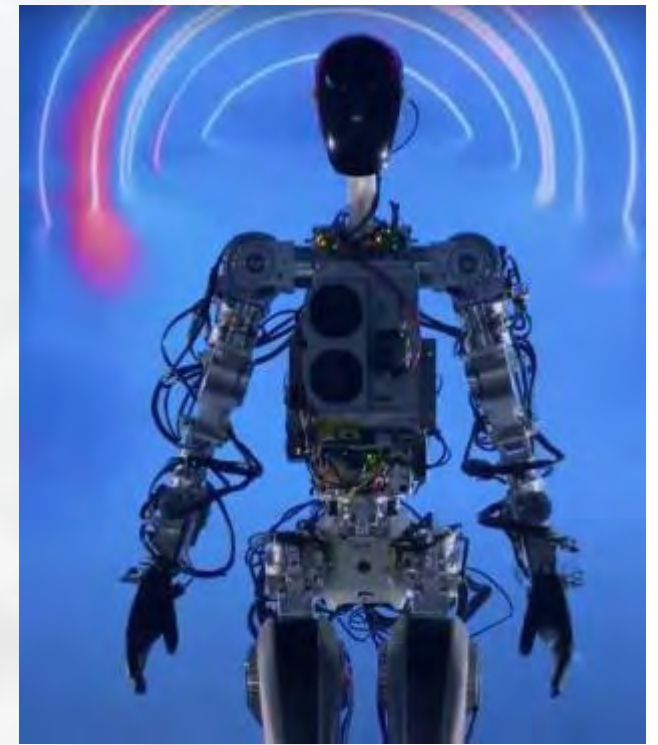


Legal info

I tell you what you should do.



Legal advice



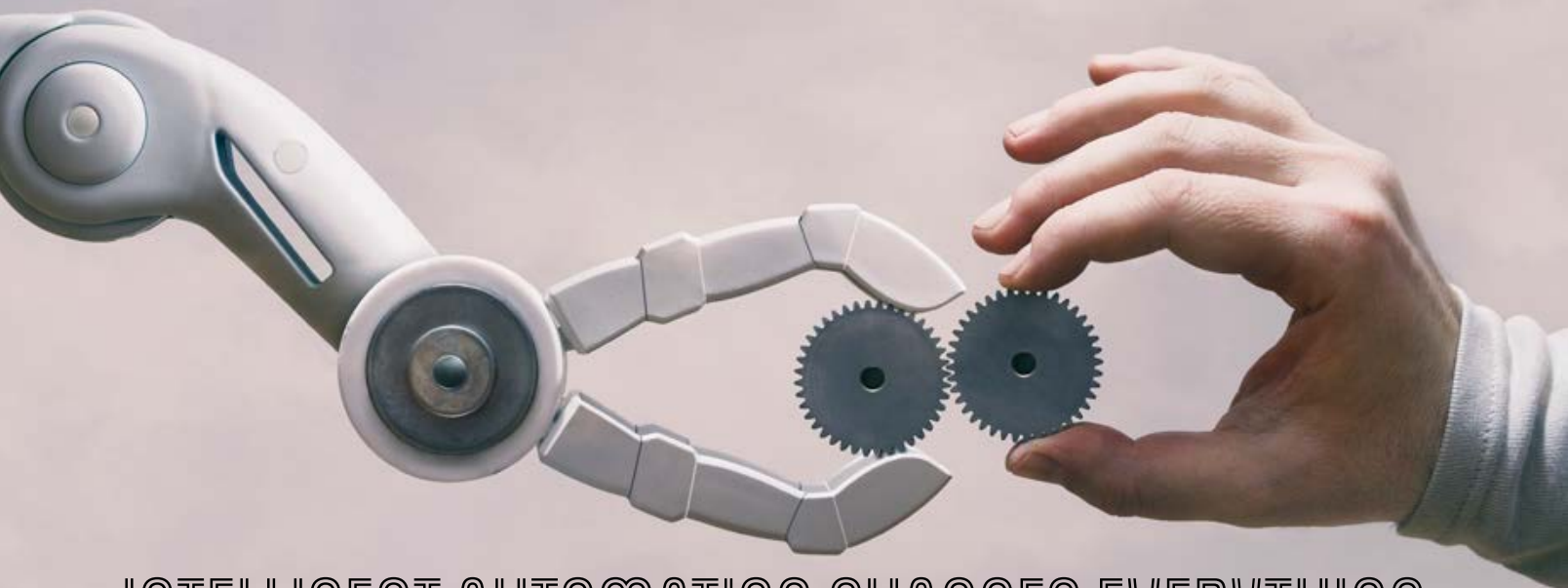
Fear + Ambiguity = Chaos

(of new technology)

(of law and regulations)

Ethical / UPL-based questions that surfaced





INTELLIGENT AUTOMATION CHANGES EVERYTHING

THE CASE FOR REREGULATION OF THE LEGAL INDUSTRY

BY TOM MARTIN

In *Coded Bias*, a documentary streaming on Netflix, Joy Buolamwini, an MIT computer scientist, tells the tale of a project she undertook that yielded some surprising results. Using facial recognition technology, she created a device, “The Aspire Mirror,” that enables you to look at yourself and see a reflection on your face of something that inspires you or that you hope to empathize with, such as a lion or a famous athlete or public figure. The problem was that the facial recognition system failed to recognize the talented black engineer’s face until she wore a white mask. Because the training data employed to calibrate the facial recognition was based on images of predominantly white individuals, it failed to properly recognize non-white faces.

The story highlights a false assumption in the narrative surrounding artificial intelligence and the data that powers it—namely, that data is impartial.

As Buolamwini puts it, “Data is a reflection of our history. . . . The past dwells within our algorithms.” If the history and data we choose to share with machines are inherently biased, then how can we expect fair results?

In this article, I explore what intelligent automation is, the dangers it poses, how it impacts the law and the legal profession, and highlight initial attempts to regulate it.

WHAT IS INTELLIGENT AUTOMATION?

“Intelligent automation” is intended to capture within it the twin current trends of artificial intelligence (AI) and robotic process automation (RPA).

RPA is made up of tools that automate repetitive tasks (such as data entry) and may use conditional logic (i.e., “if, then” statements) to determine what tasks are to be performed under certain circumstances. Zapier (<https://zapier.com>) is

an excellent example of RPA. A website visitor fills out a lead capture form on your website, and it triggers a “zap” that makes three things happen. First, you receive a text message with the contact’s name and phone number; second, the new lead receives an email from you introducing your firm; and third, the new lead is added to your contact management system. And RPA has gone mainstream; UiPath, a market leader in RPA, held an initial public offering in April 2021 on the New York Stock Exchange. RPA is not new, but the ease with which it can now be deployed and the number of systems with which it can integrate is an innovation.

AI moves beyond RPA in that it employs several technologies to attempt to understand data and then act on that understanding. You may have heard the phrase, “Data is the new oil.” Data is like oil because it is a commodity that powers AI. It is a well-known fact that Facebook makes money

Ivan Bažić/E+ via Getty Images Plus

not by charging for membership but by monetizing its users' data. Who are your friends? Where do you live? What are your religious and political affiliations? Are you married? And this information about you is used to more effectively capture your attention and to sell to you.

Machine learning algorithms can make use of past court decisions to make predictions about how likely a court is to decide a similar legal issue with similar facts. Also, modern-day risk assessment tools are often driven by algorithms trained on historical crime data that can perpetuate biased systems of oppression. It is this automation of intelligence that poses a wonderful opportunity and a great danger for the law.

HOW DOES INTELLIGENT AUTOMATION IMPACT THE LAW?

Traditionally, the attorney-client relationship has been a personal one: conversations in the office, behind closed doors. Printed legal service agreements with wet signatures. Work product consisting of printed paper documents that are handcrafted by the lawyer after gathering facts from the client and conducting legal research using compendiums of case law, treatises, and practice guides on the topics at hand.

Software, the Internet, and the cloud de-centered this personal relationship and changed the format of attorney work product. Documents became electronic, typewriters became computers, practice management software replaced paper client files and moved them to the cloud, and even in-person meetings went virtual. But overall, software, the Internet, and the cloud preserved the one-to-one attorney-client

relationship.

Now, with intelligent automation, the future of law practice may be that the personal relationship between lawyer and client moves into a secondary position. Lawyers may become specialists who are brought to bear when the primary efforts of intelligent automation are exhausted. Automated legal assistants may handle the lion's share of legal services by providing "good enough" legal advice and document automation.

The automation of intelligence poses both an opportunity and a danger for the law.

And intelligent automation not only impacts the legal industry as a commercial enterprise but also the law as an organizing principle of society. There is a reason the Rules of Professional Conduct regulate bias, conflicts of interest, and the appearance of impropriety. "[T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part" (*Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016)). Confidence in the legal system is a necessary condition of a functioning democracy.

RED FLAGS WARN OF THE DANGERS OF INTELLIGENT AUTOMATION

The use of RPA and AI has been largely unregulated. Until April 2021. That month, two announcements signaled a departure from this Wild West approach and the start of efforts to control the

unfettered application of intelligent automation.

FTC AI announcement. On April 19, in a post entitled "Aiming for Truth, Fairness, and Equity in Your Company's Use of AI" (<https://tinyurl.com/mhhbfk8y>), the Federal Trade Commission (FTC) acknowledged that data is not impartial:

[R]esearch has highlighted how apparently "neutral" technology can produce troubling outcomes—including discrimination by race or other legally protected classes. For example, COVID-19 prediction models can help health systems combat the virus through efficient allocation of ICU beds, ventilators, and other resources. But . . . if those models use data that reflect existing racial bias in healthcare delivery, AI that was meant to benefit all patients may worsen healthcare disparities for people of color.

To address these concerns, the FTC highlighted three laws as important to developers and users of AI:

- **Section 5 of the FTC Act.** The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of—for example—racially biased algorithms.
- **Fair Credit Reporting Act.** The FCRA comes into play in certain circumstances where an algorithm is used to deny people employment, housing, credit, insurance, or other benefits.
- **Equal Credit Opportunity Act.** The ECOA makes it illegal for a company to

use a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance.

The FTC then reminds readers of its ability to create reports, conduct hearings, and issue guidance, all of which offer “important lessons on using AI truthfully, fairly, and equitably.”

EU AI announcement. On April 21, the European Union released its long-awaited set of AI regulatory guidelines, the “Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence” (<https://tinyurl.com/6ks7yjr8>). In it, the European Commission voiced concern for the potential impact of AI on individual rights:

The use of AI with its specific characteristics (e.g. opacity, complexity, dependency on data, autonomous behaviour) can adversely affect a number of fundamental rights enshrined in the EU Charter of Fundamental Rights (‘the Charter’). This proposal seeks to ensure a high level of protection for those fundamental rights and aims to address various sources of risks through a clearly defined risk-based approach.

To guard against these risks, the Commission put forward a regulatory framework on AI with the following specific objectives:

- ensure that AI systems placed on the Union

market and used are safe and respect existing law on fundamental rights and Union values;

- ensure legal certainty to facilitate investment and innovation in AI;
- enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems;
- facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.

For example, the proposed draft regulation lays down a ban on a limited set of uses of AI that contravene European Union values or violate fundamental rights. The prohibition covers AI systems that distort a person’s behavior through subliminal techniques or by exploiting specific vulnerabilities in ways that cause or are likely to cause physical or psychological harm. It also covers general-purpose social scoring of AI systems by public authorities and remote biometric identification systems in publicly accessible spaces, unless authorized by law.

RULES OF PROFESSIONAL CONDUCT IMPLICATED BY INTELLIGENT AUTOMATION

As the EU observed, there are certain aspects of AI that make it particularly troublesome: its opacity, complexity, dependency on data, and autonomous behavior. And RPA, through its autonomous execution of a rules-based system, can only compound the problem if the rules it’s acting on are not

rigorously reviewed not only for their content, but also for their potential disproportionate impact and biased results.

Of particular concern are machine-learning algorithms that “are black boxes,” according to Stéphane Mallat, a research scientist at the Flatiron Institute’s Center for Computational Mathematics: “They work well, but we don’t know what’s being learned” (“Deconstructing Machine Learning’s Black Box,” Simons Foundation, May 18, 2020, <https://tinyurl.com/yupu4xnt>).

These concerns relate to several areas addressed by the ABA Model Rules of Professional Conduct:

Rule 1.1: Competence. The bedrock of professional conduct is that a lawyer must know what he or she is doing. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Implicit in this Rule is that a lawyer is also competent to wield the tools he or she uses to practice law. Model Rule 1.1 now includes a requirement of technical competence. Comment 8 to Model Rule 1.1 reads: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” Technical competence is now a requirement in 39 jurisdictions.

The complication posed by

intelligent automation is that it may be impossible for a lawyer to be technically competent with respect to existing AI systems. If “black box” machine learning escapes even the understanding of computer scientists, how, then, can a lawyer expect to be competent in its workings? The process is anything but transparent. And what distinguishes legal processes, much like the scientific method, is its transparency and openness to argument and disproof.

If AI is to be implemented in the law, what is needed is a system that reflects these principles. Any intelligent automation system should have explainable algorithms (how did it arrive at this result?) and use transparent training data, including consideration of bias in the data as well as its selection (what are the assumptions underlying this reasoning?).

Rule 1.4: Communications. “A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished . . . [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Again, if the lawyer doesn’t understand how certain machine learning algorithms work in predicting outcomes or making recommendations and the lawyer cannot hire an expert computer scientist to make the lawyer understand, then it is impossible for the lawyer to effectively communicate with the client. A client cannot make informed decisions regarding the representation if the lawyer does not understand the assumptions underlying his or

her recommendation.

Rule 1.6: Confidentiality of Information. “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . . . A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

As with all software, be it a practice management system or otherwise, a client’s personal information and communications must be entered into the system for it to be useful to both the lawyer and the client. Intelligent automation systems are no different, and the same rigorous security measures must be taken to protect the information in these systems as in practice management systems. A new threat to confidentiality posed by machine learning systems, however, is that this confidential client communication and information may be used as data to further train the system and, in a sense, become disclosed beyond the scope for which clients thought they were giving informed consent.

Rule 5.5: Unauthorized Practice of Law. “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”



Tom Martin is a legal tech advocate, lawyer, author, and speaker. He is CEO and founder of LawDroid, a No-Code Legal Automation Platform, and cofounder of the American Legal Technology Awards, advisor to ATJ Tech Fellow Program, member of ARAG Technology Innovation Committee, and mentor at the Yale Tsai Center for Innovative Thinking. Tom lives in Vancouver, British Columbia, Canada, with his wife and two daughters.

The definition of the “practice of law” here is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.

And yet, as we learned above, AI—black box or transparent—can be used to apply rules to historical data and make recommendations and decisions in order to reach specified objectives. To what extent is a lawyer “assisting another” in the unauthorized practice of law by utilizing intelligent automation?

What’s more, consider that, as I previously suggested, intelligent automation is used to place the lawyer-client relationship in a secondary position? What if lawyers are bypassed entirely? If intelligent automation can provide services that were heretofore provided exclusively by lawyers, is it the unauthorized practice of law if no lawyer is involved?

CONCLUSION

A brave new world is upon us. What it becomes is what we make of it. “Data is a reflection of our history. . . . The past dwells within our algorithms.” Intelligent automation changes everything, yet we are confronted with the same dangers that have always challenged us. Let us not repeat the mistakes of the past. The case for the reregulation of the legal industry is clear. Will we rise to the challenge? ■

V. Where We May Be Going

Lawyers Without Borders

Amy C. Stone

Senior Assistant Disciplinary Counsel

Supreme Court of Ohio

Office of Disciplinary Counsel

1

Prof.Cond. R. 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

- Sets the parameters for out of state lawyers practicing law in Ohio and when that practice may constitute UPL.
- Adopted in 2007, amended 7 times since.

2

ABA Model Rule 5.5 Amendment Project

- Two different proposals: Standing Committee on Ethics and Professional Responsibility (SCEPR) & Association of Professional Responsibility Lawyers (APRL).
- Under both, out of state lawyers will be able to practice law across state lines more easily.

3

Change Coming?

NCBE[®]

National Conference
of Bar Examiners

Change **HERE!**

UBE[®]

Uniform Bar Examination

4

Future of Prof.Cond. R. 5.5 Enforcement

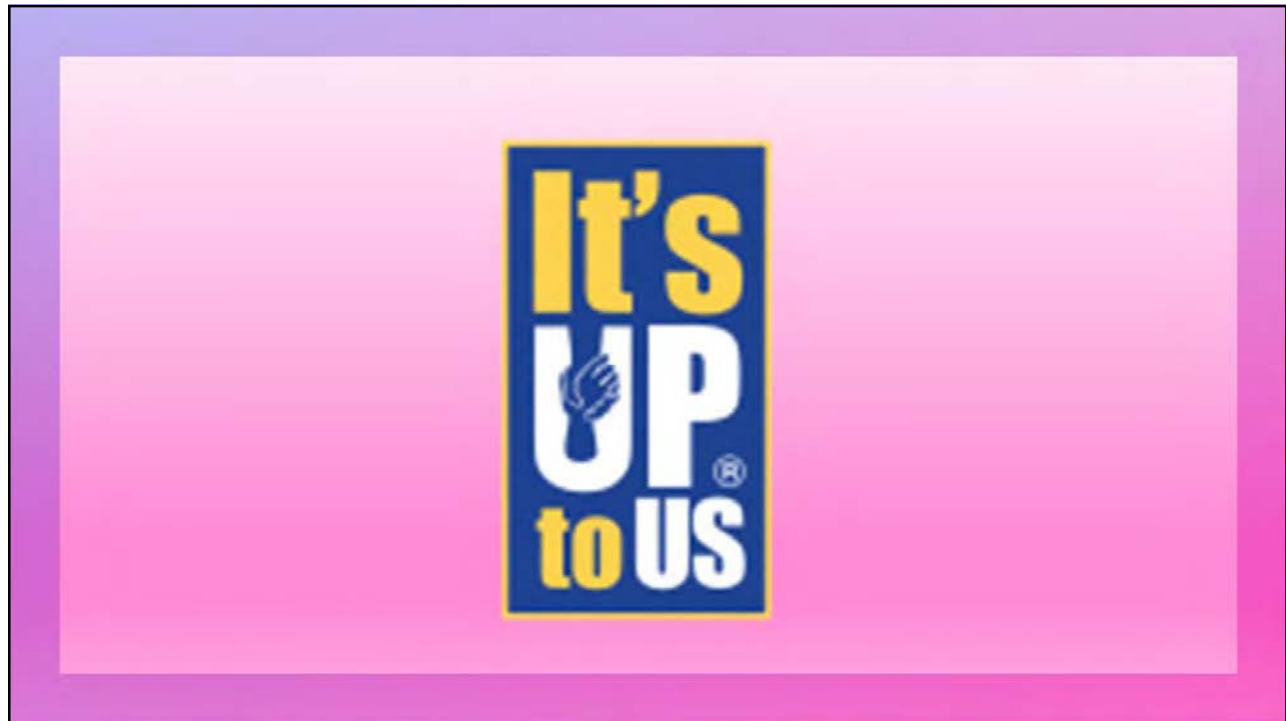
Past enforcement: *ODC v. Harris*

- Relied on Prof.Cond. R. 8.5, which states:
"A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. "

5

- Board of Professional Conduct finds violation of R. 5.5 and other rules, recommends sanction of indefinite suspension, and discusses the problems associated with Ohio disciplining a lawyer not licensed to practice by Ohio.
- Supreme Court of Ohio decides:
"Because Harris is not a member of the Ohio bar and has not taken an oath to be bound by the Ohio Rules of Professional Conduct, these rules do not apply to him; rather, his conduct is subject to review by the Board on the Unauthorized Practice of Law."

6



7

Problems:

#1 Who will pay for enforcement? Ohio?
Or licensing state?

Other problems:
Where do lawyers and clients litigate their differences?

Also: Malpractice insurance, IOLTAs

A large, green, 3D dollar sign icon is positioned to the right of the text. The background of the slide is a pink-to-purple gradient.

8

Closing Thoughts

Office of Disciplinary Counsel

(614) 387-9700

www.odc.ohio.gov

Board of Professional Conduct

(614) 387-9370

www.bpc.ohio.gov

9

Thank You and Happy Holidays!

10

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW; REMOTE PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

(1) the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) the services are *reasonably* related to a pending or potential proceeding before a *tribunal* in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or *reasonably* expects to be so authorized;

(3) the services are *reasonably* related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission;

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in any of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 6 and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 6;

(4) the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction, provided the lawyer does not do any of the following:

(i) solicit or accept clients for representation within this jurisdiction or appear before Ohio tribunals, except as otherwise authorized by rule or law;

(ii) state, imply, or hold himself or herself out as an Ohio lawyer or as being admitted to practice law in Ohio;

(iii) violate the provisions of Rules 5.4, 7.1, and 7.5.

(e) A lawyer who is practicing pursuant to division (d)(2) or (4) of this rule and the lawyer's law firm shall indicate the jurisdictional limitations of the lawyer. If any Ohio presence is indicated on any lawyer or law firm materials available for public view, such as the lawyer's letterhead, business cards, website, advertising materials, fee agreement, or office signage, the lawyer and the law firm should affirmatively state the lawyer is not admitted to practice law in Ohio. See also Rule 7.1 and 7.5.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Division (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are

authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law of this jurisdiction. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of divisions (d)(1) through (d)(4), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] After registering with the Supreme Court Office of Attorney Services pursuant to Gov. Bar R. XII, lawyers not admitted to practice generally in this jurisdiction may be authorized by order of a tribunal to appear *pro hac vice* before the tribunal. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal, this rule requires the lawyer to obtain that authority. "Tribunal" is defined in Gov. Bar R. XII,

Section 1(A), as “a court, legislative body, administrative agency, or other body acting in an adjudicative capacity.”

[10] Division (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a tribunal, division (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the tribunal. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Division (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Division (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within divisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Divisions (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Division (d) identifies four circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) through (d)(4), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Lawyers practicing remotely in Ohio must determine whether additional safeguards are necessary to comply with their duties of confidentiality, competence, and supervision, including, without limitation, their use of technology to facilitate working remotely. These measures may include ensuring secure transmission of information to the lawyer's remote computer; procedures to securely store and back up confidential information; mitigation of an inadvertent disclosure of confidential information; and security of remote forms of communication to minimize risk of interference or breach.

[17] If a lawyer employed by a nongovernmental entity establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, division (d)(1) requires the lawyer to comply with the registration requirements set forth in Gov. Bar R. VI, Section 6.

[18] Division (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or Ohio law, which includes statute, court rule, executive regulation, or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Divisions (c) and (d) do not authorize communications advertising legal services in Ohio by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in Ohio is governed by Rules 7.1 to 7.5.

[22] Division (d)(4) allows an attorney admitted in another United States jurisdiction to practice the law of that jurisdiction while working remotely from Ohio. A lawyer practicing remotely will not be found to have engaged in the unauthorized practice of law in Ohio based solely on the lawyer's physical presence in Ohio, though the lawyer could through other conduct violate the rules governing the unauthorized practice of law. A lawyer practicing remotely in Ohio must continue to comply with the rules of the lawyer's home jurisdiction regarding client trust accounts, and any client property consisting of funds should be handled as if the lawyer were located in the lawyer's home jurisdiction.

Comparison to former Ohio Code of Professional Responsibility

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

Pro hac vice admission of an out-of-state lawyer to represent a client before a tribunal was formerly a matter within the sole discretion of the tribunal before which the out-of-state lawyer sought to appear, without any registration requirements. See Gov. Bar R. I, Section 9(H) and *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33. Effective January 1, 2011, however, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 3 for the more general language used in the Model Rule. Comment [16] is stricken and Comment [17] is modified to conform to the change in division (d)(1).

Comment [4] is modified to warn lawyers that advertising or solicitation of Ohio residents may be considered a “systematic and continuous” presence, as that term is used in division (b).

Comments [9] and [11] are modified effective January 1, 2011, to recognize Gov. Bar R. XII, which also became effective on that date. Gov. Bar R. XII governs *pro hac vice* registration and defines “tribunal” for purposes of such registrations.

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**Standing Committee on Ethics
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To: ABA Center for Professional Responsibility Committees
From: Lynda C. Shely for the Standing Committee on Ethics and Professional Responsibility
Re: CPR Rule 5.5 Working Group Invitation
Date: May 23, 2022

The Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”) seeks your help in developing possible amendments to ABA Model Rule of Professional Conduct 5.5 (“the Rule”). The ABA has not undertaken a comprehensive review of Rule 5.5 since 2002, even though where and how lawyers practice law in the U.S. continues to evolve. We ask your assistance in designating a representative from your committee to serve on a Center for Professional Responsibility 5.5 Working Group (“CPR 5.5 Working Group”).

As you know, since 2002 the Rule has permitted certain “temporary” practices of the law of a jurisdiction where a lawyer is not admitted (“multijurisdictional practice” or “MJP”). A lawyer of course always must assure that they are competent to provide the legal services, whether practicing the law of the jurisdiction where they are admitted or the law of another jurisdiction. *See ABA Model Rule of Professional Conduct 1.1.* And when temporarily practicing the law of a jurisdiction in which a lawyer is not admitted, lawyers submit themselves to the disciplinary authority of the jurisdiction of temporary practice. *See ABA Model Rule of Professional Conduct 8.5.*

Since 2002 there have been various other rule changes that authorize a lawyer to practice the law of another jurisdiction.¹ For instance, in 2007, the ABA approved a Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, which temporarily relaxes the restrictions on cross-border practice following declaration of a mass disaster by a state’s highest court. This package of amendments also included a corresponding amendment to a Comment to Rule 5.5.

Four years later, in 2012, the ABA adopted a Model Rule on Practice Pending Admission, allowing a lawyer to practice in a jurisdiction for a limited period of time and subject to restrictions, while the lawyer diligently seeks admission. The ABA also amended the Model Rule for Admission by Motion to reduce the “time in practice” requirement from five years to three and urged jurisdictions to enact an “admission by endorsement” for military spouse attorneys so that a military spouse attorney holding an active license to practice law in at least one state be admitted without examination. All of these changes recognized a need to permit the practice of law *in* a jurisdiction without necessarily requiring a lawyer to take another bar exam.

¹ For a comprehensive review of the evolution of Rule 5.5, see April 18, 2022 Report of the Future of Lawyering Subcommittee of the Association of Professional Responsibility Lawyers (“APRL”) on Model Rule 5.5, available at <https://aprl.net/aprl-asks-aba-to-revised-model-rule-5-5/>.

Additionally, 40 U.S. jurisdictions have adopted the Uniform Bar Exam (UBE) and many states have admission on motion standards for more uniformity and flexibility for lawyer admission. Consistently when adopting such measures jurisdictions note the need to provide greater flexibility of admission standards, while still assuring that the lawyers admitted are competent and accountable for their actions.

Most recently the profession has seen many changes precipitated by the pandemic and technology advances. Lawyers frequently practice from locations outside of their physical offices or even outside of the jurisdictions where they are admitted to practice. With appropriate client considerations, the physical location of the lawyer is no longer determinative of whether that lawyer is engaged in the unauthorized practice of law. *See ABA Op. 495 (2020)*. Indeed some U.S. jurisdictions have even amended their Rules to recognize this reality.

Paramount in rules regulating who may practice the law of a jurisdiction is client protection. Any comprehensive review of Rule 5.5 will require considering for instance:

- how will jurisdictions regulate lawyers who may not be licensed in their jurisdiction (and who funds those regulatory services),
- should the Rule define what is the “active” practice of law or “admitted to practice” or “authorized to practice law”,
- should a lawyer disbarred or suspended in one jurisdiction be prohibited from practicing law in every jurisdiction,
- how would client protection funds address claims against lawyers working in their jurisdiction but not admitted to practice in their jurisdiction,
- which state would have jurisdiction for arbitration of fee disputes,
- how will jurisdictions confirm where a lawyer is admitted to practice law,
- how should jurisdictions address malpractice insurance disclosure requirements,
- how will jurisdictions balance other varying CLE requirements, IOLTA provisions, and other state-specific regulations,
- what will insurance companies need to consider for insurance coverage for lawyers practicing law in multiple jurisdictions,
- should there be a registration requirement for lawyers primarily working in a jurisdiction where they are not admitted, and
- what client disclosures should be required to notify clients of where a lawyer is admitted to practice law.

This non-exhaustive list of regulatory considerations may appear daunting, but they are not impossible. With the combined efforts of all of the CPR Committees (and eventually all ABA Sections and Committees and other stakeholders) we can find answers. We are problem-solvers. We all care about the profession, or we would not be volunteering with the ABA. As the ABA mission statement notes, we serve in the ABA, which is “the national representative of the legal profession.”

Page Three
May 23, 2022

The Ethics Committee has been considering many of these issues over the last few months. Attached is a first discussion draft of possible amendments to Rule 5.5 (“Draft 1.0”) that will begin the deliberations of the CPR 5.5 Working Group. This is just for discussion purposes and is based upon the initial thoughts of the Ethics Committee and several Center Committees, who the Ethics Committee thanks for their initial contributions on this important topic.

Draft 1.0 includes brackets in the first paragraph because the language needs to be researched further to determine if the phrases “authorized to practice,” “admitted,” or “active license” should be defined or used more consistently. Again, this is only Draft 1.0 to begin discussions of how Rule 5.5 might be updated.

There will be *many* opportunities for constructive input during this process, including town hall meetings, CLE programs discussing the issues, and outreach to all ABA entities, state and local bar associations, NOBC, APRL, other affiliated entities, and the Conference of Chief Justices.

Anyone involved in lawyer professional responsibility and regulation appreciates that change can be intimidating. As lawyers who care about the profession, the CPR 5.5 Working Group will give thoughtful consideration to all productive input and offer realistic recommendations to continue to keep the ABA Model Rules relevant to U.S. jurisdictions. Our first step in finding solutions to the topics listed above is for your Committee to designate a representative to the CPR 5.5 Working Group.

Please let us know your representative choice by July 1st so that we may begin to schedule monthly meetings for the CPR 5.5 Working Group starting after the Annual Meeting. We look forward to collaborating with all of the Center Committees on this crucial Rule project.

RULE 5.5: AUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer admitted [and/or authorized to practice law] by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer admitted and actively licensed to practice law by another United States jurisdiction may provide legal services in this jurisdiction if the lawyer:

(1) discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction, the jurisdiction(s) where the lawyer holds an active license to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction; and

(2) complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.

A lawyer is not required to comply with (b)(1) if the services being provided while the lawyer is located in this jurisdiction are services limited to the law of the jurisdiction in which the lawyer is admitted; authorized by federal law or rule; or limited to federal law or tribal law.

(c) A lawyer admitted to practice law in a foreign jurisdiction who is not suspended or disbarred, or the equivalent thereof, by any jurisdiction, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission. If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is actively licensed or otherwise authorized to practice law by that jurisdiction. The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the

38 equivalent, and subject to effective regulation and discipline by a duly constituted
39 professional body or a public authority

40

41 **Comments**

42 [1] To practice law in this jurisdiction, a U.S. lawyer must be “actively” licensed to
43 practice law by at least one United States jurisdiction and not disbarred or suspended
44 by an jurisdiction. “Actively” licensed means both that the lawyer has been admitted
45 to practice law by at least one jurisdiction and is currently and affirmatively
46 authorized to practice law by that jurisdiction.

47

48 [2] Foreign lawyers providing legal services in this jurisdiction pursuant to
49 paragraph (c) must be a member in good standing of a recognized legal profession
50 in a foreign jurisdiction, the members of which are admitted to practice as lawyers
51 or counselors at law or the equivalent, and are subject to effective regulation and
52 discipline by a duly constituted professional body or a public authority, or are
53 otherwise lawfully practicing as an in-house counsel under the laws of a foreign
54 jurisdiction. The latter qualification is because some foreign jurisdictions do not
55 permit otherwise qualified in-house counsel to be members of or admitted to the
56 bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel
57 may be required to relinquish any bar membership or admission while so employed
58 or they may never have obtained such admission or membership status. In addition,
59 to qualify to deliver legal services pursuant to this Rule, the admitted foreign
60 lawyer must not be suspended or disbarred, or the equivalent thereof, by any
61 jurisdiction.

62

63 [3] Paragraph (a) applies to the authorized practice of law and the unauthorized
64 practice of law by a lawyer, whether through the lawyer’s own action or by the
65 lawyer assisting another person in activities constituting unauthorized practice by
66 this jurisdiction.

67

68 [4] The definition of the practice of law is established by law and varies from one
69 jurisdiction to another. Practicing law “in a jurisdiction” does not necessarily relate
70 to a lawyer’s physical presence there. Rather, for purposes of this Rule, the practice
71 of law “in” a jurisdiction entails either performing legal services in a matter pending
72 before a tribunal of the jurisdiction or providing legal services regarding a subject
73 matter governed solely or primarily by the law of the jurisdiction. For purposes of
74 this Rule, “primarily” shall mean the law of that jurisdiction is applicable more than
75 the law of any other single jurisdiction.

76

77 [5] The practice of law in this jurisdiction by a lawyer licensed only by one or more
78 other jurisdictions, and who is not disbarred or suspended, or the equivalent thereof,
79 in any jurisdiction, may be either temporary or systematic and continuous. If such a
80 lawyer maintains a systematic and continuous presence in this jurisdiction or a
81 temporary presence, that lawyer may be required to comply with other regulatory
82 requirements of this jurisdiction governing the practice of law. Temporary practice
83 ordinarily involves advising a client on the law of this jurisdiction as part of the
84 lawyer's representation of that client in the lawyer's licensing jurisdiction or the
85 occasional pro hac vice admission by a tribunal in this jurisdiction in compliance
86 with the rules of the tribunal and the regulations of this jurisdiction governing the
87 authorized practice of law. A systematic and continuous presence in this jurisdiction,
88 on the other hand, denotes more than mere occasional or attenuated contacts with
89 this jurisdiction. It exists when lawyers or law firms hold themselves out as having
90 a professional presence in or ties to this jurisdiction, regularly solicit or direct
91 advertising towards clients in the jurisdiction, or establish an ongoing office or
92 business presence in this jurisdiction.

93
94 [6] If a lawyer is practicing law in this jurisdiction, the lawyer is subject to this
95 jurisdiction's disciplinary authority regardless of whether the lawyer has been
96 admitted to practice by this jurisdiction, in addition to being subject to the
97 disciplinary authority of the lawyer's jurisdiction or jurisdictions of admission. See
98 Rule 8.5 and Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement.

99
100 [7] A lawyer who is not admitted to practice by this jurisdiction may not hold out to
101 the public or otherwise state that the lawyer is admitted to practice by this
102 jurisdiction. *See Rule 7.1.*

103
104 [8] Nothing in this rule supersedes or abrogates the admission rules of any local court
105 or tribunal or the admission-to-practice rules of this jurisdiction requiring pro hac
106 vice admission for a particular action or proceeding. If a tribunal requires pro hac
107 vice admission to appear before that tribunal, then lawyers admitted only by other
108 jurisdictions must comply with that requirement.

109
110 [9] The disclosure provision of paragraph (b)(1) enables clients to make informed
111 decisions regarding the selection of a lawyer in such circumstances. Such a lawyer
112 has an obligation to ensure that the lawyer is competent to provide legal services
113 involving the law of this jurisdiction. See Rule 1.1. In order to comply with the duty
114 of competence, such a lawyer may, for example, elect to associate with local counsel
115 in order to assist in the representation.

116

117 [10] The paragraph (b)(1) disclosure obligation is not applicable if a lawyer actively
118 licensed to practice law by another United States jurisdiction is providing services
119 the lawyer is authorized to provide by federal law, tribal law, or the law of another
120 United States jurisdiction. For example, if a lawyer's services are strictly limited to
121 federal law or if a legal matter involves only the law of the jurisdiction where the
122 lawyer is actively licensed, then the lawyer is not required to disclose the lawyer's
123 jurisdictions of licensure. "Authorized by federal law" may include specific
124 authorization to represent clients before a tribunal or administrative agency or it may
125 mean the lawyer limits the practice to advising and representing clients solely on
126 federal law matters that do not involve appearances before a tribunal or federal
127 agency.

128

129 [11] Paragraph (b)(1) also applies to a lawyer licensed only in another jurisdiction
130 who is employed as in-house counsel.

April 18, 2022

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By email: rturner@clarkhill.com

Reginald M. Turner, Esq.
President, American Bar Association

Re: APRL's Proposal for a Revised Model Rule 5.5

Dear President Turner:

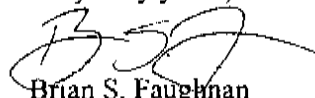
On behalf of APRL, an association of over 400 lawyers and law professors advising and representing lawyers in ethics matters, I enclose APRL's proposal for a replacement Model Rule 5.5 to better reflect the way lawyers practice in the 21st Century. Our proposal advocates that a lawyer admitted in any United States jurisdiction should be able to practice law and represent willing clients without regard to the geographic location of the lawyer or the client, without regard to the forum where the services are to be provided, and without regard to which jurisdiction's rules apply at a given moment in time. At the same time, our new Model Rule 5.5 would still preserve judicial authority in each state to regulate who appears in state courts, emphasizes that lawyers must be competent under Rule 1.1 no matter where they are practicing or what kind of legal services they are providing, and ensures that lawyers will be subject to the disciplinary jurisdiction of not only their state of licensure but wherever they practice.

Several years ago, one of my predecessors as President of APRL, George Clark, established a committee focused on the Future of Lawyering. The Future of Lawyering Committee is chaired by two other past presidents of our organization, Jan Jacobowitz and Art Lachman. After several years of hard work and discussions, the first action item from that group is a proposal to replace current ABA Model Rule 5.5 with a new version. That group has also created a very detailed report that discusses the history of the existing rule, how it is rooted in troubling presumptions, and how it is anachronistic in relation to the modern practice of law. In addition to the revised proposed rule itself, I also enclose a copy of that Report of the Future of Lawyering Subcommittee of the Association of Professional Responsibility Lawyers.

In March, APRL's Board voted to adopt the proposed revised rule as APRL's own proposal and authorized the report prepared by a Subcommittee of our Future of Lawyering Committee to be publicly disseminated. We hope to garner support not only within the ABA for this proposal, but also in any states independently willing to consider changes to their own versions of RPC 5.5. I would ask that you help disseminate these materials to the appropriate channels within the ABA.

I thank you for your time, your consideration, and your service to our profession.

Very truly yours,



Brian S. Faughnan
APRL 2021-2022 President
Lewis Thomason, P.C.

APRL MODEL RULE 5.5

RULE 5.5: Multijurisdictional Practice of Law

(a) A lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

(b) Only a lawyer who is admitted to practice in this jurisdiction may hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who provides legal services in this jurisdiction shall:

(1) Disclose where the lawyer is admitted to practice law;

(2) Comply with this jurisdiction's rules of professional conduct, including but not limited to Rule 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;

(3) Be subject to Rule 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and

(4) Not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

(d) A lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates;

(2) are not services for which the forum requires pro hac vice admission; and

(3) do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.

New Comments

1. This rule acknowledges that the practice of law now routinely transcends geographic jurisdictional boundaries. The question of what it means for a lawyer to practice law "in" a jurisdiction has been clouded by advances in technology that facilitate lawyers' ability to communicate, work, and appear in other jurisdictions. For example, historically a lawyer's physical presence in a jurisdiction was the predominate factor in determining where the lawyer practiced law. In modern law practices, lawyers routinely send e-mails, place phone calls, and participate in video calls with clients and other parties in other jurisdictions, rendering the lawyer's physical location irrelevant to the lawyer's capacity to provide legal

services. Similarly, the advent of on-line research, including access to local rules and ordinances, has enhanced lawyers' ability to master competency without regard to artificial geographic limitations. Hence, this rule recognizes the realities of current law practice and expanding access to lawyers while still being mindful of the need for public protection.

2. The definition of the practice of law may be established by statute or common law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to individuals admitted and authorized to practice law in at least one United States jurisdiction, protects the public against rendition of legal services by unqualified and unaccountable persons. Under the circumstances specified in section 5.5(d) of this rule, lawyers licensed in a foreign jurisdiction may also practice law without undue risk of harm to the public.
3. A lawyer is "admitted" in a jurisdiction when they have been formally licensed to appear in the courts of that jurisdiction without limitation. A lawyer may be "authorized" to practice in a jurisdiction if they are admitted to practice in any U.S. jurisdiction or, where court rules so require, the lawyer has been admitted to appear by a pro hac vice procedure, or other similar mechanism. A lawyer may be admitted to practice but not authorized to do so, because, for example, the lawyer is on inactive status. Under this rule, a lawyer must be both admitted and authorized to practice in at least one United States jurisdiction.
4. The distinction of being admitted in a particular jurisdiction relates to the privilege of regularly appearing in the courts of this jurisdiction and communicating that privilege to the public. Thus, while lawyers admitted in other jurisdictions may practice in this jurisdiction as provided in this rule, only lawyers admitted in this jurisdiction may represent that they are fully authorized to appear regularly in the courts of this jurisdiction.
5. Paragraph (c)(1) requires that all lawyers, including lawyers admitted in this jurisdiction, disclose the jurisdiction(s) in which they are admitted. Such disclosure is necessary to inform consumers of legal services and other parties where the lawyer's license originates and to facilitate disciplinary enforcement. This Rule anticipates that the primary form of disclosure will be in written communications, such as lawyers' signature blocks on correspondence and in lawyer advertising, including websites. A lawyer who communicates orally with another person and knows, or reasonably should know, that the other person has a misunderstanding about the lawyer's licensure, has an affirmative duty to correct the person's impression. *See* Rule 4.3.
6. A lawyer may establish an office for the practice of law in this jurisdiction with proper disclosure of the jurisdiction(s) in which the lawyer is admitted.
7. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 – 7.3.
8. All lawyers are required to be competent in the practice of law. *See* Rule 1.1. The lawyer's duty of competence applies regardless of practice area or the jurisdiction in which a matter is located.

9. All lawyers are subject to the disciplinary authority of the jurisdictions in which they practice. *See* Rule 8.5(a). The frequency with which disciplinary authorities have exercised their authority to prosecute and discipline lawyers not licensed in their jurisdiction has increased in the past decade, suggesting that geographic boundaries are not an impediment to holding lawyers accountable for ethical misconduct. Hence, allowing lawyers to practice in multiple jurisdictions does not undermine public protection.
10. A lawyer does not engage in the unauthorized practice of law by employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.
11. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority. In the absence of such requirements, this Rule permits lawyers to appear before administrative agencies in jurisdictions in which they are not admitted, subject to the other provisions of this Rule.
12. In situations in which pro hac vice admission is required, this Rule permits a lawyer to engage in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law under this rule but for which pro hac vice admission has not yet been obtained. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.
13. Paragraph (d) applies to a foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the foreign lawyer to provide personal legal services to the employer's officers or employees or legal services to the general public. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the foreign jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under this Rule needs to first consult with a lawyer admitted and authorized to practice in at least one U.S. jurisdiction.

**REPORT OF THE FUTURE OF LAWYERING SUBCOMMITTEE OF THE
ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS
REGARDING PROPOSED REVISED MODEL RULE 5.5¹**

Introduction

The Association of Professional Responsibility Lawyers Committee on the Future of Lawyering proposes a revised Model Rule 5.5 that offers a 21st century approach to the practice of law. Since the adoption of the current Model Rule 5.5 in 2002, lawyers in the United States have continued to expand their practices beyond state and national borders. The existing rule no longer adequately addresses the day-to-day questions lawyers have about multi-jurisdictional practice and it preserves outdated notions of how lawyers serve their clients. APRL believes that a broader rule is critical to the future of the profession.

APRL's proposed revision of Model Rule 5.5 reflects the concept that a lawyer admitted in any U.S. jurisdiction should be able to engage in the practice of law and represent willing clients without regard to the geographic location of the lawyer or the client, the forum the services are provided in, or which jurisdiction's rules apply at a given moment in time. The proposed revision recognizes that ethics rules will continue to govern the conduct of lawyers and require competence in the delivery of legal services provided; acknowledges that courts and other tribunals have the inherent power to control who appears before them; and embraces the fact that technology has fundamentally changed the ease with which clients and lawyers work together over vast distances.

The proposed revised Model Rule 5.5 offers up a regulatory model that would be similar, though not identical to the way that driver's licensing works in our nation. Although each jurisdiction implements its own scheme for granting drivers' licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel.

APRL's proposal does not ignore state licensure. To the contrary, APRL's proposal would enhance public protection by requiring that all lawyers, in every jurisdiction,

¹ The members of the subcommittee involved in the drafting of the proposed rule and of this report are: Kendra Basner (San Francisco, CA), Eric Cooperstein (Minneapolis, MN), Craig Dohson (New York, NY), Brian S. Faughnan (Memphis, TN), Jan Jacobowitz (Miami, FL), Arthur Lachman (Lake Forest Park, WA), David Majchrzak (San Diego, CA), Sari Montgomery (Chicago, IL), Lynda Shely (Scottsdale, AZ), and Hope Todd (Washington, D.C.).

disclose the jurisdictions in which they are licensed. APRL's proposal preserves the authority of judicial branches to regulate who appears before them, reminds lawyers of their ethical obligation under Rule 1.1 to be competent in all the services they provide, and ensures that lawyers will be held responsible for any misdeed committed in the relevant jurisdictions.

The proposal which APRL now urges acknowledges that clients must continue to be protected from the incompetent practice of law. However, the proposal also elevates the client's right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice and acknowledges that protecting clients from incompetent lawyering does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

The report provides APRL's reasoning and support for its proposal, including some significant historical context for Rule 5.5. The report addresses the realities of today's practice to highlight the unnecessary restriction on the ability of lawyers to practice in multiple jurisdictions and considers the recent experience of lawyers and their clients during the global pandemic.

The report also expands the principles that APRL believes should be at the heart of a regulatory structure that addresses multijurisdictional practice in a manner that benefits both clients and their lawyers. The report also discusses why certain existing "solutions" to these problems are insufficient, unjust, or both. Finally, the report includes historical context and insight into the origin of today's approach and the systemic problems that are exacerbated by its continuing existence.

Technology and the Evolution of the Practice of Law

If it was not already clear before the onset and consequences of the Covid-19 Global Pandemic ("2020 Pandemic") that technology has changed the modern practice of law, the conclusion is now undeniable. In the face of stay-at-home and other quarantine orders, technology has allowed lawyers to remotely meet with clients, negotiate deals, mediate, and appear in court via Zoom and other video conferencing technology.² Today's

²Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 *Vanderbilt Journal of Entertainment and Technology Law* 279 (2021);

technology readily allows a lawyer to practice law from almost anywhere assuming available access to a wireless network. However, Model Rule 5.5 and its various state iterations prohibit the unauthorized practice of law—even with the use of remarkable technology during a global Pandemic. As discussed below, both the historical underpinnings of Rule 5.5 and the contemporary practice of law compel a review and revision to what should be considered the unauthorized practice of law and the rules that prohibit it.

It is important to note that not only is there a lack of evidence that lawyers are harming the public by working across state lines (assuming that they are licensed and in good standing in at least one state), but also that there is no evidence clients prioritize the location of their lawyer when deciding who to retain. In fact, Clio's 2020 Legal Trends Report indicates that:

- ...Many consumers (37%) prefer to meet virtually with a lawyer for a consultation or first meeting, and 50% would rather conduct follow-up meetings through video conference. 56% of consumers would prefer videoconferencing over a phone call.
- ...The majority of consumers (65%) prefer to pay using electronic forms of payment, such as credit cards, debit cards, or online payment systems such as Clio Payments, PayPal, or Apple Pay over cash or check.
- ...The majority of consumers (69%) prefer working with a lawyer who can share documents electronically through a web page, app, or online portal.³

Thus, not only can lawyers and clients conduct the business of law remotely, regardless of physical location, but many even find it preferable. Just as the rules have evolved regarding competence, confidentiality, and technology so too should Rule 5.5 be revised to permit lawyers and clients to work together remotely without fear of

<https://news.bloomberglaw.com/us-law-week/pandemic-pressures-restriction-on-where-lawyers-can-practice>.

³ 2020 Legal Trends Report (Clio) available at <https://www.clio.com/resources/legal-trends/2020-report/>.

disciplinary or statutory action against the lawyer for violation of Rule 5.5 or UPL regulations.

Geographical Limitation and The Public's Access to Legal Services

There is no legitimate dispute that there is an access to justice crisis in the United States. This access to justice crisis – in all U.S. jurisdictions – exists under the current regulatory framework restricting the unauthorized practice of law. The “access to justice” gap includes many under-served clients who are willing to pay legal fees for a lawyer’s representation, but do not ever hire a lawyer. Admittedly, there are multiple reasons why clients with some means to pay may not hire a lawyer. One of those reasons is an actual physical access problem -- the unavailability of lawyers in the clients’ geographic area. Legal services “deserts” exist in many states where there are too few lawyers, or none at all, in a geographic area. Rural consumers have less access to lawyers than urban and suburban consumers.⁴ Geographic restrictions on admission further compound the problem.

In some rural areas lawyers are retiring, but new lawyers are not moving to those areas to replace them. Other locations do not have locally admitted lawyers, thus causing consumers in these legal services deserts to have to travel long distances to meet with a lawyer.

The lack of truly local lawyers can be remedied to some degree by harnessing technology to make representation by lawyers from other parts of the same state easier, but it is only the profession’s current ethical rules that make using lawyers geographically nearby but, in another state or jurisdiction as a broader remedy unworkable.

Unfortunately, even in jurisdictions that have written their UPL rules and laws to be in line with ABA Model Rule 5.5, lawyers in another state or jurisdiction cannot provide legal services on a regular basis in a jurisdiction where they are not admitted. The current state regulatory restrictions on practicing law reinforce some of the reasons these geographic legal deserts continue to exist.

⁴ See Conference of State Court Administrators, *Courts Need to Enhance Access to Justice in Rural America*, p. 1-3 (2018).

Lawyers who may be only a few miles away from clients in need cannot provide the services if the lawyers are not admitted to practice law where the clients live. Those same available lawyers may be under-employed or unemployed, yet an arbitrary state boundary prohibits them from providing services.

Additionally, those unemployed and under-employed lawyers may not be able to afford to pay a second state's admission fees, repeatedly satisfy CLE requirements, and so forth. Yet those lawyers may be competent and would otherwise be available at a reasonable fee but for current ethical and regulatory restrictions. Forcing unemployed lawyers who are competent and licensed in at least one state to take an additional bar examination, pay additional bar dues, and be challenged again about their character and fitness for the ability to serve underserved legal communities in another jurisdiction is illogical.

An unyielding, purely geographic, border inhibits the ability for competent and willing lawyers to provide legal services to consumers who need access to those services. The current state admission framework inhibits clients' ability to receive legal services and further inhibits clients' choice of counsel. If there were more flexibility for "border" lawyers to provide legal services for clients who are geographically close, whatever the applicable state law may be, the cost of legal services would be reduced, availability and access would be increased, and lawyers could be more gainfully employed.

U.S. jurisdictions continue to struggle to bridge the access to justice gap by failing to adequately amend rules concerning the "practice of law" and who may provide legal services because much of the focus is on including more and more categories of nonlawyers.⁵ This is not the only solution, and it blatantly ignores an obvious path forward.

Jurisdictions continue to have lawyers who are unemployed and under-employed⁶ all while legal services "deserts" exist in places where paying clients would be willing to

⁵ See, e.g., *Washington LLLTs and legal navigators, AZ CLDPs and LPS, California Document Preparers, Minnesota Nonlawyers, NM nonlawyers, NY advocates, Utah Sandbox Participants*. National Center for State Courts, *Non-Lawyer Legal Assistant Roles Efficacy, Design, and Implementation* (2015) at 2 (A study by the National Center for State Courts (NCSC) in 2013, "Estimating the Cost of Civil Litigation" reports that the average cost for typical civil court case types puts the courts beyond the financial means of many litigants).

⁶ 2020 Legal Trends Report (Clio), *supra*.

hire a lawyer who is presently unavailable to them. The current outdated state regulatory framework further reinforces the access to legal services problem in the U.S and it does so despite a wealth of experience demonstrating that modern technology can allow lawyers to provide many legal services seamlessly and competently to clients from just about any location.

Competency and the Paradox of the Licensed Lawyer

The seemingly arbitrary nature of the geographical limitations imposed by the current regulatory structure is heightened by an understanding of the paradox associated with how few restrictions exist on a lawyer's ability to practice by subject matter. Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law.

Indeed, historically, lawyers might take any case that crossed their office threshold, be it a family law matter one day, a criminal matter the next, or HIPAA compliance for a third-party provider of information systems the day after that. Over the past several decades, the profession has observed a trend away from the concept of lawyers as generalists and toward lawyers narrowing their practice to only one or two areas, in which they develop deep expertise. But that outcome has arisen because of the marketplace, not any ethical restrictions on practice.

A lawyer's voluntary devotion to one area of practice, however, in no way restricts the scope of the lawyer's license in their state. An attorney with 20 years of experience, but only involving family law, who learns of a neighbor's, relative's, or former client's severe car accident may agree to represent that person. Similarly, a lawyer who, following admission to the bar, works in a non-legal setting for twenty years, faces no licensing restrictions in taking on that same personal injury case as long as they have an active law license. Moreover, a newly minted lawyer immediately after passing the bar could take on a family law case, a car-accident lawsuit, and a contract negotiation with a hospital for a physician. The lawyers in these scenarios might not be the best lawyers for the job, but the Rules of Professional Conduct assume that the lawyers can educate themselves about the subject matter and competently handle the case. *See* Rule 1.1, cmt. [2].

The “Competency Fallacy of Rule 5.5,” however, dictates that a lawyer licensed in “State A”, who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel)⁷ because the lawyer is presumed to be incapable of knowing or coming to understand “the law of State B.” Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B. Those who accept the current systemic issues often rely upon arguments that lawyers who wish to be able to practice across state lines more freely can simply obtain such additional licenses through reciprocity. This option to pursue additional licenses through reciprocity is not an adequate solution, and for many jurisdictions, is simply not true.

Those who tout the virtues of reciprocity not only ignore that 11 states do not offer reciprocity or provisional/reduced admission requirements at all, but they usually gloss over the burdens that this default imposes upon lawyers in the jurisdictions where it is a possibility. First, many jurisdictions impose a “time in practice” requirement such that a lawyer seeking to become licensed in a new jurisdiction without having to sit for the bar examination must have either practiced law for a set number of years, often five or more, or must have been engaged in active law practice for some percentage (often 60% or more) of the most recent time-period or both.

For example, to seek admission by reciprocity in Tennessee, a lawyer must have been licensed in another jurisdiction for at least 5 years and must have been engaged in the active practice of law for 5 of the 7 years preceding the date of the application. See Tenn. Sup. Ct. R. 7, § 5.01(a)(3). On the other hand, there are some jurisdictions that allow reciprocity if the lawyer received a minimum passing score on the Multistate Bar Examination so long as the lawyer applies within a certain amount of time after passing that test.

Second, for those jurisdictions that conditionally allow reciprocity, the application and admissions process for reciprocity has built in expenses – both upfront and recurring

⁷ Of course, even with local counsel, the lawyer will likely also have to seek pro hac vice admission to appear in the State B court in connection with the litigation. Furthering the paradox, most rules for pro hac vice admission do not include anything that would require the lawyer seeking admission to demonstrate substantive competence with respect to the issues being litigated or even as to litigation generally.

-- in the form of application fees, the fee charged by the National Conference of Bar Examiners for conducting a background investigation (discussed below), additional annual registration or bar fees, and, in some jurisdictions, additional imposed taxes in the form of professional privilege taxes and the like.

Third, the addition of another state of licensure can also lead to the imposition of even more required hours of continuing legal education if both the lawyer's original jurisdiction and the new jurisdiction impose mandatory hours requirements and if the states' approaches to calculating hours or certifying courses are not identical.

Fourth, even for lawyers that have practiced for long enough to be eligible for admission by reciprocity, the process can take an excessive time, especially when considering that the person awaiting a ruling on their application is someone who has most likely already passed a bar examination (unless they are among the small minority of lawyers (pre-pandemic) to have obtained licensure in a diploma-privilege state) and also has already been vetted through a state's character and fitness evaluation process.

The process can take months and may even last for a year or longer. The timing of the process is prolonged because it is not one of a rubber stamping of decisions made in the home licensing jurisdiction; nor is it one in which the exploration into the applicant's background is reasonably limited to life events occurring after the issuance of the original law license.

Instead, an applicant must authorize a brand-new background investigation by either the National Conference of Bar Examiners or other state authorized investigatory body. The state entity from which reciprocity is sought then waits for the results of that new investigation and has the power to dig into any aspects of the applicant's background that it feels raises substantial questions about the applicant's character and fitness.

Thus, someone who is already a licensed lawyer in one state can find themselves facing opposition to their admission in another jurisdiction on character and fitness grounds involving past conduct that did not prevent their admission to their home jurisdiction. These situations seem discordant enough when the grounds being examined truly involve only "conduct." But the unfairness is made even starker when situations arise involving concerns about physical or mental health conditions rather than actual incidents of past misconduct. Such a situation, indirectly presented in subsequent federal court litigation, resulted in one federal district judge (now a member of the D.C. Circuit Court of Appeals),

authoring a scathing opinion taking Kentucky's regulatory process to task. *See Jane Doe v. Supreme Court of Ky.*, No. 03:19-cv-00236-JRW, (W.D. Ky. Aug. 28, 2020).

The collective burdens this general approach imposes have been the subject of scrutiny with application to military spouse attorneys, a very small subset of the population with very successful lobbying efforts at seeking regulatory reforms. Roughly 30 states have enacted rule revisions or other accommodations in response to such efforts. You can find an up-to-date listing of such revisions at <https://www.msjudn.org/rule-change/>.

While much of the focus of lobbying efforts made on behalf of military spouse attorneys focused on the sympathetic nature of their circumstances and the practical realities associated with being required to move frequently – sometimes even faster than the wheels of the regulatory system can turn to fully process a reciprocity application – there is fundamentally little reason to believe that a lawyer falling within this small subset is more ethical or more competent than another lawyer simply because they are married to someone in active military service.

Returning to Tennessee as an example, after lobbying efforts and a rules revision petition filed by a prominent military spouse attorneys' group, an exception was adopted in Tennessee that permits someone who is not licensed in Tennessee, but who is married to an active member of the U.S. armed forces, to obtain a temporary license in Tennessee without having to submit to a new NCBE character and fitness investigation as long as they are "the spouse of an active duty servicemember of the United States Uniformed Services," are "physically residing in Tennessee or Fort Campbell, Kentucky due to the servicemember's military orders," and can demonstrate several other basic requirements. *See* Tenn. Sup. Ct. R. 7, § 10.06(a).

Although the overall sample size is small when compared to the bar as a whole, the apparent dearth of any known cases of discipline for incompetent handling of matters by military spouse attorneys in the 30 jurisdictions where barriers to licensure have been dropped cannot be overlooked as an indicator that the "Competency Fallacy of Rule 5.5" cries out for re-evaluation. While allowing these lawyers more freedom to represent clients has not resulted in any noticeable increase in discipline, state bars have been actively imposing discipline against lawyers solely for engaging in "unauthorized practice

of law” in circumstances where the existence of any harm to consumers of legal services is questionable.

Client Trust and Choice of Counsel

APRL’s proposed revisions to Model Rule 5.5 do not reject the need for client protection but elevates the client’s right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice. Providing client protection does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

A client’s right to choose, discharge, or replace their lawyer is a core ethical principal that permeates the Rules of Professional Conduct and is underscored in case law throughout the country. The law of law firm breakups and lawyer departures clarifies that neither a law firm nor any of its lawyers have a possessory interest in clients. The Supreme Court of Indiana has articulated in concise fashion the broadly recognized concept that clients are not “chattel” but independent actors with agency: “Although the firm may refer to clients of the firm as ‘the firm’s clients,’ clients are not the ‘possession’ of anyone, but, to the contrary, control who will represent them.” *Kelly v. Smith*, 611 N.E.2d 118, 122 (Ind. 1993).

The concept that an individual has a right to legal counsel is traditionally centered around the concept that “choice” necessarily suggests alternatives from which to choose. When the client is prepared to pay for legal representation, it would make sense that the client should be empowered to choose whoever the client wishes. This largely unchallenged freedom of choice continues past the initial selection of a lawyer. “[T]he right to change attorneys, with or without cause, has been characterized as ‘universal.’” *Echlin v. Super. Ct. of San Mateo County*, 90 P.2d 63, 65 (Cal. 1939).

One scenario that highlights this issue is when a lawyer who has been working on a matter departs the firm where they have been employed. In such instances, the client has three choices, to remain a client with the firm, to remain a client with the departing lawyer, or whether to select new counsel altogether. *See, e.g.*, ABA Formal Ethics Op. 489; Rules Regulating the Florida Bar, rule 4-5.8; Virginia State Bar Professional Guidelines, rule 5.8 (both requiring that clients be notified of these three options).

It is because of a client's choice of counsel that restrictive covenants precluding lawyers who depart a firm from competing in the same marketplace have generally been found to be unenforceable outside of conditions on retirements, such as permitted by Model Code of Professional Responsibility DR 2-108(A) and Model Rule 5.6. Such restrictions not only discourage mobility within the marketplace but also deny clients the ability to choose between the firm and the withdrawing lawyer who previously represented them.

Under common law, the client's right to choose who should serve as their lawyer has been regarded as necessary to ensure that the proper dynamics exist for this unique fiduciary relationship. More than 90 years ago, the City Court of New York remarked, "It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client and is intended to save him from representation by an attorney whose services he no longer desires." *Gordon v. Mankoff*, 261 N.Y.S. 888, 889-90 (1931).

Further, under the Sixth Amendment, there is a presumption that a criminal defendant may retain counsel of choice. For example, the Supreme Court concluded that the denial of a defendant's request for a continuance to consult with a lawyer violated due process rights. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. ...A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 9, 10 (1954). This is consistent with the Supreme Court's earlier statement that "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

A client's preference for counsel is even honored when looking at the termination of the relationship between a lawyer and a client. Clients may end a lawyer's representation at any time and for any reason. Conversely, lawyers may terminate the relationship only based on one or more of the enumerated situations set forth in Model

Rule 1.16(a) and (b)—and may only do so upon following the procedures set forth in (c) and (d).

Indeed, it is not unheard of for a court to deny a lawyer's application to withdraw from representing a client, even when the appropriate conditions are present. This issue is often litigated when a client terminates a lawyer's engagement before the occurrence of an event that a fee is contingent upon. The terminated lawyer often argues that the client's decision is unfair, particularly if the lawyer believes there was no just cause for the termination. But fairness to lawyers is subordinate to clients' right to choose and change their legal representatives. *See, e.g., Fracasse v. Brent*, 494 P.2d 9, 13 (Cal.1972). The Supreme Court of California has remarked:

The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney. . . . The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. (*Id.*)

Even where a client's right to choose is not absolute, for example, where a lawyer has a conflict of interest that cannot be waived, courts still articulate that the right to choose counsel should be of paramount importance. Particularly when addressing challenges by third parties—often in the context of asserted conflicts—courts have consistently concluded that a client's choice of counsel should be infringed upon only in cases where injustice will result.⁸

⁸ *See, e.g., Blumenfeld v. Borenstein*, 247 Ga. 406, 408 (1981) (reversing disqualification based solely on marital status, holding, "The mere fact that the public may perceive some conduct as improper is, without some actual impropriety, insufficient justification for interference with a client's right to counsel of choice."); *United States v. Urbana*, 770 F. Supp. 1552, 1556 (S.D.Fla. 1991) (courts disqualify an accused's lawyer of choice only as a measure of last resort). *Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006) (the extreme measure of disqualifying counsel of choice should be used only when absolutely necessary); *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (the right to counsel of choice may only be overridden for compelling reasons); *Optyl Eyewear Fashion Intern. Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (because of potential for abuse, disqualification motions should be subject to particularly strict judicial scrutiny); *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 794 (2d Cir. 1983) (movant must meet a heavy burden to remove opposing counsel).

Yet when it comes to the multi-jurisdictional practice of law, the principal of client choice of counsel is strikingly absent. No matter that the prospective client has known the lawyer personally for many years, is related to the lawyer, has a prior professional relationship with the lawyer, is familiar with the lawyer's expertise in a narrow area of the law, or was referred to the lawyer by a trusted associate. If the lawyer is not licensed in the state in which the client resides or where a matter occurs, the client's choice receives no deference under Rule 5.5. Client choice of a lawyer is paramount, except when it contravenes an outdated regulatory scheme based on state boundaries

The Long and Problematic History of Placing Geographic Restrictions on the Right to Practice Law

Historical context proves useful when attempting to understand the current framework and to justify amending it to reflect the contemporary practice of law. In fact, “[t]he state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court.”⁹ It is worthwhile to journey back to this time to understand both the historical reasoning and its inapplicability to today's legal profession.

The authority to admit lawyers to practice in a jurisdiction derives from the role of the judiciary in the American legal system:

From the colonial period until today, American courts have claimed the English common law tradition of inherent power—a power not derived from statute—to regulate the lawyers practicing before them, especially with respect to admission to practice. Thus, the courts must license lawyers before lawyers will be given audience, courts set the terms upon which legal practice is pursued, and courts enforce the rules they have themselves established.¹⁰

From Colonial Times to 1921

⁹ Report of the ABA Commission on Multijurisdictional Practice, at 7 (August 2002) (“2002 MJP Report”).

¹⁰ 1 Geoffrey Hazard, Jr., William Hodes & Peter Jarvis, *THE LAW OF LAWYERING* §1.07, at 1-26 (4th ed. 2021).

In colonial America, local judges generally determined admission in colonial courts, usually based on service in an apprenticeship for a number of years. An alternative approach was to permit lawyers admitted to the English bar to practice anywhere in the colonies.¹¹ After the American Revolution, states imposed varying admission requirements, with bar examinations, where they existed, generally a mere formality that could be bypassed by choosing a different area of study, such as clerking under a practitioner or judge.¹²

“[C]ontrol of the American legal profession remained highly localized and dispersed through the first hundred years or so following the Revolution.”¹³ Thus, “during the Jacksonian era, Bar admission requirements became increasingly less strict because of the perceived elitism of admission practices as contrary to democratic ideals.”¹⁴ As a result, almost any *man* who desired to practice law could gain admittance.¹⁵ Where examinations were required, they were often oral and minimal, and have been characterized as “laughable” and almost a “farce” or a “joke.”¹⁶ “By 1860, of the thirty-nine states, only nine had any specific requirements for admission to their Bar.”¹⁷

¹¹ Daniel Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1193-94 (1995).

¹² *Id.* at 1194-95.

¹³ James Jones, Anthony Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEORGETOWN J. LEGAL ETHICS 125, 129 (2017).

¹⁴ Hansen, *supra*, at 1195; Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1199 (2008). *See also* Jones, et al., *supra*, at 129 (“early efforts by the old established bars of the original colonies to keep the legal profession small and elite through rigorous admissions standards following the American Revolution largely collapsed, in no small part because of the diverse legal needs of a vast and rapidly expanding country of individual entrepreneurs”), citing Lawrence Friedman, *A HISTORY OF AMERICAN LAW* 315-18 (2d ed. 1985).

¹⁵ Hansen, *supra*, at 1195-96; Langford, *supra*, at 1199. *See also* Matthew Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL W. L. REV. 1, 7 (2002) (“Although good moral character remained requisite for admission to the practice of law in many states, Bar membership was effectively open at the end of the Civil War to any and all male citizens who could produce a personal reference.”).

¹⁶ Hansen, *supra*, at 1196, 1200; Lawrence Friedman, *A HISTORY OF AMERICAN LAW* 317, 652 (2d ed. 1985). An often-told anecdote from the pre-Civil War period is of Abraham Lincoln examining an Illinois bar applicant while the future president was taking a bath. Hansen, *supra*, at 1196 (quoting Joel Seligman, *Why the Bar Exam Should be Abolished*, JURIS DR., at 48 (Aug.-Sept. 1978)).

¹⁷ Ritter, *supra*, at 7.

“The radical democratization of Bar admissions prompted widespread calls for its reform in the later nineteenth century.”¹⁸ The post-Civil War years saw the beginning of the standardized law school curriculum in this country, as Christopher Columbus Langdell’s theory of legal education, based on the case method of Socratic instruction and focused on increased standards and more uniformity (which would effectively limit competition in the profession), became accepted.¹⁹

In addition, “[e]xpanding post-war industrialization increased concern over the character certification and competency of lawyers to deal with the extensive legalization of the social economy.”²⁰ “The ancestor to the modern written bar examination developed between 1870 and 1890 and gained substantial ground and acceptance in the 1890s... [B]y the 1920s, there was a written bar examination in most states.”²¹ Further, “[b]etween 1880 and 1920, states adopted additional entry procedures, such as publication of applicants’ names, probationary admissions, recommendations by the local Bar, court-directed inquiries, and investigation by character committees.”²²

1921 ABA Root Report

What has become the traditional route to bar admission now includes “graduating from an accredited law school, passing the admitting state’s bar examination, and satisfying the state’s bar examiners that the applicant possesses the requisite character to

¹⁸ Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 498 (1985)

¹⁹ Hansen, *supra*, at 1198-99.

²⁰ Langford, *supra*, at 1204.

²¹ Hansen, *supra*, at 1200 (noting that “the written bar exam principally developed as a replacement for oral bar exams, and not as a check on law schools,” and citing George Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15, 25-26 (1977), for the proposition that “the bar exam was intended to standardize admissions requirements and was considered egalitarian in the sense that its mission was to equalize the disparate admissions requirements in various regions around the country”).

²² Rhode, *supra*, at 499.

practice law.”²³ This uniform route to lawyer admission in virtually every state has its roots in the ABA Root Committee Report, issued 100 years ago, in 1921.²⁴

The Root Report established the ABA’s position that three years of law school education should be required for licensed lawyers (with two years of college as a prerequisite for law school entry), but that such a requirement alone was not sufficient. “[G]raduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.”²⁵ The diploma privilege was eventually eliminated and replaced by required exams by all of the states with the exception of Wisconsin as of 2020.²⁶

The Root Report urged states to impose these legal education and bar examination requirements based on two primary considerations: “efficiency” and “character.” “The part played by lawyers in the formulation of law and in the establishment and maintenance of personal and property rights requires a high degree of efficiency for the proper service of the public.”²⁷

As to “character” considerations specifically, the Report noted that “it is plain that the private and public responsibilities of the profession demand a high standard of morality and implicit obedience to correct standards of professional ethics.”²⁸ Thus, “character screening effectively arrived in the early twentieth century.”²⁹ By 1927, a large

²³ 2002 MJP Report, at 7.

²⁴ Elihu Root, et al., *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 44 REP. ANNUAL MTG. A.B.A. 679 (1921) (“Root Report”).

²⁵ *Id.* at 687-88

²⁶ See Hansen, *supra*, at 1192 & n.7. Objections to the diploma privilege in the 20th Century included “(1) a fear that law school education lacked uniformity in the length of time given over to study; (2) a belief that the diploma privilege was anti-democratic because it tended to favor state law schools over private schools, which were often not granted the privilege; (3) a belief that the diploma privilege discriminated against state residents who studied at out-of-state institutions; (4) a belief that the bar examination produced a higher standard of practice; and (5) a fear that the diploma privilege allowed law schools to circumvent the state’s control of the bar.” Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WISC. L. REV. 645, 647. The third and fifth of these objections implicate federalism concerns that form the basis of current UPL regulation in state statutes and the ethics rules.

²⁷ *Id.* at 680.

²⁸ *Id.*

²⁹ Keith Swisher, *The Troubling Rise of the Legal Profession’s Good Moral Character*, 82 ST. JOHN’S L. REV. 1037, 1041 (2008). Other articles exploring the history of character and fitness requirements in detail

majority of the states had “strengthen[ed] character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures.”³⁰

The Report urged immediate action by the organized bar, the ABA, and state and local bar associations “to prevent the admission of the unfit and to eject the unworthy,” and to “purify the stream at its source by causing a proper system of training to be established and to be required.”³¹ It is probably an understatement to say that when enforcement of character requirements began in earnest in the middle part of the 20th Century, “both its motivations and outcomes were extremely problematic.”³² In 1971 and again in 1991, the ABA and the National Conference of Bar Examiners reaffirmed the basic conclusions and recommendations of the Root Report.³³

Statutory Developments and Enshrinement of UPL Restrictions in the Ethics Rules

Although the original 1908 ABA Canons on Professional Ethics did not contain a provision regarding the Unauthorized Practice of Law (UPL), professional bar associations began to organize against UPL about a decade before the issuance of the Root Report. In 1914, “the New York County Lawyers Association launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition from title and trust companies,” and the ABA followed suit by forming

include Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 498-503 (1985); Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visions of Good Moral Character*, 22 N. ILL. U. L. REV. 19 (2001); Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV. 1, 4-13 (2002); and Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1196-1208 (2008).

³⁰ Swisher, *supra*, at 1041 (quoting Rhode, *supra*, 94 YALE L.J. at 499).

³¹ Root Report, at 681.

³² Swisher, *supra*, at 1040. As well documented in Professor Rhode’s seminal 1995 article and expanded upon by Professor Swisher in his 2008 piece, scrutiny based on “character” excluded from admission “unworthy groups” based on gender and ethnicity considerations, as well as other perceived “problem” applicants. *Id.* at 1041-42. By the late 1950s, the U.S. Supreme Court had imposed constitutional constraints on these standards, requiring a rational connection to fitness to practice. *Id.* at 1042 (citing cases).

³³ Hansen, *supra*, at 1201 & nn.62, 63 (citing the 2nd and 3rd editions of the NCBF’s Bar Examiner’s Handbook).

its own committee on unauthorized practice by 1930.³⁴ “Beginning in the 1920s, bar associations attempted to gain greater control over the practice of law by spearheading efforts to ‘integrate’ the bar through court rules (pursuant to inherent powers) or statutes that required every lawyer to belong to the state bar.”³⁵ And beginning in the 1930s, most state legislatures adopted statutes outlawing (and sometimes criminalizing) UPL,³⁶ with state supreme courts asserting their authority (often stated as “exclusive” authority vis-à-vis the legislature) to define and regulate UPL and the practice of law.³⁷

UPL was first mentioned in an ABA ethics code in a September 30, 1937, amendment to the ABA Canons. New Canon 47, titled “Aiding the Unauthorized Practice of Law,” provided that “No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.”

Three decades later, the restriction on assisting UPL was enshrined in the ABA Model Code of Professional Responsibility but also paired with a new prohibition. Canon 3 of the 1969 ABA Model Code of Professional Responsibility was titled “A Lawyer Should Assist In Preventing the Unauthorized Practice of Law.” DR 3-101 of the Model Code,

³⁴ Derek Denckla, *Nonlawyers & the Unauthorized Practice of Law: An Overview of the Legal & Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2583-84 (1999).

³⁵ *Id.* at 2582. “Invoking ‘inherent powers,’ the highest state courts have claimed the jurisdiction—sometimes exclusive—to regulate every aspect of the practice of law, through such activities as specifying conditions for admission, disciplining or disharring those lawyers who fail to exercise good conduct, and promulgating lawyers’ codes of conduct.” *Id.*; see also *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §1, cmt. c (2000) (“The highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function. Thus, the grant of judicial power in a state constitution devolves upon the courts the concomitant regulatory power.”). The historical development of, and the role of the organized bar in, the “inherent power” doctrine in the context of state UPL regulation is extensively discussed in Laurel Rigertas, *Lobbying & Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 *CAL. W. L. REV.* 65 (2009); and in Laurel Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 *QUINNIPIAC L. REV.* 97 (2018).

³⁶ The language of these statutes appears to focus on the unauthorized practice of law by nonlawyers, but “most jurisdictions regarded even out-of-state *lawyers* as engaged in UPL, unless they had met local licensing requirements. Thus, lawyers were prohibited from practicing law in violation of local regulations, which meant that in courtroom litigation, at least, and perhaps in arbitration as well, out-of-state lawyers were required to seek admission *pro hac vice*. . . . Furthermore, whether out-of-state lawyers could participate in interstate transactional work in the ‘wrong’ jurisdiction, or even advise clients about the situation was uncertain, and many lawyers were willing to test the limits of a state’s tolerance.” 2 Hazard, Hodes & Jarvis, *supra*, §49.02, at 49-5.

³⁷ See Denckla, *supra*, at 2585.

titled “Aiding Unauthorized Practice of Law,” provided that “(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law” and “(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” The focus of the Ethical Considerations in Canon 3 was on practice by so-called non-lawyer “layman,” but EC 3-9 explained the restriction on multijurisdictional practice:

Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

In a footnote supporting the first proposition in this EC (that regulation of the practice of law is accomplished principally by the respective states), the ABA Code cited the U.S. Supreme Court decision in *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967): “That the States have broad power to regulate the practice of law is, of course, beyond question.” Quoting ABA Ethics Op. 316 (1967), the footnote also noted that “It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules.” In recognizing the potential practical difficulties with imposing these restrictions, another footnote also quoted ABA Ethics Op. 316 for the proposition that

Much of clients’ business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than

one state. The business of a single client may involve legal problems in several states.”³⁸

The Ethical Consideration noted these practical difficulties without providing guidance on how to resolve them.

This uncertainty continued with the enactment of the Model Rules. “When Model Rule 5.5 was originally promulgated in 1983, . . . it carried forward from the Model Code of Professional Responsibility, without elaboration, both aspects of the traditional prohibition on the unauthorized practice of law.”³⁹ The rule simply provided that “A lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” There was a single comment:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

As of the adoption of the Model Rules in the early 1980s, the state-based framework for regulation of lawyer admission and practice by the 50 individual states and

³⁸ An additional footnote quoted from a New Jersey Supreme Court case, *In re Estate of Waring*, 47 N.J. 367, 376, 221 A.2d 193, 197 (1966): “[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also ‘grossly impractical and inefficient’ to have had the settlement negotiations conducted by separate lawyers from different states.”

³⁹ 2 Hazard, Hodes & Jarvis, *supra*, §49.02, at 49-4.

the District of Columbia was a *fait accompli*, altogether consistent with traditional and historical federalism principles, and seemingly immutable.⁴⁰ Any and all constitutional and other challenges to the individual states' authority to regulate the practice of law within their borders, as well as federal courts' authority to condition admission based on admission in the state in which they sit, have been decisively and universally rejected by the courts.⁴¹

Birbrower: The California Supreme Court Grabs Lawyers' Attention

Despite the long history of the restrictions set forth above, the application of UPL restrictions to licensed lawyers who practice law across state lines where they are not licensed, referred to as interstate UPL, did not receive much attention in the profession until 1998 when the Supreme Court of California issued its landmark decision in the case *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County*.⁴² In sum, the Court held that New York-licensed lawyers from the New York law firm of Birbrower, Montalbano, Condo & Frank had engaged in UPL because the firm's lawyers

⁴⁰ For example, the 2002 MJP Report, at page 7, noted: "Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary to practice law within the particular state. In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law." And §3 of the Restatement of the Law Governing Lawyers, adopted in 2000, accepts as essentially unchangeable based on historical experience the concept of judicial authority of each state to regulate law practice within state boundaries. See RESTATEMENT, *supra*, §3 & cmt. b ("[J]urisdictional limitations on practice applicable to lawyers are primarily a function of state lines. . . . Occasionally, proposals are put forward for removal of state-line limitations on practice, as by means of a national bar-admission process. However, local interest in maintaining regulatory control of lawyers practicing locally is strong and historically has prevented adoption of such proposals.").

⁴¹ *E.g.*, *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016) (upholding against constitutional challenge under the Privilege and Immunities Clause a state requirement for nonresident bar members to maintain a physical office in the state), *cert. denied*, 137 S. Ct. 1580 (2017); *National Association for the Advancement of Multijurisdictional Practice (NAAMJP) v. Howell*, 851 F.3d 12 (D.C. Cir.) (joining "the chorus of judicial opinions" rejecting constitutional challenges of the NAAMJP and lawyer Joseph Giannini to local rules of practice limiting who may appear in particular state and federal courts), *cert. denied*, 138 S. Ct. 420 (2017); *NAAMJP v. Lynch*, 826 F.3d 191 (4th Cir.) (rejecting NAAMJP's constitutional challenge to conditions placed on admission to the Maryland federal district court bar), *cert. denied*, 137 S. Ct. 459 (2016); *Giannini v. Real*, 911 F.2d 354 (9th Cir.) (upholding constitutionality of California bar examination and local federal rules conditioning admission), *cert. denied*, 498 U.S. 1012 (1990); *Lawyers United Inc. v. U.S.*, 2020 WL 3498693 (D.D.C. June 29, 2020) (rejecting constitutional challenges to federal bar admission rules in D.C., California, and Florida), *affd*, 839 Fed. Appx. 570 (March 15, 2021).

⁴² 949 P.2d 1 (1998), *cert. denied*, 525 U.S. 920 ("*Birbrower*")

handled a matter in California for a California client in preparation for a California arbitration based on a contract governed by California law. The Court further held that because the firm violated California's UPL statute it could not enforce its fee agreement and collect the substantial fees it had earned for the California legal services it had provided.⁴³

Birbrower generated a great deal of controversy and concern among lawyers and law firms throughout the country. It particularly created uncertainty for lawyers who regularly practiced across state lines as to what amount of legal work and activity would constitute the unlawful practice of law. (Those interested in a more thorough discussion of *Birbrower* can find a deeper dive into its facts and ramifications at Appendix A.)

Although the California Court of Appeal case that quickly followed on the heels of *Birbrower*, *Estate of Condon v. McHenry* 65 Cal.App.4th 1138, 76 Cal. Rptr. 2d 922 (1998) ("*Condon*"), attempted to clarify some of these concerns by emphasizing that purpose of the UPL rules to protect the state's people and entities should be paramount in any analysis, the holding in *Condon* that a Colorado lawyer did not commit UPL by representing a Colorado client concerning a California matter was not widely noticed.

While there are courts that have deviated from *Birbrower*, *Birbrower's* influence continues to impact interstate UPL. For example, in the 2016 case *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), a Colorado-admitted lawyer agreed to represent his in-laws in a post-judgment debt collection matter in Minnesota. The Colorado lawyer was not licensed in Minnesota and never set foot in the state, but he unsuccessfully tried to negotiate a settlement of the Minnesota matter by telephone and email.

In defending himself against disciplinary charges, the Colorado lawyer argued that a lawyer practices law in a jurisdiction in one of three ways: (1) by being physically present in the jurisdiction; (2) by establishing an office or other systematic and continuous presence in the jurisdiction; or (3) by entering an appearance in a matter through the filing of documents with a trihunal. *Id.* at 665. Citing *Birbrower*, the court determined that physical presence in the state was not the only way to practice law in Minnesota and that through multiple e-mails sent over several months, the lawyer advised Minnesota

⁴³ *Id.* at 11.

clients on Minnesota law in connection with a Minnesota legal dispute and attempted to negotiate a resolution of that dispute with a Minnesota attorney demonstrating an ongoing attorney-client relationship with his Minnesota clients and that his contacts with Minnesota were not fortuitous or attenuated. *Id.* at 666. Thus, the court held that the out-of-state lawyer committed the unauthorized practice of law in Minnesota by violating Minn. R. Prof. Conduct 5.5(a) resulting in the lawyer being disciplined.

In response to *Birbrower* and after issuance of the 2002 MJP Report, the ABA eventually adopted a revision to the Model Rules to authorize temporary practice in jurisdictions other than a lawyer's licensed jurisdiction.

The 2002 MJP Report and the Most Recent Revisions to ABA Model Rule 5-5

The 2002 MJP report, which preceded and largely served as an advocacy piece for changes to ABA Model Rule 5.5 adopted by the House of Delegates the same year, summarized the purported policy basis for multijurisdictional UPL restrictions in state statutes and the lawyer ethics rules:

In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community. 2002 MJP Report, at 9.

The 2002 MJP Report noted that “no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis.” *Id.* at 10. For litigation matters, the Report noted that *pro hac vice* admission rules existed in every state but was not available for some aspects of litigation matters, such as pre-litigation work and ADR. *Id.* at 10, 12. Transactional lawyers “also commonly provide services in states in which they are not licensed,” and on behalf of clients in their state of admission, often “travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation.” *Id.* at 12. Thus, the Report noted that lawyers, as of the end of the 20th Century,

have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse, than by conventional wisdom or by what the U.S. Supreme Court has called “the lore of the profession.” On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Id. at 13. And these understandings were “to some extent, reinforced by the sporadic enforcement of state UPL laws,” with regulatory actions “rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters.” *Id.*

Consistent with the recommendations of the 2002 MJP Report, the ABA adopted temporary practice rules contained in Model Rule 5.5(c). It permits four exceptions to UPL that allow lawyers to “provide legal services on a temporary basis” in a jurisdiction where they are not admitted: (1) when they associate with local counsel who actively

participates in the matter; (2) when they are assisting or participating in an actual or potential proceeding before a tribunal, generally by obtaining pro hac vice admission; (3) when they are participating in an arbitration, mediation or other alternative resolution; and (4) where the legal services in the second state “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” Model Rule 5.5(c) (1-4).

Model Rule 5.5(d) further allows lawyers admitted in another US jurisdiction or in a foreign jurisdiction, or a person lawfully practicing as in-house counsel under the laws of a foreign jurisdiction to provide legal services through an office or other systematic or continuous presence in a jurisdiction where the lawyer is not licensed if certain criteria are met. Model Rule 5.5(d-e). Model rule 5.5(a-b), however, essentially continued, other than otherwise as excepted under the above sub-sections, to prohibit interstate multijurisdictional practice.

These revisions to the ABA Model Rules met widespread approval in terms of being adopted by a majority of U.S. jurisdictions, but not all jurisdictions have done so, and issues persist. Some of those issues revolve around lawyers’ need to evaluate the approaches of jurisdictions that have not embraced the Model Rule approach to temporary practice, while other issues stem from problems involving the lack of “fit” between modern law practice and either regulating activity based only on geographic boundaries or based upon notions that any lawyer practices “the law of a jurisdiction.”

Competence as an Ongoing Regulatory Justification

Defenders of the current version of Rule 5.5 often assert that restrictions on multi-jurisdictional practice are necessary to ensure the competence of lawyers who represent clients in their jurisdiction. In addition to the previously discussed competence paradox involved in the privileges of licensed lawyers under the current regulatory structure, the modern landscape of how lawyers become licensed to practice law across the United States undermines this rationale.

As discussed above, jurisdiction to regulate the practice of law has been largely a matter of geographic boundaries up to this point,⁴⁴ with some exceptions.⁴⁵ Notably, authorization to practice law within the state of licensure is comprehensive; the license does not limit a lawyer to work involving the law of the licensing jurisdiction. Although jurisdictional licensing based exclusively on a lawyer's location has provided the benefit of clarity both in terms of the authorization and freedom to practice regardless of what laws or jurisdictions the lawyer's work might touch; lawyers can now effectively practice nationwide in many respects without ever leaving their licensing jurisdictions. Moreover, the jurisdictional regulatory scheme limits lawyers' ability to physically relocate while serving clients only in those jurisdictions in which the lawyers are admitted to practice.

Licensing Lawyers in 2021

Admission by Bar Examination

As discussed above, the competency argument for multi-jurisdictional practice restrictions assumes that admission to practice in one jurisdiction does not establish competence to practice in any other jurisdiction. The underlying premise in that proposition is that some special training or testing is required to demonstrate competence in a particular jurisdiction.

Presently, 41 U.S. jurisdictions have adopted the Uniform Bar Examination (including Michigan, which announced in October 2021 that it would adopt the UBE, to be administered starting in 2023). The candidates for admission in those jurisdictions take identical bar examinations, although the minimum threshold for passing scores varies among jurisdictions:⁴⁶

⁴⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §3(1) (2000), "A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client...at any place within the admitting jurisdiction." *Id.* COMMENT (e): "Admission in a state permits a lawyer to maintain an office and otherwise practice law anywhere within its borders."

⁴⁵ Federally authorized practice, for example, allows one to practice law nationwide. See *Sperry v. Florida*, 373 U.S. 379 (1963). Federal law sets the maximum qualifications required to practice before all but one federal agency at being a member of the bar of a state. See 5 USC §500(b). Some federal courts also allow for application to admission based upon a bar license in any jurisdiction along with admission to a federal court in that jurisdiction. See, e.g., L.R.Civ.P. 83.1 (WDNY).

⁴⁶ See <https://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited Jan. 8, 2022).

260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
270	Arkansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho, Pennsylvania
273	Arizona
276	Colorado
280	Alaska

Twenty-four of the UBE jurisdictions have no additional or substitute exam component tailored to that particular jurisdiction.⁴⁷ Of the 16 jurisdictions that have a state-specific component, nine require attending a course or tutorial in the jurisdiction's law (all the courses but one, New Mexico's, are online, and only New York requires both an online course and an online test). When an applicant from another jurisdiction transfers in a passing UBE score, such applicants may also be required by these nine states to complete the state-focused course or tutorial. Seven jurisdictions (including New York) require an applicant to complete an online multiple-choice test. All seven states require anyone seeking admission, either by bar exam or transfer of score from another jurisdiction, to complete the test.

⁴⁷ <https://reports.ncbex.org/comp-guide/charts/chart-5/#1610472174303-4aeeec78b-6a74> (last visited Jan. 8, 2022).

Admission on Motion

Virtually all of the jurisdictions permitting admission by motion impose the same jurisdiction-specific exam and course requirements for those applicants. Otherwise, the states permitting admission by motion treat the lawyer's experience in their home jurisdiction as sufficient to demonstrate competence to be licensed in the new jurisdiction.

Conclusion

Geographic limitations on a lawyer's provision of services long accepted by the legal profession in the name of client protection often deprive clients of ever having an opportunity to exercise a truly full and free "choice" of counsel. These geographic restrictions exist even if lawyer and client are both willing to enter into the engagement, oftentimes already having an existing professional relationship. Geographic limitations also make no accommodation for the idea that the relationship may benefit from both the level of trust that the client has in the lawyer as the "first choice" as well as any existing knowledge the lawyer has about the client, including relevant goals, priorities, tendencies, and communication style.

Instead of such a rigid approach, APRL's proposed Model Rule 5.5 allows clients to consciously choose the lawyer they want to represent them as long as the lawyer has disclosed to the client the facts as to where they are licensed. It does not abandon client protection in empowering client choice. It also ensures that lawyers who ultimately do provide incompetent legal services, or who otherwise run afoul of their ethical obligations, will be capable of being held responsible for their misconduct or shortcomings in any (or all) of the relevant jurisdictions.

APRL's proposal to revise Model Rule 5.5 is also consistent with the trend that has come from several jurisdictions who have issued guidance during the 2020 Pandemic to lawyers who found themselves practicing across state lines less by choice and more by necessity.⁴⁸ Not all of the guidance issued in these jurisdictions has been focused entirely

⁴⁸ D.C. Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic (March 23, 2020) (interpreting the "incidental and temporary practice" exception of DC's Rule 49(c)(13)); *see also* N.J. Committee on the Unauthorized Practice of Law Op. 59, Advisory Committee on Prof. Ethics Op. 742 (Oct. 6, 2021); Pennsylvania State Bar Op. 300 (April 2020); Utah State Bar Ethics Advisory Committee Opinion

upon, or limited to situations where, lawyers were forced for public health reasons to live somewhere other than where they were licensed, but, if history is a guide, absent further improvements in the rule itself, then the progress that has been made will likely not come to fruition. APRL's proposed Model Rule 5.5 embeds the concepts of client choice, transparency, and accountability in a way that we believe will long outlive those who currently practice law under the existing regulatory system.

No. 19-03 (May 14, 2019); The Fla. Bar re: Advisory Opinion – Out-of-State Attorney Working Remotely From Florida Home, SC20-1220 (Fla. May 20, 2021).

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a *tribunal*, the rules of the jurisdiction in which the *tribunal* sits, unless the rules of the *tribunal* provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio. Extension of the disciplinary authority of Ohio to other lawyers who provide or offer to provide legal services in Ohio is for the protection of the citizens of Ohio. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. See Rule V, Section 20 of the Supreme Court Rules for the Government of the Bar of Ohio. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Ohio may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] A lawyer admitted in another state, but not Ohio, may seek permission from a tribunal to appear *pro hac vice*. Effective January 1, 2011, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII. Once *pro hac vice* status is extended, the tribunal retains the authority to revoke the status as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Revocation of *pro hac vice* status and disciplinary proceedings are separate methods of addressing lawyer misconduct, and a lawyer may be subject to disciplinary proceedings for the same conduct that led to revocation of *pro hac vice* status.

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

12-1698

In re: :
Complaint against : **Case No. 11-077**
Donald Harris : **Findings of Fact,**
Respondent : **Conclusions of Law, and**
: **Recommendation of the**
: **Board of Commissioners on**
Disciplinary Counsel : **Grievances and Discipline of**
: **the Supreme Court of Ohio**
Relator :
:

FILED
OCT 08 2012
CLERK OF COURT
SUPREME COURT OF OHIO

OVERVIEW

{¶1} This case presents a matter of first impression related to the application of Prof. Cond. R. 8.5(a) to a lawyer not admitted in Ohio but providing legal services within the state. As set forth below, the panel finds that Respondent engaged in multiple violations of the Ohio Rules of Professional Conduct and recommends that Respondent be indefinitely suspended from the practice of law.

{¶2} This matter was heard on April 23, 2012 in Columbus, Ohio before a panel consisting of Keith Sommer, Martha Butler Clark and McKenzie Davis, chair. None of the panel members resides in the district from which the complaint originated, nor did any of the panel members serve on the probable cause panel that certified the complaint.

{¶3} Geoffrey Oglesby represented Respondent. Phillip King represented Relator.

{¶4} On August 15, 2011, a four-count complaint was filed against Respondent, Donald Harris, a lawyer admitted to the practice of law in the District of Columbia (March 2004)

and the Federal Bars of both the Northern (May 2004) and Southern (August 2007) Districts of Ohio. Respondent lives in Sandusky, Ohio and focused his practice in bankruptcy.

{¶5} On October 31, 2011, Respondent filed a pro se answer to Relator's complaint.

{¶6} On March 5, 2012, Geoffrey Oglesby filed a notice of appearance on behalf of Respondent.

{¶7} On April 16, 2012, Relator filed a witness list and an exhibit list. In addition, Relator filed a motion in limine regarding specific testimony of Relator's witness, Darlene Martincak. Respondent did not file a response to Relator's motion in limine until the date of the hearing. Arguments were heard on the motion at the April 23, 2012 hearing. Relator's motion was denied, but Respondent's examination of Ms. Martincak would be limited to what occurred during Respondent's representation of her. Respondent's objection to the ruling was duly noted.

Discussion of Enforcement of a Lawyer Not Admitted to Practice Law in Ohio

{¶8} This is a matter of first impression for the Board. It is the first attempt of Relator to utilize its authority under Prof. Cond. R. 8.5.

{¶9} The Supreme Court of Ohio adopted Prof. Cond. R. 8.5 in 2007, to ensure adequate protection of Ohio citizens who are offered and provided legal services in Ohio. More specifically, Prof. Cond. R. 8.5 authorized the Court to enforce the Ohio Rules of Professional Conduct against an attorney that does not have an Ohio license but represented Ohio citizens in a court that is geographically located in Ohio. See Prof. Cond. R. 8.5, Comment 1.

{¶10} Prior to the Court's adoption of Prof. Cond. R. 8.5 in 2007, Ohio citizens who wished to file a grievance against a lawyer not licensed in Ohio were required to do so within the federal system or in the foreign licensing jurisdiction. Such a mechanism was too cumbersome and often too expensive to be an option for Ohio citizens. To address this concern in a more

broad sense, the American Bar Association designed Model Rule 8.5 to assist states in closing this gap in coverage to citizens against a lawyer not licensed in the state the legal assistance was provided. Prof. Cond. R. 8.5 is virtually identical to the ABA Model Rule 8.5.

{¶11} In the present matter, Respondent is licensed in the District of Columbia, but holds a license in the Federal Bars of the Northern District of Ohio and the Southern District of Ohio, and the 6th Circuit Court of Appeals. Therefore, Respondent is able to practice law in the District of Columbia and any of the federal courts that are geographically located in Ohio. As such, Respondent, who resides in Sandusky, represents Ohio citizens in Ohio's federal courts, mainly the Northern District of Ohio – U.S. Bankruptcy Court.

{¶12} Respondent contends Prof. Cond. R. 8.5 is unconstitutional and the other options currently in place are adequate. Respondent Closing Argument Brief 2-7. Citing various provisions of the Ohio Constitution, Respondent states “[T]he Ohio Constitution does not give the Ohio Supreme Court authority over the United States District Court or the Sixth Circuit Court of Appeals.” Respondent Closing Argument Brief 3. Additionally, Respondent indicates “[T]he rule violates the commerce clause and full faith and credit because it restricts members of the federal bar, who are licensed by the United States District Courts from participating in a forum with an understanding of rules that do not apply to them.” Respondent Closing Argument Brief 9.

{¶13} Respondent then suggests that Relator is selectively utilizing its perceived authority over only some lawyers not licensed in Ohio. Respondent Closing Argument Brief 4. Respondent contends Relator has an understanding to allow the U.S. Attorney General to handle some disciplinary matters of federal lawyers. Respondent believes this suggested type of selective enforcement is unconstitutional. *Id.*

{¶14} The panel is not persuaded by Respondent’s constitutional argument. Prof. Cond. R. 8.5 has been in place since 2007. In fact, the American Bar Association revised Model Rule 8.5 in 2002 to address this particular situation. Additionally, the District of Columbia adopted Prof. Cond. R. 8.5, which is substantially similar to the ABA Model Rule 8.5. Therefore, Respondent is aware of the potential to be subject to the rules of the state in which Respondent’s legal services are provided.

{¶15} Additionally, both federal district courts require attorneys to abide by the Ohio Rules of Professional Conduct. Ohio Northern District Local Rule 83.5(b); Ohio Southern District Local Rule IV.

{¶16} Prof. Cond. R. 8.5 specifically states, “a lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio.” Relator has alleged that Respondent both provided and offered legal services in Ohio. Relator Closing Argument Brief 15-19. Whether Relator provided sufficient evidence that Respondent provided legal services in Ohio will be addressed later; but, Prof. Cond. R. 8.5(a) clearly provides Relator the opportunity to bring forth the allegations.

{¶17} Therefore, the panel finds Relator’s use of Prof. Cond. R. 8.5 in alleging violations against Respondent appropriate.

{¶18} Additionally, Prof. Cond. R. 8.5(a) specifically states, “a lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.” Thus, a lawyer could be charged and required to defend oneself in two jurisdictions as a result of the same conduct. Furthermore, neither jurisdiction is bound by the ruling of the previous jurisdiction’s findings.

{¶19} Procedurally, it is also necessary to examine the choice of law requirements set forth in Prof. Cond. R. 8.5(b). Prof. Cond. R. 8.5(b)(1) requires the rules of the jurisdiction to be applied if the conduct involves a pending matter. Prof. Cond. R. 8.5(b)(2) requires for all other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred be applied, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction be applied. In the matter at hand, Respondent's representation of client's in the Northern District of Ohio U.S. Bankruptcy Court and counsel to other clients in Ohio, dictate that Ohio should be the controlling jurisdiction and consequently, Respondent is subject to the Ohio Rules of Professional Conduct.

Misapplication of Prof. Cond. R. 5.5(a)

{¶20} In Respondent's closing argument brief, Respondent asserts Relator charged Respondent with the wrong section of Prof. Cond. R. 5.5. Respondent is charged with a violation of Prof. Cond. R. 5.5(a), which Respondent contends, does not apply to him. Respondent believes Prof. Cond. R. 5.5(a) applies to attorneys licensed in Ohio who practice in another jurisdiction. On the other hand, Prof. Cond. R. 5.5(b) applies to situations like the matter at hand, where a lawyer not licensed in Ohio is supposedly practicing in Ohio. Respondent Closing Argument Brief 7-8. Therefore, the matter does not apply to Respondent's alleged misconduct.

{¶21} The panel also disagrees with Respondent's argument that Relator is charging the wrong section of Prof. Cond. R. 5.5. Prof. Cond. R. 5.5(a) states: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Relator is charging Respondent with practicing law in a jurisdiction

where he is not licensed to practice. The panel finds that is the intent of Prof. Cond. R. 5.5(a). Rule 5.5, Comment 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Count One—Skeel Matter

{¶22} Respondent represented Aimee Skeel in two bankruptcies filed in the U.S. Bankruptcy Court for the Northern District of Ohio. The first was filed on February 17, 2009 (hereafter referred to as the 2009 bankruptcy). Relator Ex. 2. Among the items filed with the bankruptcy court was a “Disclosure of Compensation of Attorney for Debtor,” which certifies Respondent had received \$1,500 in fees from Skeel for the 2009 bankruptcy within a year of its filing. Relator Ex. 3. Skeel confirmed at the panel hearing that \$1,500 was the amount paid for the 2009 bankruptcy. Hearing Tr. 150. However, Skeel was not able to make payments according to the Chapter 13 plan and the 2009 bankruptcy was dismissed. Hearing Tr. 151.

{¶23} On May 10, 2010, Respondent filed the second bankruptcy on behalf of Skeel (hereafter referred to as the 2010 bankruptcy). Relator’s Ex. 5. However, Respondent did not file an “Official Form 1” document as required by the bankruptcy court in the initial filing. Relator’s Ex. 7. On May 11, 2010, the bankruptcy court issued a show cause order requesting why the matter should not be dismissed for failure to follow the procedural rules. Relator’s Ex. 7. Both the “Official Form 1” and the response to why the matter should not be dismissed for failure to follow the procedural rules were to be filed by May 14, 2010. Relator’s Ex. 7. Respondent filed the Official Form 1, but did not file the required response ordered by the bankruptcy court. Respondent’s answers to questioning on the required response were extremely evasive, never acknowledging the need for the additional document. Hearing Tr. 291-298.

{¶24} After the initial Chapter 13 filing, Respondent was to file the following six documents within 14 days: (1) schedule and a summary of schedule; (2) a statement of financial affairs; (3) a Chapter 13 plan; (4) an attorney fee disclosure statement; (5) copies of all payment advices or other evidence of payment received by debtor from any employer; and (6) a statement of current income and calculation of commitment period and disposable income. U.S. Bankruptcy Rules 1007 and 3015. Respondent did not file any of these documents within the 14-day time period. Relator's Ex. 8. On May 26, 2010, the bankruptcy court issued a show cause order why the 2010 bankruptcy should not be dismissed for again failing to follow the procedural rules. *Id.* The court ordered Respondent to file the six documents by June 9, 2010 and set a hearing for July 6, 2010 to determine whether the 2010 bankruptcy should be dismissed and whether appropriate sanction and/or disgorgement of attorney fees should not be imposed by the court. Relator's Ex. 9. On June 15, 2010, six days after the court requested the documents, Respondent filed five of the six documents (copies of all payment advices or other evidence of payment received by debtor from any employer were not filed). Hearing Tr. 301-302. Included in the documents that were filed was the "Disclosure of Compensation of Attorney for Debtor," wherein Respondent certifies he had received \$1,500 for the bankruptcy filing. Relator's Ex. 6.

{¶25} The bankruptcy court also requires petitioners to upload the information of the creditors listed on the Matrix filed with the original petition into the court's electronic case filing (ECF) system. Respondent did not upload the required information. On June 18, 2010, the bankruptcy court issued an order requesting Respondent upload the required information on the Matrix by June 21, 2010. Relator's Ex. 10. The bankruptcy court's order also stated it would dismiss the 2010 bankruptcy without a hearing if Respondent did not upload the required information by June 21, 2010. Relator's Ex. 10. Respondent did not upload the required

information set forth in the court's order and Skeel's 2010 bankruptcy was dismissed on June 23, 2010. Relator's Ex. 11. Skeel testified that she attempted to contact Respondent numerous times during the failures to file and upload the required and requested information, but Respondent did not call or text message her back. Hearing Tr. 155-156. Respondent, on the other hand, claims that Skeel never provided him with the necessary information to file the required documentation.

{¶26} On June 25, 2010, Skeel filed a grievance with Relator against Respondent. Relator's Ex. 13. In response to letters of inquiry by Relator, Respondent acknowledged Skeel's 2010 bankruptcy did not get completed. Relator's Ex. 15. Additionally, Respondent stated he received \$800 for attorney fees for the 2009 bankruptcy, seemingly contrary to the 2009 disclosure of compensation of attorney for debtor filed February 17, 2009. Relator's Ex. 15. Respondent also indicated he did not receive attorney fees from Skeel for the 2010 bankruptcy, seemingly contrary to the 2010 disclosure of compensation of attorney for debtor filed June 15, 2010. Relator's Ex. 15. In a follow-up letter, Respondent explained the 2010 disclosure of compensation of attorney for debtor represented the \$1,500 previously paid in 2009, also contrary to the earlier letter sent to Relator. Relator's Ex. 16. Skeel testified that she paid \$1,500 twice to Respondent. Hearing Tr. 150-152. Respondent claims to have been paid \$1,500 once. Respondent eludes to the fact that an employee took the second \$1,500 and did not give it to him. Hearing Tr. 304-305.

{¶27} On June 18, 2010, Skeel sent a letter to the bankruptcy court judge complaining about Respondent's representation in this matter. Relator's Ex. 12. In the letter, Skeel outlined how Respondent had failed to keep her updated on the case and that she had provided him with all the necessary information. *Id.* Skeel indicated that she would not be able to attend the July 6,

2010 hearing on whether appropriate sanction and/or disgorgement of attorney fees should not be imposed by the court and to allow this letter to serve as her testimony. *Id.*

{¶28} The July 6, 2010, hearing on sanction and disgorgement was heard without Skeel. The bankruptcy judge declined to order sanction or disgorge any attorney fees. Respondent's Ex. 1; Document 27.

{¶29} Respondent is charged with the following rule violations in connection with the conduct set forth in Count One: Prof. Cond. R. 1.3 [diligence]; Prof. Cond. R. 1.4(a)(4) [failure to comply as soon as practicable with reasonable requests for information from the client]; Prof. Cond. R. 1.16(e) [failure to promptly refund any unearned attorney's fee upon termination of representation]; Prof. Cond. R. 8.1(a) [a lawyer shall not knowingly make a false statement of material fact in connection with a disciplinary matter]; Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice]; and Prof. Cond. R. 8.4(h) [conduct adversely reflecting on the lawyer's fitness to practice law].

{¶30} Respondent suggests the entire count should be dismissed simply because the bankruptcy court held in the show cause hearing that Respondent should not be sanctioned or required to disgorge the attorney fees. Respondent Closing Argument Brief 13-20.

{¶31} The panel is not persuaded that the bankruptcy court's decision not to sanction Respondent nor disgorge fees should have any bearing on our conclusion.

{¶32} First, the panel believes Prof. Cond. R. 8.5(a) should be interpreted to mean that (1) a lawyer may be required to defend oneself in two jurisdictions as a result of the same conduct, and (2) neither jurisdiction is bound by the ruling of the previous jurisdiction's findings.

{¶33} Secondly, and more fundamentally, the show cause hearing referenced by Respondent bears little similarity to the disciplinary matter brought before the Board. Thus, to analogize them and suggest the matter has been fully examined is not appropriate.

{¶34} The panel finds clear and convincing evidence that Respondent violated all of the rules alleged by Relator.

{¶35} Respondent violated Prof. Cond. R. 1.3, by continuously failing to file the appropriated document required by the bankruptcy court and allowing the matter to be dismissed.

{¶36} Respondent violated Prof. Cond. R. 1.4(a)(4), by not adequately communicating with Skeel and if necessary obtaining the appropriate information to file the bankruptcy.

{¶37} Respondent violated Prof. Cond. R. 1.16(e), by not refunding any unearned fee Respondent and his office received from Skeel. Irrespective of whether Skeel gave the money to Respondent or his office, Respondent is responsible for the actions of his office. Such failure to take ownership of this issue constitutes a violation of Prof. Cond. R. 1.16(e).

{¶38} Respondent violated Prof. Cond. R. 8.1(a), by filing inaccurate materials with the bankruptcy court and with Relator. Respondent's failure to clear up the disputed amounts of legal fees paid to Respondent with the bankruptcy court, his client and Relator constitute a violation.

{¶39} Respondent violated Prof. Cond. R. 8.4(c), by failing to refund fees for work that was not completed.

{¶40} Respondent violated Prof. Cond. R. 8.4(d), by failing to complete the bankruptcy on behalf of Skeel and neglecting her inquiries.

{¶41} Respondent violated Prof. Cond. R. 8.4(h), by the totality of the circumstances.

Count Two—Sharp Matter

{¶42} Ronald Sharp contacted Respondent in August 2009, requesting his assistance in modifying a mortgage. Relator's Ex. 18. Respondent had represented Sharp in a Chapter 7 and a Chapter 13 bankruptcy. Hearing Tr. 191. On August 17, 2009, Sharp entered into an agreement with Respondent to modify or renegotiate the mortgage Sharp held on his current residence. Relator's Ex. 18. Sharp had been represented by Loretta Riddle, who shares office space with Respondent, in a domestic matter. Riddle had not completed the domestic matter for Sharp and owed him \$500. Riddle met with Respondent and decided to provide Sharp a credit for the representation in the loan modification. Hearing Tr. 200-204. Respondent did not inform Sharp that he was not licensed to practice law in Ohio. Hearing Tr. 204-205.

{¶43} It is unclear precisely what Respondent did on behalf of Sharp to modify the mortgage. Respondent claims to have contacted HSBC on behalf of Sharp numerous times. Respondent Closing Argument Brief 23. In fact, Respondent claims to have modified Sharp's mortgage with HSBC. Respondent suggests that the Sharp family was not satisfied with the new terms and turned down the modification he was able to obtain on their behalf. Respondent Closing Argument Brief 27. Sharp claims that he later learned HSBC does not do loan modifications, thus Respondent could not have modified the mortgage on his behalf. Hearing Tr. 219. Furthermore, Sharp claims that Respondent or representatives from his office created a fictitious individual for whom he was supposedly working with on the loan. The person Respondent told Sharp he was working for never actually existed at HSBC upon investigation by Sharp. Hearing Tr. 196. However, all parties agree that they spoke with Scott Ciupak, legal counsel for HSBC, on a conference call about renegotiating the mortgage. Hearing Tr. 196-198.

{¶44} There was much discussion about the difference between a loan modification, rate modification, loan renegotiation, and reaffirmation agreement. However, the panel does not believe they are relevant to the issue at hand. The panel was able to decipher a couple of key issues from the complicated and conflicting testimony of both Sharp family members and Respondent. Respondent entered into a separate agreement with Sharp, outside of the two bankruptcy matters, to assist him in a separate legal matter. Respondent did attempt to change the terms of Sharp's mortgage. Sharp was not able to pay whatever amount Respondent was able to negotiate for the mortgage with HSBC. Hearing Tr. 230-233. No documents were presented, by either party, demonstrating the amount Respondent was able to negotiate.

{¶45} Count Two charges Respondent with the following rule violations in connection with his representation of Sharp: Prof. Cond. R. 5.5(a) [a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction]; Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(h).

{¶46} The panel does not find sufficient evidence that Respondent violated Prof. Cond. R. 8.4(c) and Prof. Cond. R. 8.4(h). Although the testimony was confusing and often conflicting, the evidence is not clear enough to conclude Respondent acted with dishonesty, fraud, deceit, or misrepresentation. Nor is the evidence clear enough to conclude that Respondent engaged in conduct adversely reflecting on his fitness to practice law.

{¶47} Additionally, the panel does not find sufficient evidence that Respondent violated Prof. Cond. R. 5.5(a). Prof. Cond. R. 5.5(a) states: "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another is doing so." Respondent is not licensed to practice law in the state of Ohio. To violate the rule, Respondent must have "practiced law." Respondent never disputed that he practiced

law, and the panel concludes Respondent did practice by entering into an agreement with Sharp and attempting to modify the mortgage with HSBC.

{¶48} Respondent argues there is no violation of Prof. Cond. R. 5.5 because he met the criteria set forth in Prof. Cond. R. 5.5(c) and (d). Specifically, Prof. Cond. R. 5.5(c)(4) permits “a lawyer who is admitted in another United States jurisdiction to provide legal services on a temporary basis in this jurisdiction if the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”

{¶49} Although there was a separate agreement put in place with Sharp for the loan modification, the panel believes such a legal act is reasonably related to the bankruptcy, which he is authorized to complete through his federal bar admission. The panel acknowledges the potential creation of a slippery slope as to what can be considered reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. However, we were hard pressed to find a nonlitigation activity that is more closely related to bankruptcy than the potential of the modification of the individual’s home mortgage. Therefore, we conclude insufficient evidence exists to find Respondent violated the alleged rule violations set forth in Count Two and dismiss the entire count.

Count Three—Martincak/Roussos Matter

{¶50} In late 2006, Darlene Martincak verbally entered into an agreement to transfer five properties owned under her company, Mr. Max Properties, to Alexander Roussos. Hearing Tr. 87. Prior to the agreement, Martincak’s brother, who did much of the maintenance on the properties, had a brain aneurysm and would not be able to continue the maintenance. Hearing Tr. 87. The properties became overwhelming and Martincak wanted to sell the properties. *Id.*

{¶51} In 2010, Martincak engaged Respondent to file her bankruptcy. Prior to the filing of the bankruptcy, Respondent met with Martincak and Roussos to discuss the completion of the property transfers. Hearing Tr. 348. Respondent agreed to assist in the transfers. Respondent would create an LLC on behalf of Roussos and handle all of the document transfers from Mr. Max to the newly created LLC. Roussos paid \$1,500 and Martincak paid \$250 for the LLC formation and property transfers. Respondent did not inform Martincak or Roussos that he was not licensed to practice law in Ohio. Hearing Tr. 355-357.

{¶52} Respondent hired Marian Mills, an independent contractor with the National Association of Bankruptcy Petition Preparers to assist in the representation of both Roussos and Martincak. Hearing Tr. 347. Mills is not an attorney, but the membership director for the association. On September 17, 2010, Mills prepared the documentation for the property transfers from Mr. Max to Roussos Contracting, LLC, which had yet to be created, on behalf of Respondent. Hearing Tr. 349. Respondent reviewed the documentation. Respondent had Loretta Riddle, an Ohio licensed attorney with whom he shares office space, briefly review the documentation. Hearing Tr. 351-352. Shortly thereafter, both Martincak and Roussos signed the contracts.

{¶53} On October 5, 2010, Respondent met with Martincak to discuss the formation of the LLC for Roussos. Hearing Tr. 348-349. Respondent drafted the appropriate documentation for an LLC formation. Again, Respondent had attorney Riddle briefly review the LLC documentation. Hearing Tr. 351-352. Respondent gave the documentation to Martincak to obtain the necessary signatures from Roussos. Martincak met with Roussos and obtained the necessary signatures. Martincak returned the LLC formation documentation to Respondent. Respondent again had attorney Riddle briefly review in order to finalize the LLC documentation.

Attorney Riddle received a small amount of compensation, but did not actively participate, nor share any responsibility in the representation of Martincak or Roussos. Hearing Tr. 352-355; 379-380.

{¶54} Respondent contends the formation of the LLC for Roussos was on behalf of Martincak and the property transfers were part of the bankruptcy. Respondent Closing Argument Brief 28. Therefore, according to Respondent, the exceptions set forth in Prof. Cond. R. 5.5(c) and (d) allow Respondent's conduct relating to the formation of the LLC and property transfers. Respondent Closing Argument Brief 28. The panel was not persuaded by Respondent's argument in this count.

{¶55} Count Three charges with respondent with the following rule violations: Prof. Cond. R. 1.6(a) [revealing information relating to the representation of a client, unless the client gives informed consent]; Prof. Cond. R. 5.5(a); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(h).

{¶56} First, the panel finds clear and convincing evidence Respondent violated Prof. Cond. R. 1.6(a) by permitting Attorney Loretta Riddle to review the materials at different intervals in the representation. Neither Martincak nor Roussos gave consent to Respondent to allow her to review the materials. Hearing Tr. 355. Attorney Riddle is not a member of Respondent's firm, nor was she compensated for her services; therefore, she does not meet the authorized disclosure provision of Prof. Cond. R. 1.6(a), Comment [5]. The fact that Marian Mills participated in the representation of Martinack and Roussos does not absolve Respondent of his duty to protect client confidences. Respondent hired Mills to assist him in the representation. Both Martincak and Roussos gave their implied consent by meeting with her and openly discussing the matter with her. Such discussion and or consent was not offered or given by Martincak and Rousos as it relates to Riddle's involvement.

{¶57} Second, the panel finds clear and convincing evidence Respondent violated Prof. Cond. R. 5.5(a) by practicing law in Ohio without a license.

{¶58} In order to find a violation of Prof. Cond. R. 5.5(a), the panel must conclude Respondent “practiced law.” Again, while Respondent does not dispute he practiced law, the panel concluded that Respondent’s entering into a contract with Roussos and Martincak for a total \$1,750 to form an LLC and transfer the properties into the newly formed LLC constitutes the practice of law.

{¶59} Respondent claims the situation in this count is the same as in the previous count. Respondent again suggests his conduct is protected by the exceptions in Prof. Cond. R. 5.5(c) and (d). The panel disagrees.

{¶60} In this count, Respondent formed the LLC on behalf of Roussos, not Martincak. Although Martincak stood to benefit from the formation of the LLC, the legal work was completed for Roussos. Roussos would be the real party in interest in the malpractice claim, not Martincak.

{¶61} Furthermore, the oral agreement for the transfers of property occurred three years prior to Martincak’s bankruptcy. Hearing Tr. 87. Martincak indicated she wanted to get rid of the property because her brother would not be available to assist her in the maintenance. Therefore, it would be impossible for the property transfers to be reasonably related the bankruptcy.

{¶62} The representation of one client cannot be reasonably related to the representation of another client and meet the spirit of the exceptions in Prof. Cond. R. 5.5(c) and (d). The panel cannot find the conduct meets any of the exceptions set forth in Prof. Cond. R. 5.5(c) or (d).

Therefore, the panel finds sufficient evidence for a violation of Prof. Cond. R. 5.5(a) by practicing law in Ohio without an Ohio law license.

{¶63} The panel also finds Respondent violated both Prof. Cond. R. 8.4(c) and (h) by representing both the transferor and transferee in the real estate transaction between Martincak and Roussos and intentionally attempting to practice law in Ohio without an Ohio license.

Count Four—Information about Legal Services Violations

{¶64} Count 4 charges Respondent with the following rule violations: Prof. Cond. R. 7.1(a) [making or using a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services; Prof. Cond. R. 7.5(a) [using letterhead that is misleading as to the identity of the lawyers practicing under the firm name]; Prof. Cond. R. 7.5(d) [implying that a lawyer practices with other lawyers in a firm when this is false]; Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(h).

{¶65} Respondent formed the Donald Harris Law Firm, Attorneys at Law in 2004. Hearing Tr. 263. He has employed a number of different individuals at different times since 2004. Hearing Tr. 403-405. This count deals with the relationship between Respondent and Loretta Riddle. It has been suggested that law firms in small towns benefit from the appearance that they are larger than they actually are. Before the panel can determine whether rule violations occurred, we must first determine whether a law firm existed between Respondent and Riddle.

{¶66} Respondent also maintained a website from 2004 to the date of the hearing. Hearing Tr. 405. A print-out of the website on July 19, 2011 stated "Members of the Ohio Bar, Michigan Bar, Tennessee Bar, American Bar Association, Northern District of Ohio Federal Bar, American Trial Lawyers Association, National Association of Consumer Bankruptcy Attorneys,

and The Washington D.C. Bar.” Relator’s Ex. 36. Another portion of the same website page stated, “The lawyers in the Donald Harris Law Firm are licensed in Ohio, Michigan, Tennessee and the District of Columbia.” *Id.* The website page does not list the other lawyers in the firm. *Id.* A print-out of the website on April 5, 2012, indicated that the first quote listed above was changed to read, “Lawyers in the firm are members of the Ohio Bar, Michigan Bar, Tennessee Bar, American Bar Association, Northern District of Ohio Federal Bar, American Trial Lawyers Association, National Association of Consumer Bankruptcy Attorneys and The Washington DC Bar.” *Id.*

{¶67} Since 2009, Respondent has listed Riddle on his letterhead and considered her the other lawyer in the law firm and therefore able to utilize the terms “Attorneys at Law” in the name of his firm. Hearing Tr. 385. However, Respondent testified that, for tax purposes, he lists himself as a sole practitioner. Hearing Tr. 264. Respondent also testified that he and Riddle do not have a written agreement confirming their business relationship. Hearing Tr. 282.

{¶68} Riddle testified that she stopped receiving a wage from the Donald Harris Law Firm in mid-2008. Hearing Tr. 372. Riddle testified that she has not received a W-2 from Harris since 2007. Hearing Tr. 378. Riddle testified that she does not share her legal fees with the Donald Harris Law Firm. Hearing Tr. 373. Riddle testified that she maintains her own fee agreements. Hearing Tr. 388. Riddle testified that she uses her own letterhead, Loretta Riddle, Attorney at Law, for her cases. Hearing Tr. 393. Riddle testified that she maintains her own professional liability insurance. Hearing Tr. 388. Riddle testified that she has her own books for gross receipts and payments of bills and expenses and her own business account for deposits and expenses. Hearing Tr. 394. Riddle testified that she shares office space and split some office

expenses. Hearing Tr. 389. Finally, Riddle testified that she considers herself a member of the Donald Harris Law Firm. Hearing Tr. 385.

{¶69} The definition of a law firm in Prof. Cond. R. 1.0(c) reads:

“Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or legal department of a corporation or other organization.

{¶70} The rule was designed to prevent conflicts of interest and protect the public from firms representing both sides.

{¶71} Respondent suggests the inclusions of the terms “or other organization” in Prof. Cond. R. 1.0 allows for the creation of a firm, if, in the minds of those that want the firm, believe there is a firm. Additionally, Respondent points to the Indiana Supreme Court’s ruling in *In the Matter of James R. Recker*, (2009) 902 N.E.2d 225, for further justification. In *Recker*, the Indiana Supreme Court looked to the comment section of the Indiana Rules of Professional Conduct Rule 1.0. Specifically, the Court states that:

Whether two or more lawyers constitute a firm* * * can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the rule.

{¶72} Respondent contends a law firm existed based on two factors: (1) the belief by both Respondent and Riddle a law firm existed; and (2) that Respondent and Riddle somehow represented themselves to the Sandusky community that they are part of a law firm.

{¶73} The ABA Model Rules of Professional Conduct Rule 1.0 comment section contains the provision cited by Respondent. It is likely to assume that Indiana adopted Rule 1.0 directly from the ABA Model Rule.

{¶74} The Ohio version of Prof. Cond. R. 1.0 comment section does not include the reference from the Indiana rule cited by Respondent. The comments to the Ohio rule provide no statement that would allow for courts to consider two practitioners that present themselves as a law firm to the public, to be considered a law firm for the purposes of the Rules of Professional Conduct. Therefore, it must be concluded that the Supreme Court of Ohio evaluated the particular provision in the ABA comment section and made a policy decision to not include the statement because the Court did not want to provide for such circumstances.

{¶75} The panel is not convinced a law firm organization existed between Respondent and Loretta Riddle based on the testimony of Loretta Riddle. The panel cannot conclude the inclusion of the terms “or other organizations” in Prof. Cond. R. 1.0 should be construed to permit what amounts to an office-sharing arrangement be considered a law firm.

{¶76} The panel is not bound by the ABA Model Rules or the Indiana Court’s decision because of the Supreme Court of Ohio’s intentional exclusion of the “holding themselves to the public” language. However, if the Ohio court were willing to extend this additional protection, the panel would still not be persuaded by Respondent’s reliance on the Indiana Court’s decision. Although both Donald Harris and Loretta Riddle testified they are a law firm by “presenting themselves to the public,” other facts suggest that is not the case. The mere fact that Riddle maintains her own letterhead implies they do not “present themselves to the public” as a law firm. Additionally, Riddle is not listed on The Donald Harris Law Firm website. Finally, Respondent cannot be a sole practitioner, for tax purposes, but be a law firm in other circumstances when it would be advantageous. These facts together, strongly suggest that Respondent and Riddle do not meet that criteria and are not part of the same law firm.

{¶77} Based on the testimony from Loretta Riddle and websites created by Respondent, the panel finds no law firm organization existed and there is clear and convincing evidence to conclude Respondent violated all of the alleged rule violations.

{¶78} Specifically, the panel finds Respondent violated Prof. Cond. R. 7.1 by falsely including Riddle's name on his letterhead, while she maintained her own letterhead for all the cases she handled. Additionally, Respondent violated Prof. Cond. R. 7.1 by falsely claiming the licensure of numerous bar memberships to his law firm, when he was the only member of the law firm and did not hold those licenses.

{¶79} The panel finds clear and convincing evidence to conclude Respondent violated Prof. Cond. R. 7.5(a) by including Riddle's name in his letterhead when she was not a member of the Donald Harris Law Firm.

{¶80} The panel finds clear and convincing evidence to conclude Respondent violated Prof. Cond. R. 7.5(d) by implying to the public he practices with Riddle in a firm when a law firm does not exist.

{¶81} Finally, the panel finds clear and convincing evidence to conclude Respondent violated Prof. Cond. R. 8.4(c) and (h) by his intentional efforts to misuse and confuse the public about his relationship with Riddle for his potential future economic benefit.

AGGRAVATION, MITIGATION, AND SANCTION

{¶82} Respondent did not provide the panel any specific mitigating factors that should be considered in recommending a less severe sanction. However, the panel finds that Respondent has no prior disciplinary record.

{¶83} The panel, based on Relator's submission, finds the following factors in recommending a more severe sanction:

- *A pattern of misconduct* – The record is clear that Respondent pushed the limits of his licensure to practice in other jurisdictions in numerous situations;
- *Selfish or dishonest motives* – Respondent pushed the limits of his licensure for his own pecuniary gain;
- *Lack of remorse* – Respondent’s conduct during the hearing clearly indicated he does not believe he did anything wrong;
- *Failure to acknowledge the wrongfulness of his actions* – As stated above, Respondent does not believe he did anything wrong;
- *Harm to clients* – There was harm to Skeel, and possibly others relating to the information for legal services violation; and
- *Failure to cooperate with disciplinary proceeding* – Respondent was needlessly difficult during the discovery stage of the proceeding as well as at the hearing.

{¶84} Relator recommends an indefinite suspension with the condition of restitution of \$750 to Aimee Skeel, \$500 to Ronald Sharp, and \$1,500 to Alexander Roussos. Respondent recommends a dismissal of all counts.

{¶85} The presumptive sanction for an attorney engaging in the unauthorized practice of law is disbarment. *Disciplinary Counsel v. Koury*, 77 Ohio St.3d 433, 1997-Ohio-91. The Court has, however, imposed indefinite suspension in a number of other unauthorized practice of law matters.

{¶86} The facts in the matter at hand are much different from the case law regarding unauthorized practice of law. Here, as earlier discussed, is a matter of first impression for the Board. Therefore, previous case law will not provide the panel with much guidance.

{¶87} In the previous cases, the Court’s rulings dealt with attorneys licensed in Ohio, but practicing law while under suspension or on inactive status in Ohio. Here, the panel is faced with an attorney, licensed in the District of Columbia and licensed in the Federal Districts of Ohio, but practicing in Ohio because of his federal bar privileges.

{¶88} The Supreme Court of Iowa was faced with a similar dilemma when addressing misconduct by an out-of-state lawyer who violated the Iowa Rules of Professional Conduct while practicing federal immigration law in Iowa. *Iowa Supreme Court Attorney Disciplinary Bd. v. Carpenter*, 781 N.W.2d 263 (2010). That court fashioned a sanction using its injunctive and equitable powers, finding that such a sanction was necessary for the protection of Iowa citizens, and referenced cases from other states in which a similar result was reached. *Id.* at 269-270.

{¶89} The panel concluded that Respondent knew or should have known his conduct was inappropriate in Counts One and Three. Respondent believed either he could get away with it or make the case, it was close enough to what his federal bar licensure would allow him to do. Count Four, on the other hand, is a clear attempt to manipulate the local community to believe that his firm was much larger than it actually was. The panel found Respondent's and Loretta Riddle's testimony relating to the existence of a law firm not credible.

{¶90} Each individual act of misconduct does not amount to what the panel would conclude as warranting significant time away from the practice of law. However, all the acts together, combined with Respondent's cavalier attitude towards the proceedings and clear attempt to broaden his potential client base by deceptive advertising practice necessitate a different conclusion.

{¶91} Finally, the panel is concerned, given Respondent's belief that the Board and the Court have no authority over his practice, whether the ultimate sanction will impact the manner in which he represents citizens of the state of Ohio, presumably in federal bankruptcy court. Therefore, the panel must conclude the only appropriate sanction would be to indefinitely suspend Respondent from the practice of law. This sanction will, therefore, require Respondent to request reinstatement and demonstrate his awareness of the Court's authority over his ability

to represent citizens of Ohio in the state of Ohio. Respondent's reinstatement should further be conditioned on payment of restitution of \$750 to Aimee Skeel and \$1,500 to Alexander Roussos.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 5, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Donald Harris, be indefinitely suspended from the practice of law with reinstatement subject to the conditions set forth in ¶91 of this report. The Board further recommends that the costs of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.



RICHARD A. DOVE, Secretary

DISCIPLINARY COUNSEL v. HARRIS.

[Cite as *Disciplinary Counsel v. Harris*, 137 Ohio St.3d 1, 2013-Ohio-4026.]

Attorneys—Misconduct—Attorney not licensed in Ohio practicing in federal district court located in Ohio—Ohio has no authority to enforce Ohio Rules of Professional Conduct against attorney not licensed in Ohio—Complaint dismissed and matter referred to Board on Unauthorized Practice of Law for further proceedings.

(No. 2012-1698—Submitted February 26, 2013—Decided September 26, 2013.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 11-077.

O’DONNELL, J.

{¶ 1} This issue in this case is whether Donald Harris, an attorney who is admitted to the practice of law in the District of Columbia and the Northern and Southern Districts of Ohio, but who is not admitted to the practice of law in the state of Ohio, is subject to the disciplinary authority of this court. Because Harris is not a member of the Ohio bar and has not taken an oath to be bound by the Ohio Rules of Professional Conduct, these rules do not apply to him; rather, his conduct is subject to review by the Board on the Unauthorized Practice of Law (“UPL Board”).

{¶ 2} Accordingly, we dismiss the Aimee Skeel matter in deference to the authority of the bankruptcy court, and we dismiss the remaining matters and refer them to the UPL Board for further proceedings.

Factual and Procedural Background

{¶ 3} Donald Harris has never been admitted to the practice of law in the state of Ohio. However, as a member of the District of Columbia bar and of the

bars of the United States District Court for the Northern and Southern Districts of Ohio, he has focused his practice in bankruptcy law before the federal courts geographically located in Ohio.

{¶ 4} In August 2011, disciplinary counsel filed a four-count complaint against Harris relating to his representation of an Ohio client in bankruptcy proceedings before the United States District Court for the Northern District of Ohio, his establishment of a limited-liability company on behalf of an Ohio client, his assistance to an Ohio client in a mortgage modification, and representations regarding the relationship between an Ohio-licensed attorney and the Donald Harris Law Firm. Disciplinary counsel maintains that since Harris is an out-of-state attorney practicing federal law within Ohio's boundaries, he is subject to the disciplinary authority of this state pursuant to Prof.Cond.R. 8.5.

{¶ 5} A hearing panel of the Board of Commissioners on Grievances and Discipline concluded that disciplinary counsel had properly filed the complaint against Harris pursuant to Prof.Cond.R. 8.5. The panel further found that Harris had engaged in numerous violations of the Ohio Rules of Professional Conduct and recommended that Harris be indefinitely suspended from representing Ohio citizens in the state of Ohio. Upon review, the board adopted the findings of fact, conclusions of law, and recommendation of the panel.

{¶ 6} In his objections to the report and recommendation of the board, Harris asserts that Prof.Cond.R. 8.5 does not authorize this court to enforce the Ohio Rules of Professional Conduct against attorneys who are not licensed in Ohio. Moreover, Harris maintains that Prof.Cond.R. 5.5(a)—which prohibits a lawyer from practicing law in a jurisdiction in violation of its regulation of the legal profession—applies only to attorneys licensed in Ohio who practice in another jurisdiction. And he further contends that the federal courts and the District of Columbia have jurisdiction over any disciplinary matters relating to his practice in the federal bankruptcy courts.

The Court’s Authority to Regulate the Practice of Law in Ohio

{¶ 7} Article IV, Section 2(B)(1)(g) of the Ohio Constitution grants this court “ ‘exclusive power to regulate, control, and define the practice of law in Ohio.’ ” *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, ¶ 16, quoting *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 39. We have explained that “[a]ny definition of the practice of law inevitably includes representation before a court, as well as the preparation of pleadings and other legal documents, the management of legal actions for clients, all advice related to law, and all actions taken on behalf of clients connected with the law.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95, ¶ 22.

{¶ 8} We have defined the unauthorized practice of law as “ ‘the rendering of legal services for another *by any person not admitted to practice in Ohio* under Rule I and not granted active status under Rule VI, or certified under Rule II, Rule IX, or Rule XI of the Supreme Court Rules for the Government of the Bar of Ohio.’ ” (Emphasis added.) *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, ¶ 17, quoting former Gov.Bar R. VII(2)(A), 103 Ohio St.3d XCIX, CI. Gov.Bar R. VII(2)(A)(4) defines the unauthorized practice of law to include “[h]olding out to the public or otherwise representing oneself as authorized to practice law in Ohio by a person not authorized to practice law by the Supreme Court Rules for the Government of the Bar or Prof.Cond.R. 5.5.” And controlling in this case is our own precedent: “a lawyer admitted to practice in another state, but not authorized to practice in Ohio, who counsels Ohio clients on Ohio law and drafts legal documents for them is engaged in the unauthorized practice of law in Ohio.” *Cleveland Bar Assn. v. Moore*, 87 Ohio St.3d 583, 584, 722 N.E.2d 514 (2000), citing *Cleveland Bar Assn. v. Misch*, 82 Ohio St.3d 256, 695 N.E.2d 244 (1998).

Rules of Professional Conduct Do Not Apply to Harris

{¶ 9} Although Harris is licensed to practice law in another jurisdiction, because he is not admitted to the Ohio bar, our Rules of Professional Conduct, designed to regulate conduct of attorneys admitted to practice law in Ohio, do not apply to him. He never subjected himself to them because he has never been admitted to practice law in this state.

{¶ 10} Every lawyer who is admitted to practice law in Ohio takes an oath of office. *See* Gov.Bar R. I(1)(F). As part of that oath, the attorney swears or affirms to support the Constitutions of the United States and the state of Ohio and to “abide by the Ohio Rules of Professional Conduct.” Gov.Bar R. I(8)(A).

{¶ 11} Harris never took that oath and never agreed to abide by our rules, and we are reluctant to impose our rules of conduct on him or other such attorneys who engage in the practice of law in our state. It appears that this is precisely why we have created the UPL Board and why we have defined the unauthorized practice of law as “ ‘[t]he rendering of legal services for another by any person not admitted to practice in Ohio.’ ” *Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, ¶ 17, quoting former Gov.Bar R. VII(2)(A), now Gov.Bar R. VII(2)(A)(1).

{¶ 12} In this regard, Harris is no different from an accountant, a real estate agent, or a financial planner who undertakes activity that constitutes the practice of law and who becomes subject to discipline pursuant to the unauthorized practice of law framework. It is inconsistent to conclude that an attorney admitted in another jurisdiction who engages in the unauthorized practice of law in Ohio becomes subject to the Board of Commissioners on Grievances and Discipline when another professional, such as a real estate agent, who engages in the unauthorized practice of law becomes subject to the UPL Board. Similarly, our decision today is in accordance with Gov.Bar R. VI(3)(C), which provides:

An attorney who is admitted to the practice of law in another state or in the District of Columbia, but not in Ohio, and who performs legal services in Ohio for his or her employer, but fails to register in compliance with this section or does not qualify to register under this section, *may be referred for investigation of the unauthorized practice of law* under Gov.Bar R. VII * * *.

(Emphasis added.)

{¶ 13} Additionally, our sanctions for serious violations of the Rules of Professional Conduct, suspension and disbarment, are ineffective and meaningless to Harris because he is not a member of the Ohio bar. We cannot suspend or disbar an attorney who is not a member of the Ohio bar. Thus, we consider these matters as alleged unauthorized practice of law violations.

Harris's Conduct

The Bankruptcy Proceedings

{¶ 14} Harris represented Aimee Skeel in two bankruptcy petitions filed in the United States Bankruptcy Court for the Northern District of Ohio. We determine that Harris did not engage in the unauthorized practice of law when he represented Skeel because, as a member of the District of Columbia bar, and having been admitted to practice in the Northern District of Ohio, he was *authorized* to practice before the United States Bankruptcy Court for the Northern District of Ohio. As such, he becomes subject to the disciplinary authority of those federal courts.

{¶ 15} As the Bankruptcy Court for the Northern District of Ohio explained, “[a] bankruptcy court has the power to regulate the practice of law in the cases before it.” *In re Ferguson*, 326 B.R. 419, 422 (Bankr.N.D.Ohio 2005), citing *United States v. Johnson*, 327 F.3d 554, 560 (7th Cir.2003); *see also*

Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (“the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it”). Specifically, Loc.R. 2090-2(b) of the United States Bankruptcy Court for the Northern District of Ohio states that “[p]rofessional conduct and attorney discipline shall be governed by Local Civil Rule 83.7,” which provides that “any attorney admitted to practice before this Court may be subjected to such disciplinary action as the circumstances warrant.” Loc.Civ.R. 83.7(b)(1) of the United States District Court for the Northern District of Ohio.

{¶ 16} Here, the United States Bankruptcy Court for the Northern District of Ohio exercised its authority and declined to sanction Harris or order the disgorgement of attorney fees for his representation of Skeel in bankruptcy proceedings. Because the alleged misconduct involving Skeel occurred before the United States Bankruptcy Court for the Northern District of Ohio and because that court has the power to discipline Harris for his practice before it, we dismiss this charge in deference to the disciplinary authority of the United States Bankruptcy Court for the Northern District of Ohio.

Formation of an L.L.C.

{¶ 17} Darlene Martincak engaged Harris to file a petition in bankruptcy. She also asked Harris to help her transfer five properties owned by her company to Alexander Roussos. Prior to the filing of the bankruptcy, Harris met with Martincak and Roussos to discuss the property transfers and agreed to assist them. In relation to these transactions, during oral argument, Harris’s counsel admitted that Harris had formed an L.L.C. Harris did not inform Martincak or Roussos that he was not licensed to practice law in Ohio.

{¶ 18} Harris has never been admitted to the practice of law in Ohio, does not have active status, and is not certified. By definition, then, Harris did not commit a disciplinary violation because he never became subject to our

disciplinary rules by gaining admission to the bar of the state of Ohio. Rather, Harris may have engaged in the unauthorized practice of law when he assisted Roussos in establishing an L.L.C. in accordance with Ohio law and when he participated in transferring properties to that L.L.C. *See Columbus Bar Assn. v. Verne*, 99 Ohio St.3d 50, 2003-Ohio-2463, 788 N.E.2d 1064, ¶ 1-4. In addition, by his silence, he may have further engaged in the unauthorized practice of law by leading Roussos and Martincak to believe that he was a member of the Ohio bar. *See Gov.Bar R. VII(2)(A)(4)*, which defines the unauthorized practice of law to include holding out to the public or otherwise representing oneself as authorized to practice law. Thus, since Harris is not admitted to the Ohio bar and because the conduct with which he is charged has been defined by this court to constitute the unauthorized practice of law, we dismiss the disciplinary action and refer this matter to the UPL Board.

Modification of a Mortgage

{¶ 19} Harris also agreed to seek modification of a mortgage that Ronald Sharp—a client whom Harris had represented in two prior bankruptcy proceedings—held on his residence and failed to inform Sharp that he was not licensed to practice law in Ohio.

{¶ 20} While we agree with the board that there is insufficient evidence to support the allegations that Harris committed any disciplinary violations relating to the modification of Sharp’s mortgage, we refer this matter to the UPL Board for its consideration and review.

Violations Involving Information about Legal Services

{¶ 21} Harris formed the Donald Harris Law Firm in 2004. The firm maintained a website, which indicated that unnamed attorneys in his firm were licensed in various states, including Ohio. In addition, Harris’s letterhead stated, “Attorneys at Law” below the firm name and listed Loretta Riddle, a member of the Ohio bar, as an attorney. However, the nature of the working relationship

between Harris and Riddle is unclear. Thus, by holding out to the public that Riddle was a member of the Donald Harris Law Firm, he may have engaged in the unauthorized practice of law in Ohio. *See* Gov.Bar R. VII(2)(A)(4). We therefore refer this matter to the UPL Board for its consideration and review.

Conclusion

{¶ 22} Because Harris is not a member of the Ohio bar, he is not subject to this court’s disciplinary authority. Rather, as an attorney not admitted to practice in Ohio, he may have engaged in the unauthorized practice of law by rendering legal services in Ohio to Ohio clients.

{¶ 23} Therefore, in conformity with our previous decisions in *Moore* and *Misch* and our longstanding definition of the unauthorized practice of law, we dismiss the Skeel matter in deference to the authority of the bankruptcy court. We further dismiss the Roussos/Martincak matter, the Sharp matter, and the charges relating to information about legal services and refer these matters to the UPL Board for further proceedings.

So ordered.

O’CONNOR, C.J., and PFEIFER, LANZINGER, KENNEDY, FRENCH, and O’NEILL, JJ., concur.

Jonathan E. Coughlan, Disciplinary Counsel, and Philip A. King, Assistant Disciplinary Counsel, for relator.

Oglesby & Oglesby, Ltd., and Geoffrey L. Oglesby, for respondent.



IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
ARIZONA CODE OF JUDICIAL) Administrative Order
ADMINISTRATION § 7-210:) No. 2020 - 174
LEGAL PARAPROFESSIONAL)
)
)
_____)

The above-captioned provision having come before the Arizona Judicial Council on October 22, 2020 and having been approved and recommended for adoption,

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the above-captioned provision, attached hereto, is adopted as section of the Arizona Code of Judicial Administration, effective January 1, 2021.

Dated this 4th day of November, 2020.

ROBERT BRUTINEL
Chief Justice

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 7: Administrative Office of the Courts
Chapter 2: Certification and Licensing Programs
Section 7-210: Legal Paraprofessional

A. Definitions. In addition to the definitions in ACJA § 7-201(A), the following definitions apply to this section:

“Advocacy” means course content or practical experience that demonstrates and develops skills that are associated with conducting court hearings and trials, administrative hearings, mediation and arbitration, and settlement and plea negotiation.

“Board” means the Board of Nonlawyer Legal Service Providers.

“Civil procedures course” means at least 3 credits from a course dedicated to civil procedure and the remaining required credits can be obtained through a course or courses that cover an area of civil law, such as administrative law, if the course includes procedural law content.

“Experiential learning” means learning through a format such as an internship, externship or clinical experience during which students develop knowledge, skills, and values from direct experiences outside a traditional academic setting.

“Legal Paraprofessional” (“LP”) means an individual licensed pursuant to this section to provide legal services without the supervision of an attorney in the areas of law and within the scope of practice defined herein.

“Legal specialization course” means a course that covers substantive law or legal procedures and that was developed specifically for, and that teaches practical skills needed by, paralegals or legal paraprofessionals. For clarity, courses in general “business law” designed for undergraduate or graduate business curriculums and law-related courses that focus solely on theory do not qualify as a legal specialization course.

“Substantive law-related experience” means the provision of legal services as a paralegal or paralegal student including, but not limited to, drafting pleadings, legal documents or correspondence, completing forms, preparing reports or charts, legal research, and interviewing clients or witnesses in the area(s) or practice the applicant seeks to be licensed. Substantive law-related experience does not include routine clerical or administrative duties.

B. Applicability. This section applies to individuals who provide legal services within the exception to the prohibition of the unauthorized practice of law set forth in Supreme Court Rule 31.3(e)(4) and this section. To qualify to provide legal services under the specified exception pursuant to Rule 31.3(e)(4) and this section, legal paraprofessionals shall hold a valid license and perform their duties in accordance with subsection (F). A person shall not represent that he or she is a legal paraprofessional unless the person holds an active license as a legal paraprofessional. This section is read in conjunction with ACJA § 7-201: General Requirements, and the Arizona Rules of Supreme Court governing the practice of law. In the

event of any conflict between the Arizona Rules of Supreme Court, ACJA § 7-201, and ACJA § 7-210, the Rules of Supreme Court shall govern.

C. Purpose. The supreme court has inherent regulatory power over all persons providing legal services to the public, regardless of whether they are lawyers or nonlawyers. Accordingly, this section is intended to result in the effective administration of the legal paraprofessional licensing program.

D. Administration.

1. Role and Responsibilities of the Supreme Court. In addition to the requirements of ACJA § 7-201(D), the supreme court shall review recommendations from the board for licensure of applicants and make a final determination on the licensure of these applicants.
2. Establishment and Administration of Fund. The supreme court shall establish a legal paraprofessional fund consisting of monies received for license fees, costs, and civil penalties. The supreme court shall administer the legal paraprofessional fund and shall receive and expend monies from the fund.
3. Role and Responsibilities of the Division Staff. These responsibilities are contained in ACJA § 7-201(D).
4. Board of Nonlawyer Legal Service Providers. In addition to the requirements of ACJA § 7-201(D) the following requirements apply:
 - a. The Board of Nonlawyer Legal Service Providers is established, comprised of the following eleven members appointed by the chief justice:
 - (1) Two certified legal document preparers;
 - (2) Until June 30, 2022, two additional members and thereafter, two legal paraprofessionals,
 - (3) One judge or court administrator;
 - (4) One clerk of the superior court or designee;
 - (5) One attorney;
 - (6) Two public members; and
 - (7) Two additional members.
 - b. The board shall issue licenses to qualified applicants pursuant to subsections (E)(2) and (3).
 - c. On or before April 1 of each year, the board shall file a report with the supreme court describing the status of the legal paraprofessional program. The report shall include but is not limited to, the following information:
 - (1) The number of applications granted and declined during the previous calendar year;
 - (2) The number of licensed legal paraprofessionals as of December 31 of the previous calendar year;

- (3) The number of charges filed against legal paraprofessionals during the previous calendar year and the nature of the charge(s);
 - (4) The number of complaints initiated by the state bar during the previous calendar year and the nature of the complaint;
 - (5) Discipline imposed during the previous calendar year, the nature of the conduct leading to the discipline and the discipline imposed; and
 - (6) Recommendations concerning modifications or improvements to the legal paraprofessional program.
- d. The state bar shall provide the board with the following information:
- (1) On a calendar quarter basis:
 - (a) The number of charges filed against legal paraprofessionals during the previous calendar quarter and the nature of the charge(s);
 - (b) The number of complaints initiated by the state bar during the previous calendar quarter and the nature of the complaint; and
 - (c) Discipline imposed during the previous calendar quarter, the nature of the conduct leading to the discipline and the discipline imposed.
 - (d) The current list of licensed LP's; the state bar shall submit a copy to the clerk of the supreme court.
 - (2) On or before January 31 on an annual basis:
 - (a) the number of licensed legal paraprofessionals as of December 31; and
 - (b) Recommendations concerning modifications or improvements to the legal paraprofessional program.
 - (3) Such other information as the board may request to prepare the report described in (D)(4)(c) herein.

E. Licensure. In addition to the requirements of ACJA § 7-201(E)(1) through (5), the following requirements apply:

1. Necessity. A person shall not represent that the person is a legal paraprofessional, or is authorized to provide legal services, without holding a valid license pursuant to this section.
2. Eligibility for Applying for a License.
 - a. All potential applicants for a license, in addition to meeting the requirements set forth in subsection (E)(3), shall meet the examination requirements of this subsection.
 - (1) Potential applicants for a license shall successfully pass the examination prior to submitting an application for licensure.
 - (2) Upon a potential applicant passing the examination, division staff shall forward notice to the potential applicant of the potential applicant's fulfillment of the examination requirement and provide the potential applicant with a license application form which shall include forms necessary for a review of qualification based on character and fitness.

b. Administration of the Examination. In addition to the requirements of ACJA § 7-201(E):

(1) The examinations for a license shall consist of:

- (a) a test on legal terminology, substantive law, client communication, data gathering, document preparation, the ethical code for LPs, and professional and administrative responsibilities pertaining to the provision of legal services, as identified through a job analysis conducted at the direction of the board; and
- (b) a substantive law test on each of the areas of practice described in subsection (F)(2) in which the applicant seeks to be licensed. The examinations shall be administered in a board-approved format and delivery method.

(2) Administration of reexaminations. These requirements are contained in ACJA § 7-201(E)(1)(f)(2).

3. Licensing.

a. Fingerprinting. Pursuant to ACJA § 7-201(E)(1)(d), an applicant shall furnish fingerprints for a criminal background investigation.

b. Eligibility for License; Education. The board shall grant a license to an applicant who possesses the following qualifications:

(1) A citizen or legal resident of the United States;

(2) At least twenty-one years of age;

(3) Not have been denied admission to the practice of law in Arizona or any other jurisdiction;

(4) An applicant disbarred or suspended from the practice of law in Arizona or any other jurisdiction may only be granted a license if approved by the supreme court;

(5) Of good moral character;

(6) Complies with the laws, court rules, and orders adopted by the supreme court governing legal paraprofessionals in this state;

(7) The applicant has successfully passed the legal paraprofessional examination for each area of practice in which they seek licensure;

(8) The applicant has been deemed qualified by the board based on character and fitness; and

(9) The applicant shall also possess one of the following combinations of education:

- (a) An associate-level degree in paralegal studies or an associate-level degree in any subject plus a certificate in paralegal studies approved by the American Bar Association or is offered by an institution that is accredited by an institutional accrediting agency recognized by the U.S. Department of Education or the Council for Higher Education Accreditation (CHEA) and that requires successful completion of a minimum of 24 semester units, or the clock hour equivalent, in legal specialization courses which shall include a minimum of:

- (i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3

credit hours of legal research and writing, and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy;

(iii) For the administrative law endorsement: 3 credit hours in administrative law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy;

(iv) For all endorsements, a minimum of 3 credit hours in professional responsibility.

All applicants meeting the education requirements of (9)(a) must also have one (1) year of substantive law-related experience under the supervision of a lawyer in the area of practice of each endorsement sought.

(b) Four-year bachelor's degree in law from an accredited college or university and approved by the court that included the following coursework:

(i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iii) For the administrative law endorsement: 3 credit hours in administrative law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iv) For all endorsements, a minimum of 3 credit hours in professional responsibility.

(c) Completed a certification program for legal paraprofessionals approved by the Arizona Judicial Council. Certification programs may be for credit or non-credit but must be offered through an educational institution that is at least regionally accredited. Certification programs must provide the subject matter courses that meet the credit hours or equivalent clock hours in the subject matter areas required for each subject matter area endorsement.

(d) A Master of Legal Studies (MLS) from an American Bar Association accredited law school that included the following coursework:

(i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a

- (a) For licensure in family law, limited jurisdiction civil, and limited jurisdiction criminal, 2 years of substantive law-related experience in each area in which the applicant seeks licensure.
 - (b) For landlord-tenant, debt collection, and administrative law, 2 years of substantive law-related experience in each area in which the applicant seeks licensure.
- (10) Proof of substantive law-related experience will be certified by supervising attorney, meeting the following requirements:
- (a) The name and Bar number of the supervising lawyer(s);
 - (b) Certification by the lawyer that the work experience meets the definition of substantive law-related experience in the practice area in which the applicant will be licensed as defined in (A); and
 - (c) The dates of the applicant's employment by or service with the lawyer(s) or licensed paralegal practitioner(s).
- d. Professionalism Course. Within one year after being licensed, a newly licensed LP shall complete the state bar course on professionalism. A newly licensed LP who fails to comply with the requirements of this paragraph shall be summarily suspended upon motion of the state bar pursuant to Rule 62, provided that a notice of non-compliance shall have been sent to the LP, mailed to the LP's last address of record at least thirty days prior to such suspension, but may be reinstated in accordance with the rules of reinstatement herein.

F. Role and Responsibilities of Licensees.

1. Authorized Services. Upon successful completion of a substantive law exam described in subsection (E)(2)(b) for one or more of the areas of practice described in subsection (F)(2) and the board's endorsement on the legal paraprofessional's license, a legal paraprofessional is authorized to render legal services within the scope of practice defined in subsection (F)(2), without the supervision of an attorney, including:
 - a. Prepare and sign legal documents;
 - b. Provide specific advice, opinions, or recommendations about possible legal rights, remedies, defenses, options, or strategies;
 - c. Draft and file documents, including initiating and responding to actions, related motions, discovery, interim and final orders, and modification of orders, and arrange for service of legal documents;
 - d. Appear before a court or tribunal on behalf of a party, including mediation, arbitration, and settlement conferences where not prohibited by the rules and procedures of the forum; and
 - e. Negotiate legal rights or responsibilities for a specific person or entity.

2. Areas of Practice; Scope of Practice.
 - a. Family Law. Legal paraprofessionals may render authorized services in domestic relations, except they may not represent any party in a matter that involves the following unless the legal paraprofessional has met additional qualifications as established by the supreme court.
 - (1) Preparation of a Qualified Domestic Relations Order (QDRO) and supplemental orders dividing retirement assets;
 - (2) Division or conveyance of formal business entities or commercial property; or
 - (3) An appeal to the court of appeals or supreme court.
 - b. Limited Jurisdiction Civil. Legal paraprofessionals may engage in authorized services in any civil matter that may be or is before a municipal or justice court of this state.
 - c. Limited Jurisdiction Criminal. Legal paraprofessionals may render authorized services in criminal misdemeanor matters before a municipal or justice court of this state where, upon conviction, a penalty of incarceration is not at issue, whether by law or by agreement of the prosecuting authority and trial court.
 - d. Administrative Law. Legal paraprofessionals may engage in authorized services before any Arizona administrative agency that allows it. Legal paraprofessionals are not authorized to represent any party in an appeal of the administrative agency's decision to a superior court, the court of appeals, or the supreme court, except that the legal paraprofessional may file an application or notice of appeal. LPs are not authorized to represent any lawyer or LP before the court, presiding disciplinary judge, or hearing panel.
3. Code of Conduct. Each legal paraprofessional shall adhere to the code of conduct in subsection J.
4. Identification. A legal paraprofessional shall include the practitioner's name, the title "Arizona Legal Paraprofessional" or the abbreviation "LP" and the legal paraprofessional's license number on all documents prepared by the legal paraprofessional, unless expressly prohibited by a non-judicial agency or entity. The legal paraprofessional shall also provide the practitioner's name, title and license number to any person upon request.
5. Notification of Discipline. A license holder who has been disbarred from the practice of law in any state since original licensure as a legal paraprofessional shall provide the information regarding the disbarment to the board within 30 days of service of the notice of the disbarment.
6. Notification of Denial of Admission. A license holder who has been denied admission to the practice of law or suspended or disbarred from the practice of law in any jurisdiction since original licensure as a legal paraprofessional shall provide the information regarding the denial to the board and state bar within 30 days of service of the notice of the denial.

G. Complaints, Investigation, Disciplinary Proceedings, and Continuing Legal Education.

The Supreme Court Rules governing complaints, investigations, discipline, sanctions, reinstatement, continuing legal education, and public access to state bar records are applicable to legal paraprofessionals, except:

1. Rule 44 is not applicable to legal paraprofessionals.
2. Rule 60(a)(1) is applicable to legal paraprofessionals, except that the term “revocation” shall replace the term “disbarment.”
3. Reinstatement proceedings under Rules 64 and 65, Rules of Supreme Court, are applicable to legal paraprofessionals, except the term “revoked” or “revocation” shall replace the term “disbarred” or “disbarment.”

H. Policies and Procedures for Board Members. These requirements are contained in ACJA § 7-201(I).

I. Continuing Legal Education Policy.

1. Purpose. Ongoing continuing legal education (“CLE”) is one method to ensure legal paraprofessionals maintain competence in the field after licensure is obtained. Continuing education also provides opportunities for legal paraprofessionals to keep abreast of changes in the profession and the Arizona judicial system.
2. Applicability. All legal paraprofessionals shall comply with the continuing education requirements of Rule 45, Arizona Rules of Supreme Court. Continuing education must relate to the subject matter in which the legal paraprofessional is endorsed to practice.
3. Responsibilities of legal paraprofessionals.
 - a. It is the responsibility of each legal paraprofessional to ensure compliance with the continuing education requirements, maintain documentation of completion of continuing education, and to submit the maintained documentation to the nonlawyer legal service provider program upon the request of the board or division staff.
 - b. Upon request, each legal paraprofessional shall provide any additional information required by the board or division staff when reviewing renewal applications and continuing education documentation.

J. Code of Conduct. This code of conduct is adopted by the supreme court to apply to all legal paraprofessionals in the State of Arizona. The purpose of this code of conduct is to establish rules of professional conduct and minimum standards for performance by legal paraprofessionals.

1. Ethics. Each legal paraprofessional is bound by Supreme Court Rule 42, Arizona Rules of Professional Conduct in accordance with the following:

- a. References to “lawyer(s)” are to be read as “legal paraprofessional(s).”
 - b. References to “applicant” or “applicant for admission to the state bar” is to be read as applicant for a legal paraprofessional license.
 - c. References to “admission to practice” or “admitted to practice” shall be read as licensed as an LP.
 - d. ER 5.5(a) through (b) applies to LPs. ER 5.5(c) through (h) are not applicable.
2. Professionalism. Each legal paraprofessional shall adhere to Supreme Court Rule 41, except for the Oath of Admission to the Bar.
 3. Trust Accounts. Each legal paraprofessional shall adhere to Supreme Court Rule 43.
 4. Insurance Disclosures. Each legal paraprofessional shall adhere to Supreme Court Rule 32(c)(13).
 5. Performance in Accordance with Law.
 - a. A legal paraprofessional shall perform all duties and discharge all obligations in accordance with applicable laws, rules, or court orders.
 - b. A legal paraprofessional shall not represent that the practitioner is authorized to practice law beyond the areas of practice and scope of practice as provided in subsections (F)(1) and (2).
 - c. A legal paraprofessional shall not use the designations “lawyer,” “attorney at law,” “counselor at law,” “Esq.,” or other equivalent words, the use of which is reasonably likely to induce others to believe the legal paraprofessional is authorized to engage in the practice of law beyond that allowed by the practitioner’s license. Any communications concerning an LP’s services must identify the LP as being a legal paraprofessional.
 - d. A legal paraprofessional shall not provide any kind of advice, opinion or recommendation to a client about possible legal rights, remedies, defenses, options, or strategies unless the practitioner has the license and subject matter area specific endorsement to do so.
 - e. A legal paraprofessional shall inform the client in writing that a legal paraprofessional is not a lawyer and cannot provide any kind of advice, opinion or recommendation to a client about possible legal rights, remedies, defenses, options, or strategies beyond what the LP is specifically licensed to provide authorized services for.

K. Fee Schedule.

1. Application Fees
 - a. Application Fee; Initial Licensure \$300
 - b. Fingerprint Application Processing - rate set by Arizona law and is subject to change.
2. Examination Fees
 - a. Core Skills Test \$100
 - b. Core Skills Test Reexaminations \$100
(For any applicant who does not pass the examination on the first attempt. The \$100 fee applies to each reexamination.)
 - c. Core Skills Test Reregistration for Examination \$100
(For any applicant who registers for an examination date and fails to appear at the designated site on the scheduled date and time.)
 - d. Subject Matter Test \$150
 - e. Subject Matter Test Reexamination \$150
(For any applicant who does not pass the examination on the first attempt. The \$150 fee applies to each reexamination.)
 - f. Subject Matter Test Reregistration for Examination \$150
4. Miscellaneous Fees.
 - a. Application. Printed Application for Admission or Character Report (materials available online for free) \$ 20.00
 - b. NSF Fee \$ 40.00
 - c. Document Deficiency Fee: assessed if required supporting documents are not filed with application. \$100.00
 - d. Public Record Request per Page Copy \$.50
 - e. Certificate of Correctness of Copy of Record \$ 18.00
5. Annual Dues for Arizona State Bar Affiliate Members. Each person licensed as a legal paraprofessional is subject to the membership fees and requirements of Supreme Court Rule 32(c). Dues for State Bar Affiliate Membership are assessed separately.



IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
ARIZONA CODE OF JUDICIAL)	Administrative Order
ADMINISTRATION § 7-209:)	No. 2020 - <u>173</u>
ALTERNATIVE BUSINESS)	
STRUCTURES)	
<hr/>)	

The above-captioned provision having come before the Arizona Judicial Council on October 22, 2020 and having been approved and recommended for adoption,

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the above-captioned provision, attached hereto, is adopted as section of the Arizona Code of Judicial Administration, effective January 1, 2021.

Dated this 4th day of November, 2020.

ROBERT BRUTINEL
Chief Justice

Arizona Code of Judicial Administration
Part 7: Administrative Office of the Courts
Chapter 2: Certification and Licensing Programs
Section 7-209: Alternative Business Structures

A. Definitions.

“Alternative business structure” (“ABS”) is a business entity that includes nonlawyers who have an economic interest or decision-making authority in the firm and provides legal services in accord with Supreme Court Rules 31 and 31.1(c).

“Authorized person” means a person possessing:

1. An economic interest in the alternative business structure equal to or more than 10 percent of all economic interests in the alternative business structure; or
2. The legal right to exercise decision-making authority on behalf of the alternative business structure. Examples may include: a sole proprietor of a sole proprietorship, a manager of a limited liability company, an officer of a corporation, a general partner of a general or limited partnership, or a person possessing comparable rights by operation of law or by agreement.

“Compliance lawyer” means an active member of the State Bar of Arizona in good standing who, pursuant to Supreme Court Rule 42, ER 5.3(d) and subsection (G)(3)(b) of this section, is responsible for ensuring compliance with the rules governing ABSs, Supreme Court Rule 42, and the regulatory requirements of this section.

“Decision-making authority” in an ABS means the authority, by operation of law or by agreement, to directly or indirectly:

1. Legally bind the ABS;
2. Control or participate in the management or affairs of the ABS;
3. Direct or cause the direction of the management and policies of the ABS; or
4. Make day-to-day or long-term decisions on matters of management, policy, and operations of the ABS.

“Director” means the administrative director of the courts or the director’s designee.

“Economic interest” means (1) a share of a corporation’s stock, a capital or profits interest in a partnership or limited liability company, or a similar ownership interest in any other form of entity, or (2) a right to receive payments for providing to or on behalf of the entity management services, property, or the use of property (including software and other intangible personal property) that is based, in whole or in part, on the firm’s gross revenue or profits or any portion thereof. Notwithstanding the foregoing, “economic interest” does not mean employment-based compensation pursuant to a plan qualified under the Internal Revenue Code of 1986, as hereafter may be amended, or any successor rule, or discretionary bonuses paid to employees.

"Person" means an individual, business corporation, nonprofit corporation, partnership, limited partnership, limited liability company, general cooperative association, limited cooperative

association, unincorporated nonprofit association, statutory trust, business trust, common-law business trust, estate, trust, association, joint venture, public corporation, or government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

B. Applicability. This section governs the administration, licensing and regulation of alternative business structures, and shall be read with the supreme court rules governing the practice of law.

C. Purpose. This section is intended to result in the effective administration of the alternative business structures licensing program.

D. Administration

1. Role and Responsibilities of the Supreme Court. The supreme court is authorized to regulate the practice of law as a function of its responsibility to administer an integrated judiciary, pursuant to article VI, §§ 1 and 3 of the Arizona Constitution.
2. Establishment and Administration of Fund. The state treasurer shall establish an Alternative Business Structures Fund consisting of monies received for licensure fees, costs, and civil penalties. The Administrative Office of the Courts shall administer the fund and shall receive and expend monies from the fund for ABS program operations, including disciplinary operations by the State Bar of Arizona.
3. Role and Responsibilities of the Director. As designated by article VI, § 7 of the Arizona Constitution, the director:
 - a. Shall:
 - (1) Develop policies and procedures in conformity with this section;
 - (2) Appoint and supervise all division staff;
 - (3) Approve or disapprove all budgetary matters;
 - (4) Ensure implementation of the applicable laws and this section; and
 - (5) Develop policies and procedures regarding the processing of applications for licensing by division staff.
 - b. May:
 - (1) Direct division staff to conduct an investigation into alleged acts of misconduct or violations in relation to initial licensure, renewal of a license or licensure after a period of revocation; and
 - (2) Refer a complaint to the state bar.
 - (3) Initiate a compliance audit of a license holder to determine if the license holder is in compliance with statutes, court rules, administrative orders, court orders, local rules, the ACJA, and any other legal or ethical requirement relating to the license holder's ABS license. The following provisions apply to audits:
 - (a) Timeframes. The director shall develop timeframes and procedures for division

staff conducting compliance audits.

- (b) Confidentiality.
 - (i) Working papers associated with the compliance audit maintained by division staff are not public records and are not subject to disclosure, except to court staff in connection with their official duties, the state bar, the attorney general, county attorney, public regulatory entities, or law enforcement agencies.
 - (ii) Upon completion of an audit the final report issued to the affected party is a public record subject to public inspection.
- (c) Subpoena. The director may subpoena witnesses or documentary evidence, administer oaths, and examine under oath any individual relative to the audit.
- (d) Referral. The director may refer the audited license holder to the state bar for investigation of alleged acts of misconduct or violations of statutes, court rules, administrative orders, court orders, local rules, the ACJA, and any other legal or ethical requirement relating to the license holder's ABS license.
- (e) Violations or Noncompliance. Willful violation of or willful noncompliance with an order of the director regarding the audit, or willful noncompliance with a corrective action plan resulting from an audit, may result in an order directing the license holder to comply. The director may forward a copy of the order or report to the superior court and request the superior court issue an order to require the appearance of a person or business, compliance with the director's order, or both. The superior court may treat the failure to obey the order as contempt of court and may impose penalties as though the license holder had disobeyed an order issued by the superior court.

4. Role and Responsibilities of Division Staff.

- a. The director shall designate the division director and other division staff to assist in the administration of the ABS licensing program pursuant to article VI, § 7 of the Arizona Constitution.
- b. Division staff shall:
 - (1) Submit completed applicant fingerprint cards and applicable fees to the Arizona Department of Public Safety, in accordance with A.R.S. § 41-1750 and Public Law 92-544, pursuant to subsection (E)(1)(c);
 - (2) Make recommendations to the committee on all application and licensing matters and any other matters regarding applicants and license holders;
 - (3) Provide updates to the committee on program activities;
 - (4) Maintain a list of license holders and post the list on the applicable website and make the list available to the public;
 - (5) Conduct compliance audits and monitoring as required by this section; and
 - (6) Conduct pre-licensure investigations of allegations of acts of misconduct or violations of the statutes, court rules, or the applicable sections of the ACJA by applicants or authorized persons and report the findings to the committee.
 - (7) Submit a quarterly report to the court and the state bar of current license holders.

5. Role and Responsibilities of Committee on Alternative Business Structures.

- a. Appointment of Members. Pursuant to Rule 33.1, the court shall appoint members to initial varying terms of one, two, and three years to encourage continuity of the committee. Other appointment details are contained in Supreme Court Rule 33.1(a)(2) and (3). The members shall assist division staff in the recruitment of committee members.
- b. Duties of the Committee. In addition to Supreme Court Rule 33.1(a)(4) – (6) and (b):
 - (1) The committee shall:
 - (a) Make recommendations to the supreme court or the Arizona Judicial Council regarding rules, policies, and procedures for regulating ABSs, including:
 - (i) applicant qualifications;
 - (ii) fees;
 - (iii) a code of conduct; and
 - (iv) any other matter pertaining to ABSs.
 - (b) Recommend whether to license an applicant for initial licensure;
 - (c) Examine license renewal applications and grant or deny renewal; and
 - (d) Order a summary suspension of a license.
 - (2) The committee may:
 - (a) Hold interviews of applicants regarding initial licensure; and
 - (b) Hold interviews of license holders regarding renewal of licensure;
- d. In addition to the requirements of subsection (D), and except as otherwise provided herein, committee members must abide by ACJA § 7-201(I)(2) through (7).
- e. On or before April 1 of each year the committee shall file a report with the supreme court describing the status of the ABS program. The report shall include, but is not limited to, the following information:
 - (1) The number of applications granted and declined during the previous calendar year;
 - (2) The number of licensed ABSs as of December 31 of the previous calendar year;
 - (3) The number of charges filed against ABSs and ABS compliance lawyers during the previous calendar year and the nature of the charge(s);
 - (4) The number of complaints initiated by the State Bar during the previous calendar year and the nature of the complaint;
 - (5) Discipline imposed during the previous calendar year, the nature of conduct leading to the discipline and the discipline imposed; and
 - (6) Recommendations concerning modification or improvements to the ABS program.
- f. The state bar shall provide the committee with the following information:
 - (1) On a calendar quarter basis:

- (a) The number of charges filed against ABSs during the previous calendar quarter and the nature of the charge;
 - (b) The number of complaints initiated by the state bar during the previous calendar quarter and the nature of the complaint; and
 - (c) Discipline imposed during the previous calendar quarter, the nature of the conduct leading to the discipline and the discipline imposed.
- (2) On or before January 31, on an annual basis:
 - (a) The number of licensed ABSs as of December 31st; and
 - (b) Recommendations concerning modifications or improvements to the ABS program.
 - (3) Such other information as the committee may request to prepare the report described in section (D)(5)(e) herein.
6. **Role and Responsibility of the State Bar of Arizona.** The State Bar of Arizona is responsible for receiving, processing, investigating, seeking interim suspension of, and prosecuting disciplinary matters against ABSs and an ABS's members, and shall carry out this responsibility according to supreme court rules and this code section.
7. **Computation of Time.** For the purposes of this section, the computation of days pursuant to Rule 6(a), Rules of Civil Procedure is calculated as follows:
- (1) **Day of the Event Excluded.** Exclude the day of the act, event, or default that begins the period.
 - (2) **Exclusions if the Deadline is Less Than 11 Days.** Exclude intermediate Saturdays, Sundays, and legal holidays if the period is less than 11 days.
 - (3) **Last Day.** Include the last day of the period unless it is a Saturday, Sunday, or legal holiday. When the last day is excluded, the period runs until the next day that is not a Saturday, Sunday, or legal holiday.
 - (4) **Next Day.** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

E. Licensure.

- 1. **Application for Initial Licensure.**
 - a. **Forms.** An applicant, including all authorized persons, shall apply for licensure on approved forms and file them with division staff.
 - (1) Division staff shall conduct a preliminary review of the submitted application and determine if the application is deficient, the required supporting documents are deficient, fees are deficient, or a combination of these requirements are deficient.
 - (2) Division staff shall advise the applicant of the deficiencies.
 - (3) The applicant shall provide the information and a written response to correct or explain the deficiencies, or otherwise remedy the defects in the application, supporting documents or fees.

- (4) Division staff may require the applicant to provide additional information or an explanation reasonably necessary to determine if the applicant meets the required qualifications specified in this section.
 - (5) Upon receipt of a complete application, division staff may conduct a personal credit review and review records regarding an application for initial licensure, consistent with the policies and procedures developed by the director.
 - (6) The applicant shall notify division staff of any changes relevant to the application for licensure within five days of the change.
 - (7) Upon a final review of the application, division staff shall prepare and forward to the committee a written recommendation regarding the applicant's qualifications and eligibility for licensure.
 - (8) Division staff shall advise the committee in any written recommendation regarding licensure of an applicant, of any complaints alleging acts of misconduct or violations of statute, court rules or order, or this section, if the allegations occurred during the time the applicant held an active license and were received after the applicant's licensure expired.
 - (9) Division staff's written recommendation to the committee shall note any deficiencies in the application. A deficient application for initial licensure is lacking one or more of the following requirements:
 - (a) An explanation or correction of any deficiencies, pursuant to subsection (E)(1)(a)(4);
 - (b) Payment of all appropriate fees, pursuant to subsection (E)(1)(b); or
 - (c) Necessary information or documents to complete a criminal background check, including a readable fingerprint card or affidavit in lieu of a fingerprint card, pursuant to subsection (E)(1)(c).
 - (10) The committee, upon review of the division staff recommendation, may request an informal interview with an applicant, pursuant to subsection (D)(5)(c)(2)(a), to establish if:
 - (a) Additional information is needed to determine if the applicant meets all qualifications in this section;
 - (b) An explanation of the information provided by the applicant is needed to determine if the applicant meets all qualifications in this section; or
 - (c) Any complaints, regarding allegations of misconduct or violations of the statutes, court rules, or applicable sections of the ACJA, received after the applicant's original licensure expired, require investigation by division staff pursuant to subsection (E)(1)(a)(4).
- b. Fees. The applicant shall submit with the application, an application fee, initial licensure fee, and any other fees required as specified in subsection (J). Fees are not refundable or waivable. An applicant shall make the payment for any fee payable to the Arizona Supreme Court. An application submitted without fees is deficient. In addition to the fees described in subject J, if the cost of the investigation exceeds \$1,500, or division staff expends more than 80 hours performing the investigation, applicant shall pay the additional investigation cost and division staff additional investigation time at \$100 per hour.

c. Fingerprinting. If required, an authorized person shall submit with the application, a full set of fingerprints, with the fee established by law, for the purpose of obtaining a state and federal criminal records check. An application submitted without a fingerprint card, if required, is deficient.

(1) The authorized person shall provide a readable and complete fingerprint card. The authorized person shall pay any costs attributable to the original fingerprinting or subsequent re-fingerprinting due to unreadable fingerprints and any fees required for the submission or resubmission of fingerprints.

(2) If after two attempts, the FBI determines the fingerprints provided are not readable, the authorized person shall submit a written statement, under oath, that the authorized person has not been arrested, charged, indicted, convicted of or pled guilty to any felony or misdemeanor, other than as disclosed on the application.

(3) Division staff shall submit completed fingerprint cards and the applicable fees to the Arizona Department of Public Safety, pursuant to A.R.S. § 41-1750, Public Law 92-544, and subsection (D)(4)(b)(1).

2. Decisions Regarding Licensure.

a. In determining whether to recommend to the supreme court a grant of licensure, the committee shall take into consideration Supreme Court Rule 33.1(b), which states:

Decision Regarding Licensure. The Committee shall recommend approval of applications if the requirements in this rule and in ACJA are met by the applicant. The Committee's recommendation shall state the factors in favor of approval.

(1) Decisions of the Committee must take into consideration the following regulatory objectives:

(A) protecting and promoting the public interest;

(B) promoting access to legal services;

(C) advancing the administration of justice and the rule of law;

(D) encouraging an independent, strong, diverse, and effective legal profession; and

(E) promoting and maintaining adherence to professional principles.

(2) The Committee shall examine whether an applicant has adequate governance structures and policies in place to ensure:

(A) lawyers providing legal services to consumers act with independence consistent with the lawyers' professional responsibilities;

(B) the alternative business structure maintains proper standards of work;

(C) the lawyer makes decisions in the best interest of clients;

(D) confidentiality consistent with Supreme Court Rule 42 is maintained; and

(E) any other business policies or procedures do not interfere with a lawyers' duties and responsibilities to clients.

- b. Notification of Licensure. Upon the supreme court's order approving a license, division staff shall promptly notify qualified applicants of licensure in writing. Each qualified ABS shall receive a document evidencing licensure, stating the applicant's name, date of licensure, license number, and expiration date of the license. Each license shall expire as provided in (F)(1).
- c. License Status. All licenses are valid until expired, voluntarily surrendered, suspended or revoked.
- d. Denial of Initial License.
 - (1) The committee shall recommend to the supreme court denial of licensure if the applicant does not meet the qualifications or eligibility requirements at the time of the application described in this section; or has not submitted a complete application with all deficiencies corrected, the required documents and fees.
 - (2) The committee may recommend denial of licensure if the committee finds, with respect to the applicant or any authorized person, one or more of the following:
 - (a) Has committed material misrepresentation, omission, fraud, dishonesty, or corruption in the application form;
 - (b) Has committed any act constituting material misrepresentation, omission, fraud, dishonesty or corruption in business or financial matters;
 - (c) Has conduct showing the applicant or an authorized person of the applicant is incompetent or a source of injury and loss to the public;
 - (d) Has a conviction by final judgment of a felony, regardless of whether civil rights have been restored;
 - (e) Has a conviction by final judgment of a misdemeanor if the crime has a reasonable relationship to the practice of law or the delivery of legal services to be provided by the ABS, regardless of whether civil rights have been restored;
 - (f) Has been disbarred from, or denied admission to, the practice of law or the equivalent of disbarment or denial in this state or any other jurisdiction;
 - (g) Is currently suspended from the practice of law in this state or any jurisdiction;
 - (h) Has a denial, revocation, suspension, or any disciplinary action of any professional or occupational license or certificate;
 - (i) Has a censure, probation, or any other disciplinary action of any professional or occupational license or certificate by other licensing or regulatory entities if the underlying conduct is relevant to licensure under this section;
 - (j) Has a termination, suspension, probation, or any other disciplinary action regarding past employment if the underlying conduct is relevant to licensure under this section;
 - (k) Has been found civilly liable in an action involving misrepresentation, material omission, fraud, misappropriation, theft, or conversion;
 - (l) Is currently on probation or parole;
 - (m) Has violated any decision, order, or rule issued by a professional regulatory entity;
 - (n) Has violated any order of a court, judicial officer, administrative tribunal, or the

- committee;
- (o) Has made a false or misleading statement or verification in support of an application for licensure filed by another person;
 - (p) Has made a false or misleading oral or written statement to division staff or the committee;
 - (q) Failed to disclose information on the application subsequently revealed through the background check;
 - (r) Failed to respond or furnish information to division staff or the committee when the information is legally requested and is in the applicant's control or is reasonably available to the applicant and pertains to licensure or investigative inquiries; or
 - (s) If the applicant's business has a record of conduct constituting dishonesty or fraud on the part of an employee, authorized person, or the business.
- (3) The committee may consider any or all of the following criteria when reviewing the application of an applicant with a misdemeanor or felony conviction, pursuant to subsection (E)(2)(d)(2)(d) or (e):
- (a) The applicant's age at the time of the conviction;
 - (b) The applicant's experience and general level of sophistication at the time of the pertinent conduct and conviction;
 - (c) The degree of violence, injury or property damage and the cumulative effect of the conduct;
 - (d) The applicant's level of disregard of ethical or professional obligations;
 - (e) The reliability of the information regarding the conduct;
 - (f) If the offenses involved fraud, deceit, or dishonesty on the part of the applicant resulting in harm to others;
 - (g) The recency of the conviction;
 - (h) Any evidence of rehabilitation or positive social contributions since the conviction occurred as offered by the applicant;
 - (i) The relationship of the conviction to the purpose of licensure;
 - (j) The relationship of the conviction to the practice of law or the delivery of legal services to be provided by the ABS;
 - (k) The applicant's candor during the application process;
 - (l) The significance of any omissions or misrepresentation during the application process; and
 - (m) The applicant's overall qualifications for licensure separate from the conviction.
- (4) Upon the committee's decision to recommend denial of licensure, division staff shall notify each applicant of the reasons for the denial and the right of the applicant to a hearing, pursuant to subsection (E)(2)(d)(5). The division staff shall provide the notice in writing and shall send the notice within 10 days after the committee's decision.
- (5) An applicant is entitled to a hearing on the decision to recommend denial of licensure, if the disciplinary clerk receives a written request for a hearing within fifteen days after division staff mails the notice of the denial. The applicant is the moving party at the hearing and has the burden of proof. The provisions of ACJA § 7-201(H)(12) through (23) apply regarding procedures for the hearing and appeal.

- (6) An applicant denied licensure by a final decision of the supreme court, whether or not a hearing was requested and held, may reapply for licensure, pursuant to subsection (E), under the following circumstances:
 - (a) It has been twelve months since the final decision by the supreme court;
 - (b) The applicant shall present new documentation to address the original issues resulting in denial including all of the following:
 - (i) Demonstration of acceptance of responsibility for the conduct leading to the denial by the committee; and
 - (ii) Establishes purpose of business meets the regulatory objective of Supreme Court Rule 33.1(b)(1) and subsection (E)(2)(a)(1).
 - (c) In determining whether the applicant has established that the purpose of business meets the regulatory objective of Supreme Court Rule 33.1(b)(1) and subsection (E)(2)(a), the committee shall conduct an informal interview with the applicant no later than 60 days after the applicant has submitted a completed application.

3. Time Frames for Licensure.

- a. The director shall develop time frames for the processing of applications by division staff, pursuant to subsection (D)(3)(a)(5).
- b. An applicant shall respond timely to requests for information from division staff pertaining to the applicant's application. Unless the applicant can show good cause as to why the committee should grant additional time, the committee shall not approve any applicant unless the applicant successfully completes all requirements within 90 days from the date division staff received the original initial application for licensure.
- c. If an applicant needs additional time to comply with division staff requests or to complete the application process within the time frames specified in this subsection, the applicant shall file a written request for an extension with division staff. The request shall state the reasons for additional time to comply with time frames and licensure requirements. The applicant shall file the request for additional time to complete the initial application at a minimum, 10 days prior to the 90-day deadline, unless the applicant makes a showing of good cause. Failure to complete the application process or file a written request for an extension of time within this time period shall nullify and void the original application and supporting documents, including fingerprints and fees.
- d. Division staff shall forward the written request for an extension of time to the committee at the next scheduled committee meeting.
- e. If the applicant fails to meet the 90-day deadline or is not granted additional time by the committee to complete the initial licensure process, the applicant is considered a new applicant. The applicant shall submit a new application including a fingerprint card and fees.

4. Records of Applicants for Licensure and License Holders shall be governed by the provisions of Supreme Court Rule 123, except as otherwise provided in Arizona Rules of Court. Division staff shall retain applicant and license holder records for a period of five years from the last activity in the record. Division staff shall take appropriate methods to ensure the confidentiality of any destroyed records.
5. Unlawful Use of Designation or Abbreviation.
 - a. An ABS who has received a license is authorized to utilize the designation of “Arizona licensed” in connection with their title or name and may use any appropriate abbreviation connected with this licensure. No other business shall assume or use the title, designation, or abbreviation, or any other title, designation, sign or card, the use of which is reasonably likely to induce others to believe the business holds a valid ABS license issued by the Arizona Supreme Court. The license holder shall not sell, transfer, or assign its license to any other business.
 - b. The committee, upon completion of an investigation may issue a cease and desist order. A hearing officer or a superior court judge, upon petition by the committee, may enter an order for an individual or business to immediately cease and desist conduct constituting engagement as an ABS without the required license.
6. Voluntary Surrender. A license holder in good standing may surrender its license to the committee. However, the surrender is not valid until accepted by the committee. The committee or division staff may require additional information reasonably necessary to determine if the license holder has violated any provision of the statutes, court rules, and this section. The surrender does not prevent the commencement of subsequent discipline proceedings for any conduct of the surrendered license holder occurring prior to the surrender.
 - a. Division staff shall present the surrendered license to the committee at the next available committee meeting after receiving notice of the surrender. Upon the committee’s acceptance of the voluntary surrender, division staff shall designate the license of the license holder as a “surrendered license holder in good standing.” Division staff shall notify the license holder in writing within 10 days after the committee’s acceptance of the surrender.
 - b. The committee shall not accept the surrender if there is a complaint pending against the license holder.
 - c. The committee shall, within 90 days of the receipt of the surrendered license by division staff, either accept the surrender or, based upon the recommendations of division staff, await the outcome of the pending disciplinary proceedings. If the supreme court, hearing panel or presiding disciplinary judge subsequently imposes a sanction upon the license of the surrendered license holder, division staff shall change the status of the license holder from “surrendered license holder in good standing” to that of an ABS so disciplined.

- d. An ABS who is granted voluntary surrender must comply with the requirements of subsections (H)(4)-(6).

F. Renewal of Licensure.

1. Expiration Date. Licenses expire on February 1 of each year, except as otherwise provided in this section. All licenses shall continue in force until expired, voluntarily surrendered, suspended, or revoked.
2. Application. A license holder is responsible for applying for a renewal license. The license holder shall apply for renewal of licensure on the form provided by division staff. The committee shall set a renewal application deadline, in advance of the expiration date, to allow a reasonable time frame for processing the renewal application.
 - a. When a license holder has filed a timely and complete renewal application, the existing license does not expire until the administrative process for review of the renewal application has been completed.
 - b. When a license holder requests to file an untimely renewal application, the division director may process the untimely application and recommend to the committee to renew a license if the untimely renewal applicant demonstrates to the director good cause for the untimely filing. In addition, the following shall apply:
 - (1) The applicant shall submit a complete renewal application and applicable fees, and any other documentation requested by division staff to verify the grounds for the good cause exception requested.
 - (2) The applicant shall not provide legal services:
 - (a) Until the director decides in writing based on good cause to process the application; or
 - (b) If the director decides not to process the untimely application, until an initial application is processed, and the applicant is granted a license renewal pursuant to this section.
 - c. When a timely renewal application is denied, the existing licensure does not expire until the last day for seeking a hearing on the denial decision pursuant to subsection (E)(2)(d)(5); or if a hearing is requested, until the final decision is made on an appeal of the denial by the committee pursuant to ACJA § 7-201(H)(25).
 - d. The committee may request an informal interview with the applicant for renewal, pursuant to subsection (D)(5)(c)(2)(b), to establish if additional information or an explanation of the information provided by the applicant is needed to determine if the applicant continues to meet the qualifications for licensure in this section.
 - e. The license of a license holder who does not supply a complete renewal application and payment of the renewal fee in the specified time and manner to division staff shall

expire as of the expiration date. Division staff shall treat any renewal application received after the expiration date as a new application, except when the license holder requests to file an untimely renewal application pursuant to subsection (F)(2)(b).

3. Additional Information. Before renewal of licensure, division staff may require additional information reasonably necessary to determine if the applicant continues to meet the qualifications specified in this section, which may include:
 - a. Background information, pursuant to subsection (E)(1)(a); and
 - b. Fingerprinting pursuant to subsection (E)(1)(c).
4. Decision Regarding Renewal.
 - a. The committee may renew a license if the license holder:
 - (1) meets all requirements for renewal as specified in this section;
 - (2) submits a completed renewal application;
 - (3) pays the renewal fees on or before the expiration date as specified by this section; and
 - (4) meets the regulatory objectives and governance structures and policies of section (E)(2)(a).
 - b. Division staff shall promptly notify the applicant in writing of the committee's decision to renew the applicant's license. Each renewed applicant shall receive a document evidencing renewal of licensure, stating the applicant's name, date of licensure, license number and expiration date.
 - c. The committee may deny renewal of licensure for any of the reasons stated in subsection (E)(2)(d). Division staff shall promptly notify the applicant, in writing, within 10 days of the committee's decision to deny renewal of licensure. The notice shall include the committee's reasons for the denial of renewal of licensure and the right of the applicant to a hearing, pursuant to subsection (F)(4)(d).
 - d. An applicant is entitled to a hearing, on the decision to deny renewal of licensure if the disciplinary clerk receives a written request for a hearing within fifteen days after the date of the notice of denial. The applicant is the moving party at the hearing and has the burden of proof. The provisions of ACJA § 7-201(H)(12) through (23) and (H)(25) through (27) apply regarding procedures for hearing and appeal.

G. Role and Responsibilities of Licensed Alternative Business Structures and Compliance Lawyers.

1. Initial Licensure. In addition to the requirements of subsection (E)(1), each applicant for licensure as an ABS must meet the following requirements:

- a. Submit completed applications for the alternative business structure and each authorized person.
- b. Submit a prescribed indemnification statement and conflict of interest statement signed by each authorized person.
- c. Fully disclose all relationships to any parent company or organization, and currently paid or unpaid officers, directors, owners, and boards of directors, and any and all company subsidiary dba's operating in any state.
- d. Declare a statutory agent in Arizona.
- e. Obtain any necessary federal and state tax identification numbers as required by law.
- f. Designate a principal with whom division staff may communicate on any administrative, procedural, or operational issues.
- g. Submit articles of incorporation and letters of good standing from the Arizona Corporation Commission or otherwise demonstrate authorization to do business in the State of Arizona.
- h. Demonstrate the business meets objectives identified in Supreme Court Rule 33.1(b) and subsection (E)(2)(a) herein.
- i. Submit the prescribed acknowledgement form that the ABS and its members are subject to the regulatory and discipline authority as set forth in the supreme court rules and this section.
- j. Insurance Disclosure
 - (1) Each ABS shall certify to the state bar on an annual form prescribed by the state bar on or before February 1 of each year whether the ABS is currently covered by professional liability insurance. Each ABS who reports being covered by professional liability insurance shall notify the state bar in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason. An ABS who acquires professional liability insurance after February 1 shall advise the state bar of the change of status in coverage.
 - (2) The state bar shall make the information submitted by ABSs pursuant to this rule available to the public on its website as soon as practicable after receiving the information.
 - (3) Any ABS who fails to comply with this section in a timely fashion may be summarily suspended by the Committee on Alternative Business Structures. Supplying false information in complying with the requirements of this section shall subject the ABS to appropriate disciplinary action.

2. Roles and Responsibilities of ABSs. Each ABS shall:

- a. Adhere to the Rules of Arizona Supreme Court and the standards in the code of conduct in subsection (K) herein.
 - b. Maintain a statutory agent in Arizona.
 - c. Notify division staff of any change in designated principal, compliance lawyer, or authorized person or any change in the telephone number, business address, mailing address, or home address of principals, compliance lawyers, and authorized persons, or any other required database information within 3 business days of the change. The designated principal of the ABS shall notify division staff of changes through the ABS regulation email system or in writing, utilizing the form provided by division staff.
 - d. Maintain the confidentiality of all records regarding any person receiving legal services.
 - e. Notify division staff in writing within 30 days of a change in designated principal or compliance lawyer.
 - f. Any ABS that ceases doing business must adhere to the requirements of subsections (H)(4) through (6).
 - g. Any ABS subject of an acquisition or merger with another business entity, regardless of whether the other business entity is also an ABS, must prior to merger or acquisition:
 - (1) Submit on the form prescribed notice of impending merger or acquisition; and
 - (2) Comply with the requirements of subsections (G)(1)(a) through (c), and (j).
3. Compliance lawyer. Each ABS must designate a compliance lawyer whose qualifications and responsibilities are as follows:
- a. Qualifications. The compliance lawyer shall:
 - (1) Meet the requirements of Supreme Court Rule 31(a) and (b);
 - (2) Be a manager or employee of the ABS;
 - (3) Consent to the designation;
 - (4) Not have been subject to discipline by the State Bar of Arizona or any similar agency in any other jurisdiction during the past 10 years; and
 - (5) Possess credentials and experience in the legal field to ensure that ethical obligations, protection of the public, and standards of professionalism are adhered to.
 - b. Responsibilities. The compliance lawyer shall take all reasonable steps to:
 - (1) Ensure compliance with the ethical and professional responsibilities of lawyers in the ABS providing legal services;
 - (2) Ensure compliance by the ABS's authorized persons;

- (3) Ensure the ABS's authorized persons and others employed, associated with, or engaged by the ABS do not cause or substantially contribute to a breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers;
 - (4) Ensure that a prompt report is made to the state bar of any facts or matters reasonably believed to be a substantial breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers;
 - (5) Ensure that the state bar is promptly informed of any fact or matter that reasonably should be brought to its attention in order that the state bar may investigate whether a breach of regulatory or ethical requirements has occurred; and
 - (6) Notify division staff and the state bar in writing within 3 days when the compliance lawyer has ceased to be the compliance lawyer for the ABS.
- c. Violations. Any compliance lawyer who fails to comply with this section, including any failure to report any facts or matters reasonably believed to amount to a substantial breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers, in addition to other possible sanctions, may be suspended on an interim basis pursuant to Rule 61, Rules of Supreme Court.

H. Discipline.

1. Rules. The supreme court rules governing complaints, investigations, and disciplinary proceedings against Arizona licensed attorneys are applicable to alternative business structures and its members under this section, except as otherwise stated in this section.
2. Sanctions. Misconduct by an ABS or its members shall be grounds for imposition of one or more of the following types of sanctions:
 - a. Revocation. Revocation of an ABS's license may be imposed by judgment and order entered by the supreme court, a hearing panel, or the presiding disciplinary judge. Any order of revocation must state a fixed period of time a license is revoked before an ABS can seek re-licensure.
 - b. Suspension. Suspension of an ABS may be imposed by judgment and order entered by the supreme court, a hearing panel, or the presiding disciplinary judge for an appropriate fixed period of time not to exceed 3 years. Suspension of an ABS license prohibits the ABS from accepting new legal services clients and requires notification pursuant to subsection (H)(4). An order of the supreme court, a hearing panel, or the presiding disciplinary judge may specify additional restrictions on the activities of an ABS during the term of suspension. An ABS whose activities are suspended shall remain suspended until the court enters an order reinstating the ABS to its full business capacity in Arizona or upon order of the presiding disciplinary judge pursuant to subsection (E)(8)(b).
 - c. Reprimand. A reprimand may be imposed by judgment and order entered by the supreme court, a hearing panel, or the presiding disciplinary judge.

- d. Admonition. An admonition may be imposed by judgment and order entered by the supreme court, a hearing panel, the presiding disciplinary judge, or the Attorney Discipline Probable Cause Committee.
- e. Probation. Probation may be imposed by judgment and order entered by the supreme court, a hearing panel, the presiding disciplinary judge, or the Attorney Discipline Probable Cause Committee as follows:
 - (1) Probation shall be imposed for a specified period not in excess of one year but may be renewed for an additional one-year period.
 - (2) Probation may be imposed only in those cases in which there is little likelihood that the respondent ABS or its members will harm the public during the period of probation and the conditions of probation can be adequately supervised. The conditions of probation shall be stated in writing, shall be specific, understandable and enforceable, and may include restitution, disgorgement, and assessment of costs and expenses.
 - (3) The presiding disciplinary judge may appoint a monitor to supervise the ABS during a period of probation. The cost of the monitor shall be paid by the ABS.
 - (4) The monitor shall report to the state bar, which shall be responsible for supervising the respondent ABS during the probationary period. Bar counsel shall report material violations of the terms of probation to the presiding disciplinary judge by filing a notice of noncompliance with the disciplinary clerk and serving respondent with a copy of the notice. The notice of noncompliance shall include verification or separate affidavit upon personal knowledge stating sufficient facts to support the allegations of material violations of the terms of probation. Respondent shall have 10 days after service of the notice to file a response. Upon filing the notice of noncompliance, the presiding disciplinary judge may (a) issue an order declining to proceed with the notice; (b) issue an order setting the matter for status conference; or (c) issue an order setting a hearing within 30 days to determine if the terms of probation have been violated and if an additional sanction should be imposed. In a probation violation hearing, the state bar must prove a violation by preponderance of the evidence. At the end of the probation term, bar counsel shall prepare and forward a notice to the presiding disciplinary judge regarding the respondent's completion or non-completion of the imposed terms.
- f. Monetary Penalties. The supreme court, a hearing panel, or the presiding disciplinary judge may order the license holder to pay any of the following monetary obligations:
 - (1) Restitution or refund (disgorgement) may be ordered to persons financially injured, including reimbursement to the State Bar Client Protection Fund. Restitution or refund and the amount thereof must be proven by a preponderance of the evidence;
 - (2) A civil fine in an amount not to exceed \$1,000,000. Civil fines collected pursuant to this section shall be deposited in the Alternative Business Structure Fund.

- g. Assessment of Costs and Expenses. An assessment of costs and expenses related to disciplinary proceedings shall be imposed upon an ABS pursuant to Supreme Court Rule 60(d).
3. Enforcement. Execution and other post-judgment remedies shall be governed by Supreme Court Rule 60(d).
 4. Notice to Clients and Adverse Parties. Within 10 days after the date of an order or judgment issued by the presiding disciplinary judge, a hearing panel, or the supreme court imposing discipline and sanctions, or the date of surrender of license, an ABS whose license was revoked or suspended or who has surrendered its license, shall notify the following persons by registered or certified mail, return receipt requested, of the order of judgment or surrender, and of the fact that the ABS is disqualified from providing legal services after the effective date of same:
 - a. All legal services clients represented by ABS legal service providers in pending matters;
 - b. Any co-counsel in pending matters;
 - c. Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties; and
 - d. Each court or tribunal in which the ABS's legal service providers have any pending matter, whether the matter is active or inactive.
 5. Duty to Withdraw. In the case of a suspension for longer than 90 days, or a suspension of 90 days or less when any client does not consent to the association of counsel, and in all cases of revocation of licensure, it shall be the responsibility of the assigned lawyer in the ABS to move in the court or agency in which any proceeding is pending for leave to withdraw in the event the client does not obtain substitute counsel before the effective date of the suspension or revocation.
 6. Return of Client Property. Respondent shall deliver to all clients being represented in pending legal matters any papers or other property to which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. The respondent shall deliver all files and records in pending legal matters to the client, notwithstanding any claim of outstanding payment for services.
 7. Effective Date of Order; Pending Matters. Judgments imposing suspension or revocation shall be effective 30 days after entry, unless the presiding disciplinary judge, hearing panel, or the supreme court specifies an earlier date. Judgments and orders imposing other sanctions are effective immediately upon entry. Respondent, after entry of a judgment of revocation or suspension, shall not provide legal services, except that during the period between entry and the effective date of the order, respondent may complete on behalf of

any client all matters that were pending on the entry date. If a judgment or order permits the ABS to provide legal services under supervision of the state bar, respondent may only provide those services allowed by the judgment or order. Respondent shall refund any part of fees paid in advance which have not been earned.

8. Affidavit Filed with Presiding Disciplinary Judge and Court. Within 10 days after the effective date of the judgment of revocation or suspension, respondent shall file with the disciplinary clerk and with the supreme court an affidavit showing:
 - a. Respondent has fully complied with the provisions of the order and with this section;
 - b. An agent of record and other addresses where communications may thereafter be directed; and
 - c. Respondent has served a copy of such affidavit upon bar counsel.
9. Duty to Maintain Records. An ABS whose license has been revoked or suspended shall keep and maintain records constituting proof of compliance with this section. Proof of compliance, which shall include copies of the notice sent pursuant to subsection (H)(4) and signed returned receipts, shall be provided to chief bar counsel. Proof of compliance is a condition precedent to any application for reinstatement or licensing.
10. Contempt. Failure to comply with the provisions of this section may be punishable by contempt.

I. Reinstatement after Suspension or Revocation. An alternative business structure license holder whose license was suspended or revoked by the supreme court may apply for reinstatement under the following conditions:

1. If an ABS's license has been revoked the ABS may, after a period of 3 years, apply for reinstatement of licensure in accordance with the requirements for initial licensure herein. In addition, an applicant is subject to the requirements of subsection (3) below and shall pay the initial licensure and reinstatement fees.
2. An ABS whose license has been suspended 90 days or less may apply for reinstatement no sooner than 10 days before the expiration of the period of suspension by filing with the disciplinary clerk and serving on the state bar an affidavit for reinstatement. The affidavit shall include an avowal that the ABS has fully complied with the requirements of the suspension judgment or order, and has paid all required fees, costs, expenses, and fines. If an affidavit is not filed within 60 days after expiration of the period of suspension, the reinstatement procedure set forth in subsection (3) below shall apply.
3. An ABS whose license has been suspended for more than 90 days may apply for reinstatement no sooner than 90 days prior to the expiration of the period of suspension set forth in the judgment but may not be reinstated until the full period of suspension has been served. An applicant for reinstatement shall file a written application for reinstatement

with the disciplinary clerk, which shall be verified by the applicant, and accompanied by the appropriate fees and proofs of payment required by subsection (4) below of this section. The applicant shall file with the application for reinstatement a written release or authorization for the state bar to obtain documents or information in the possession of any third party. The application shall contain the following information and be accompanied by the following documents:

- a. A copy of the final order of suspension;
- b. An affidavit from the state bar stating whether any further investigations or formal proceedings alleging misconduct have been filed or are pending against the ABS, any authorized person, and any lawyer the ABS will employ, associate with, or engage to provide legal services;
- c. A statement of the offense or misconduct upon which the suspension was based, together with the dates of suspension;
- d. The names and addresses of all complaining witnesses in discipline proceedings that resulted in suspension and the names of the hearing officer or presiding judge before whom the discipline proceedings were heard;
- e. A concise statement of facts claimed to support reinstatement of licensure. An ABS must show by clear and convincing evidence that the basis for suspension has been overcome;
- f. A detailed description of any ABS activities during the period of suspension, if allowed by the judgment or order of suspension;
- g. A description of the occupation and income, during the period of suspension, for all authorized persons and any lawyers the ABS will employ, associate with, or engage to provide legal services;
- h. A statement covering the period of suspension showing the dates, general nature and final disposition of every civil action against the ABS or in which any authorized person and any lawyer the ABS will employ, associate with, or engage to provide legal services, was either a plaintiff or defendant;
- i. A statement covering the period of suspension showing dates, general nature and ultimate disposition of every matter involving the arrest or prosecution of any authorized person and any lawyer the ABS will employ, associate with, or engage to provide legal services;
- j. A statement showing whether or not any applications were made by any authorized person and any lawyer the ABS will employ, associate with, or engage to provide legal services, requiring proof of good moral character for its procurement, and as to each application, the dates, the name and address of the authority to whom it was addressed and the disposition thereof;
- k. A statement covering the period of suspension setting forth any procedure or inquiry concerning the standing as a member of any profession or organization, or any holder of any license or office, which involved the reprimand, removal, suspension, revocation of any authorized person, and any lawyer the ABS will employ, associate with, or

- engage to provide legal services, together with the dates, facts and disposition thereof, and the name and address of the authority in possession of the record thereof;
- l. A statement of any charges of fraud made or claimed against the ABS, or any authorized person, and any lawyer the ABS will employ, associate with, or engage to provide legal services, whether formal or informal, together with the dates, names, and addresses of persons making such chargers;
 - m. Copies of all prior applications for reinstatement, including all findings, decisions or orders entered;
 - n. A list of all authorized persons, the designated principal, and compliance lawyer. Any changes to who is an authorized person, principal, or compliance lawyer must be noted. The following documentation shall accompany the list:
 - (1) application form for any newly identified authorized persons;
 - (2) form designating a principal for any newly identified principal; and
 - (3) form designating a compliance lawyer for any newly identified compliance lawyer; and
 - o. Any further information or documents as requested by the state bar.
4. **Application Fee.** As a prerequisite to filing and before investigation of the application, every applicant for reinstatement shall pay to the records manager of the state bar an application fee, as set forth in section (J) herein, along with the state bar's estimate of the costs of its investigation and the costs and expenses of all related proceedings before the presiding disciplinary judge, a hearing panel, or the supreme court. The state bar may contract with an outside agency to perform all or part of the investigation. If the applicant's payment is less than the actual cost of investigation and subsequent proceedings, the applicant shall be required to satisfy such deficiency before the application is reviewed by the court. Any excess costs advanced shall be promptly refunded to the applicant at the conclusion of proceedings. Any subsequent costs or expenses incurred shall be paid by the applicant before the ABS's license is reinstated.
 5. **Costs and Expenses of Disciplinary Proceedings.** Prior to filing the application for reinstatement, the applicant shall pay all outstanding costs and expenses of any disciplinary proceeding. Verification of such payment in the form of an affidavit from the records manager of the state bar must accompany the application.
 6. **Amounts Owning to the Client Protection Fund.** Prior to filing an application for reinstatement, the applicant shall cause all state bar members to pay sums owed to the client protection fund due prior to reinstatement proceedings. Verification of such payment in the form of an affidavit from the Administrator of the Client Protection Fund must accompany the application.
 7. **Annual or Other Licensure Fees.** No reinstatement shall become effective until payment of all licensing fees and other charges accruing after the application for reinstatement has been granted.

8. Successive Applications. No application for reinstatement shall be filed within one (1) year following the denial of a request for reinstatement.
9. Withdrawal of Application. An applicant may withdraw an application at any time before the filing of the hearing panel report.
10. Reinstatement Proceedings. Reinstatement hearings shall be governed by Supreme Court Rule 65(b).

J. Fee Schedule.

1. Definitions. The following definitions apply to this schedule:

- a. “International” means the ABS has one or more physical locations outside the United States.
- b. “Large – Non-law Firm” means an ABS that has 100 or more full- or part-time employees and is not a traditional law firm as that term is defined herein.
- c. “Small – Non-law Firm” mean an ABS that has fewer than 100 full- or part-time employees and is not a traditional law firm as that term is defined herein.
- d. “Non-profit - Not Arizona” mean an ABS that is a nonprofit corporation in good standing that is not incorporated in Arizona.
- e. “Non-profit – Arizona” is an ABS that is a nonprofit corporation in good standing that is incorporated in Arizona.
- f. “Traditional Law Firm” is an ABS whose primary business is provision of legal services with nonlawyer economic interest holders.

2. Initial Licensure

a. International	\$12,000
b. Large – Non-law Firm	\$10,000
c. Small – Non-law Firm	\$ 6,000
d. Non-profit - Not Arizona	\$ 5,000
e. Non-profit – Arizona	\$ 2,000
f. Traditional Law Firm	\$ 6,000

3. Renewal Licensure	
a. International	\$ 6,000
b. Large - Non-law Firm	\$ 5,000
c. Small – Non-law Firm	\$ 3,000
d. Non-profit - Not Arizona	\$ 2,500
e. Non-profit – Arizona	\$ 1,000
f. Traditional Law Firm	\$ 3,000
4. Miscellaneous Fees.	
a. Replacement of License or Name Change.	\$25
b. Merger or Acquisition Fee	
(1) International	\$12,000
(2) Large – Non-law Firm	\$10,000
(3) Small – Non-law Firm	\$ 6,000
(4) Non-profit – Not Arizona	\$ 5,000
(5) Non-profit – Arizona	\$ 2,000
(6) Traditional Law Firm	\$ 6,000
c. Public Record Request Per Page Copy	\$.50
d. Certificate of Correctness of Copy of Record	\$18
e. Reinstatement Application (after suspension or revocation)	
(1) International	\$12,000
(2) Large – Non-law Firm	\$10,000
(3) Small – Non-law Firm	\$ 6,000
(4) Non-profit - Not Arizona	\$ 5,000
(5) Non-profit – Arizona	\$ 2,000
(6) Traditional Law Firm	\$ 6,000
f. Extraordinary investigation assessment (see section (E)(1)(b) herein)	based on actual costs;

K. Code of Conduct. The following code of conduct describes the expectations and standards that an ABS is expected to maintain as a provider of legal services. A failure to meet these standards or a breach of regulatory requirements are grounds for disciplinary action against an

ABS itself, or its non-lawyer members, who each have the same responsibility for ensuring ethical legal services for clients. Members of an ABS who are members of the state bar bear the responsibility of the ethical and professional obligations of the profession as well as the standards stated herein. An individual failure or breach may warrant action itself or as a pattern of conduct.

1. Code of Conduct for ABS's. In addition to the requirements of subsection (G)(2), each ABS and its authorized persons must adhere to the following minimum standards of conduct.
 - a. Shall not allow the legal representation of clients, if the representation involves a conflict of interest as governed by Supreme Court Rule 42, ERs 1.7, 1.8, 1.9, 1.10, 1.11, 1.13 and 1.18.
 - b. Shall not take any action or engage in activity that interferes with the professional independence of lawyers or others authorized to provide legal services.
 - c. Shall ensure that legal services are delivered with reasonable diligence and promptness.
 - d. Shall not take an action or engage in any activity that misleads or attempts to mislead a client, a court, or others, either by the ABS's own acts or omissions, or those of its members or employees, or by allowing or being complicit in the acts or omissions of others.
 - e. Shall maintain effective governance structures, arrangements, systems, and controls to ensure:
 - (1) Compliance with the requirements of supreme court rules and this section; and
 - (2) Managers, economic interest holders, decision-makers, employees, or anyone employed, associated with, or engaged do not cause or substantially contribute to a breach of the ethical rules of Supreme Court Rule 42 or this section.
 - f. Must maintain records to demonstrate compliance with its obligations under the supreme court rules and this section.
 - g. Must monitor financial stability and business viability. When an ABS becomes aware it will cease to operate, it must affect an orderly wind-down of business activities and comply with the requirements for surrender of an ABS license in this section.
 - h. Must monitor and manage all material risks to the business, including those which arise from connected businesses or connected services.
 - i. Must hold property of legal services clients separate from the property of the ABS. The requirements of Supreme Court Rules 42, ER 1.15 and Rule 43 are applicable to all legal services-related client property.

- j. An ABS, its members and employees must cooperate with the Administrative Office of Courts, Committee on Alternative Business Structures, the State Bar of Arizona, the presiding disciplinary judge, and any court who oversees and investigates concerns related to its delivery of legal services.
 - k. Must respond promptly to the Administrative Office of Courts, Committee on Alternative Business Structures, the state bar, the presiding disciplinary judge, and the supreme court and provide full and accurate information and documentation in response to any request or investigation.
 - l. Shall not attempt to prevent any person from providing information or documents in response to any request or investigation.
 - m. Must act promptly to take any remedial action requested by the state bar, the Administrative Office of Courts, the presiding disciplinary judge, and the supreme court.
 - n. Shall assure that all authorized persons and employees, in matters pertaining to legal services, perform all duties and functions in the manner ethically required of a lawyer pursuant to Supreme Court Rule 42.
2. Code of Conduct for Authorized Persons, Managers, Economic Interest Holders, and Decision-Makers. An authorized person, including any manager, economic interest holder, or decision-maker in an ABS is individually responsible for compliance by the ABS with this code of conduct. Failures or breaches of this responsibility may subject any authorized person, including any manager, economic interest holder, or decision-maker of an ABS to discipline.
 3. Code of Conduct for Compliance Lawyers. In addition to the requirements of subsection (G)(3)(b) and Supreme Court Rule 42, a designated compliance lawyer is responsible individually for compliance by the ABS and authorized persons, including any managers, economic interest holders, or decision-makers of the ABS, with this code of conduct. Failures or breaches of this responsibility may subject a compliance lawyer to discipline.
 4. As to matters involving legal services, in the event of a conflict between this code of conduct, Supreme Court Rule 42, and other professional codes of conduct (e.g., AICPA Code of Professional Conduct), this code of conduct and Rule 42 shall govern.





Task Force on the Delivery of Legal Services

October 4, 2019

Report and Recommendations

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EXECUTIVE SUMMARY

Creation and Charge of Task Force

On November 21, 2018, then Chief Justice Scott Bales issued Administrative Order No. 2018-111, which established the Task Force on Delivery of Legal Services. The administrative order outlined the purpose of the task force as follows:

- a) Restyle, update, and reorganize Rule 31(d) of the Arizona Rules of Supreme Court to simplify and clarify its provisions.
- b) Review the Legal Document Preparers program and related Arizona Code of Judicial Administration requirements and, if warranted, recommend revisions to the existing rules and code sections that would improve access to and quality of legal services and information provided by legal document preparers.
- c) Examine and recommend whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, and administrative hearings not otherwise allowed by Rule 31(d), and family court.
- d) Review Supreme Court Rule 42, ER 1.2 related to scope of representation and determine if changes to this and other rules would encourage broader use of limited scope representation by individuals needing legal services.
- e) Recommend whether Supreme Court rules should be modified to allow for co-ownership by lawyers and nonlawyers in entities providing legal services.
- f) In the Chair's discretion, consider and recommend other rule or code changes or pilot projects on the foregoing topics concerning the delivery of legal services.

The administrative order further directed the task force to submit a report and recommendations to the Arizona Judicial Council (AJC) by October 1, 2019. The report that follows consists of the task force's recommendations for the AJC's review and consideration.

The Task Force Process

Members of the task force represented a wide variety of perspectives on the delivery of legal services. From January through September 2019, the task force met monthly, discussing the issues outlined by Administrative Order 2018-111 and its charge. The task force received

presentations on various innovative approaches employed nationally and internationally to deliver legal services. The task force also heard from speakers about the changing legal marketplace and the impact of those changes on the cost of legal services and on the legal profession itself. Information about how local, national, and international community leaders are examining, exploring, and implementing innovative ways of delivering legal services was a regular part of information shared and discussed at monthly meetings.

Due to the number and complexity of topics the task force was charged with addressing and the limited time it had to explore those topics, task force members divided into two workgroups.¹ Workgroups met in breakout sessions during monthly task force meetings as well as in meetings held separately as needed. Workgroups invited subject matter experts, legal practitioners, and other stakeholders to give presentations and to testify on various topics. Each task force meeting included presentations by the workgroups, along with questions from and feedback by all task force members about workgroup efforts. Task force meetings were attended by the public and stakeholders who were encouraged to comment on the recommendations generated by the workgroups. This approach facilitated input from different perspectives, accounted for potential overlap among workgroups, ensured workgroups were not working in isolation, and recognized that members of the public and local stakeholders had a substantial interest in and knowledge about the topics being explored that would facilitate developing meaningful final recommendations.

¹ A workgroup co-led by Don Bivens and Stacy Butler addressed items (a) through (c) and a workgroup led by Judge Maria Elena Cruz addressed items (d) through (f) of the task force's charge.

Abbreviated Recommendations

1. Eliminate Arizona's Rules of Professional Conduct (ER) 5.4 and 5.7 and amend ERs 1.0 through 5.3 to remove the explicit barrier to lawyers and nonlawyers co-owning businesses that engage in the practice of law while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public. In anticipation of these rule changes, the Supreme Court should immediately convene a group to explore regulation of legal entities in which nonlawyers have a financial interest.
2. Modify ERs 7.1 through 7.5 (the "Advertising Rules") to incorporate many of the 2018 ABA Advertising Rule amendments and to align the rules with the recommendation to amend ERs 1.0 through 5.3 and eliminate ERs 5.4 and 5.7.
3. Promote education and information on what unbundled legal services are to the bench, bar, and public to encourage expanded understanding and utilization of unbundled legal services.
4. Revise Rule 38(d), Arizona Rules of Supreme Court, to clarify when a law student at an accredited law school or recent law school graduate may practice law under the supervision of a lawyer admitted to practice in Arizona, what legal services the law student or law graduate may provide, and the duties and obligations of the supervising lawyer.
5. Revise Rule 31(d), Arizona Rules of Supreme Court, by re-styling the rule into four separate rules, making the rule easier to navigate and understand.
6. Develop, via a future steering committee, a tier of nonlawyer legal service providers, qualified by education, training, and examination, to provide limited legal services to clients, including representation in court and at administrative proceedings.
7. Initiate, by administrative order, the Licensed Legal Advocate Pilot program developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College

of Law, to expand delivery of legal services to domestic violence survivors through the creation of a new tier of legal service provider.

8. Initiate, by administrative order, the DVLAP Document Preparer Pilot program as proposed by the Arizona Foundation for Legal Services and Education (the “Bar Foundation”) to create exceptions to the requirements of the Legal Document Preparer program and allow domestic violence lay advocates to prepare legal documents for victims of domestic violence receiving services through the Bar Foundation’s Domestic Violence Legal Assistance Program (DVLAP).
9. Make the following changes to improve access to and the quality of legal services provided by certified Legal Document Preparers:
 - a. Amend ACJA § 7-208 to allow LDPs to speak in court when addressed by a judge.
 - b. Amend ACJA § 7-208 to further define permissible and prohibited activities of LDPs.
 - c. The Arizona Supreme Court should pursue a campaign of educating the bench, members of the bar, and the public regarding what a legal document preparer is, what they can do, and what they are prohibited from doing.
 - d. Amend ACJA § 7-208 to remove the restrictions prohibiting legal document preparers from assisting clients who are represented by counsel.
 - e. Recommend increased access to LDP training, especially online, particularly for LDPs in rural areas.
 - f. Amend the ACJA and any other rules governing the investigation of and seeking of legal sanctions for engaging in unauthorized practice of law when the actions in

question involve a person acting in a manner that a legal document preparer would act if certified.

10. Advance and encourage local courts to establish positions and programs where nonlawyers located within the court are available to provide direct person-to-person legal information to self-represented litigants about court processes and available self-help services.

REPORT AND RECOMMENDATIONS

I. Background

The American Bar Association Commission on the Future of Legal Services found that “[d]espite sustained efforts to expand the public access to legal services, significant unmet needs persist” and that “[m]ost people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.”² In 2017, the Legal Services Corporation released a report, finding that 86% of civil legal matters reported by low-income Americans in the prior year received no or inadequate legal help.³ Relevant to the task force’s work, the Commission found that as of the last census, 63 million people met the financial qualifications for legal aid, but funding for the Legal Services Corporation is inadequate.⁴ In fact, in some jurisdictions more than 80% of civil litigants are in poverty and unrepresented.⁵ Importantly, one study has shown that “well over 100 million Americans [are] living with civil justice problems many involving what the American Bar Association has termed ‘basic human needs,’” including

² Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States*, 11-14 (American Bar Association 2016), available at https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf

³ Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017), available at <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>; National Center for State Courts, *Nonlawyer Legal Assistant Roles Efficacy, Design, and Implementation*, 1 (2015) (Research on unmet civil legal needs suggest that around 80% of such need does not make it into a court. At the same time, legal aid organizations are able to satisfy less than half of those that request legal help.).

⁴ Commission on the Future of Legal Services, *supra* note 2, at p. 12.

⁵ *Id.*

matters such as housing (evictions and mortgage foreclosure), child custody proceedings, and debt collection.⁶

One reason for the current “justice gap” is that the costs of hiring lawyers has increased since the 1970s, and many individual litigants have been forced to forego using professional legal services and either represent themselves or ignore their legal problems.⁷ Professor William D. Henderson, Indiana University Maurer School of Law, has noted the alarming decline in legal representation for what he calls the “PeopleLaw sector,” observing that law firms have gradually shifted the core of their client base from individuals to entities. Indeed, while total receipts of United States law firms from 2007 to 2012 rose by \$21 billion, receipts from representing individuals declined by almost \$7 billion. Correspondingly, the percentage of revenue generated by representing individuals fell 4.8% during that time period.⁸ And according to a report issued by the National Center for State Courts, 76% of 900,000 civil cases examined from July 1, 2012 through June 30, 2013 involved at least one self-represented party.⁹

Small firm lawyers, who primarily serve the PeopleLaw sector, are struggling to earn a living, which curtails their abilities to represent people unable to pay adequate amounts for legal services.¹⁰ According to the 2017 Clio Legal Trends Report, the average small firm lawyer bills

⁶ *Id.* (quoting Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. Rev. 433, 466 (2016)).

⁷ William Henderson, *The Decline of the People Law Sector*, November 19, 2017, Post 037, available at <https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/>.

⁸ *Id.* at i.

⁹ National Center for State Courts, *The Landscape of Civil Litigation in State Courts*, 31-33 (2015), available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

¹⁰ See Henderson, *supra* note 7 at p. 14-15.

\$260 per hour, performs 2.3 hours billable work a day, bills 1.9 hours of that work, and collects 86% of invoiced fees.¹¹ As a result, the average small firm lawyer earns \$422 per day before paying overhead costs. These lawyers are spending roughly the same amount of time looking for legal work and running their business as they are performing legal work for clients.¹² Professor Henderson suggests that this lagging legal productivity may result in part from ethical rules that restrict ownership of law firms to lawyers because “ethics rules are the primary mechanism for regulating the market for legal services.”¹³ Also, a growing mismatch between the cost of litigation and amounts in controversy has made many cases unattractive to lawyers and clients alike.¹⁴

Courts across the nation strive to give litigants greater access to civil justice. Much of that focus, in the past decade, has been on providing clear information to self-represented litigants about court processes and procedures. But despite these efforts, the justice gap has grown between those who can afford to pay for legal services and those who cannot do so. Clearly, merely assisting litigants to navigate the justice system alone is insufficient to ensure that Arizonans have meaningful access to our courts to resolve legal issues. And although subsidized and free legal

¹¹ Clio, *2017 Legal Trends Report*, 17 (2017), <https://www.clio.com/resources/legal-trends/2017-report/>.

¹² *Id.*

¹³ Henderson, *supra* note 7, at p. 21 (citing Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structures*, 84 Va. L. Rev. 1707 (1998) (noting that “[e]thical rules are a form of professional self-regulation enforced by civil liability or professional discipline.”)).

¹⁴ National Center for State Courts, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, 25 (2015), available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

services, including low bono and pro bono legal services, are a key part to solving this access to justice gap, they are insufficient. “U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with civil legal needs.”¹⁵

Considering the large market for legal services left unserved by lawyers, technology-based and artificial intelligence platforms have stepped in to serve clients. Online entities assist customers to form businesses, register trademarks, and draft wills and other legal forms.

Arizona has long explored new ways of delivering legal services. Since 2003, the Arizona Supreme Court has authorized the certification of Legal Document Preparers (“LDPs”), and the State Bar of Arizona recently implemented a web-based “Find A Lawyer” program, connecting those with legal needs to lawyers willing to do the work pro bono or at an affordable cost.¹⁶ Arizona courts have also worked to expand and clarify ways in which court staff can provide legal information to self-represented parties.¹⁷ Arizona, like other states, has also recently turned to technology to help bridge the justice gap. Examples include implementing a virtual resource center through the award-winning webpage AZCourtHelp.org with legal information sheets and legal information videos, pilot online dispute resolution programs, and the design of an online program (AZPoint.org) to streamline drafting, filing, serving, and transmitting orders of protection.

¹⁵ Commission on the Future of Legal Services, *supra* note 2, at p. 14 (citing Gillian K. Hadfield, *Innovating Access: Changing the Way Courts Regulate Legal Markets*, *Daedalus* 5 (2014)).

¹⁶ <https://azbar.legalserviceslink.com/>

¹⁷ *See, e.g.*, the Arizona Commission on Access to Justice’s Question and Response Handbook available in print for court employees and accessible online through AZCourtHelp.org available at <https://www.azcourthelp.org/faq>.

It is against this backdrop and Arizona's many years of efforts to advance access to justice that the task force was established and carried out its work. The task force developed 10 recommendations in relation to the six topics it was charged with analyzing. The following pages summarize those recommendations and the impetus and rationale behind them.

II. Recommendations.

Recommendation 1: Eliminate Arizona's ERs 5.4 and 5.7 and amend ERs 1.0 through 5.3 to remove the explicit barrier to lawyers and nonlawyers co-owning businesses that engage in the practice of law while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public.

A. Review of National Efforts and Recommendation Development.

Ethical rules have been called out as contributing to the justice gap as demonstrated by Professor Henderson's *Legal Marketplace Landscape Report*.¹⁸ Henderson's watershed report and the work of the Association of Professional Responsibility Lawyers (APRL) make clear that Arizona's ethical rules should be amended given that lawyers are increasingly providing services in a manner other than through traditional legal partnerships or professional corporations. E.R. 5.4, which generally prohibits lawyers from sharing fees with nonlawyers and prohibits nonlawyers from having any financial interest in law firms, has been identified as a barrier to innovation in the delivery of legal services.

Arizona is not alone in considering significant and innovative changes to the ethical rules that restrict ownership of any business that engages in the practice of law to lawyers alone. In June 2019 the Board of Trustees of the State Bar of California voted to seek public comment on broad concepts for changing California's ethical rules that would allow limited alternative business

¹⁸ Henderson, *supra* note 7, at p. 21; Oregon State Bar Futures Task Force, *Future: The Future of Legal Services in Oregon, Executive Summary*, 4 (2017), available at http://www.osbar.org/_docs/resources/taskforces/futures/futurestf_summary.pdf (citing Commission on the Future of Legal Services, *supra* note 2, at p. 16).

structures.¹⁹ These concepts include loosening rules on passive investment and allowing nonlawyers to partner with lawyers in the formation of businesses that provide legal services. Utah is similarly considering a two-year pilot “sandbox” program that would allow the formation of alternative business structures and regulate those businesses through an independent regulatory body overseen by the Utah Supreme Court. In addition, Washington D.C. has allowed limited alternative business structures for several decades²⁰ and the American Bar Association (“ABA”) Commission on the Future of Legal Services has also considered proposals to eliminate model ethical rule 5.4.²¹

Task force members not only heard from Professor Henderson but spoke with representatives from the Washington D.C. Bar about the effect of D.C.’s 5.4 rule changes, heard from ethics experts locally, and attended a summit hosted by the Institute for the Advancement of the American Legal System (“IAALS”), that focused on regulatory changes related to the practice of law. The task force received information about past and present efforts of national organizations like the ABA and APRL to consider and propose rule changes that would allow for the creation of alternative legal business structures. To assist it, the workgroup assigned to examine whether to permit nonlawyer ownership of firms invited two Arizona ethics lawyers to join in forming proposals.²² A sentiment that resounded within the workgroup was that lawyers have the ethical

¹⁹ See State Bar of California Task Force on Access Through Innovation of Legal Services Report: *Request to Circulate Tentative Recommendations for Public Comment*, July 11, 2019, available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf>.

²⁰ Rule 5.4, D.C. Rules of Professional Conduct.

²¹ Commission on the Future of Legal Services, *supra* note 2, at p. 66.

²² Patricia A. Sallen, a legal ethics consultant and lawyer based in Phoenix, Arizona, whose work has included serving as Director of Special Services and Ethics with the Arizona State Bar,

obligation to assure legal services are available to the public, and that if the rules of professional conduct stand in the way of making those services available, then the rules should be changed, albeit in a way that continues to protect the public.

Before deciding to recommend eliminating ER 5.4, the task force considered and rejected two other proposals offered by the workgroup. First, similar to Washington D.C.'s approach, the task force considered amending Rule 5.4 to allow the formation of alternative business structures.²³ The goal of this proposal was to open business possibilities and allow passive investment in legal services businesses. Important aspects of this proposal included disclosing to the public and clients that the businesses involved nonlawyer partners or investors, registering with the State Bar, and reinforcing the ethical rules that address lawyer independence and conflicts of interest. Major hurdles faced by the workgroup in attempting to merely amend ER 5.4 and other ethical rules addressing the independence of lawyers and protection of the public included how to regulate nonlawyers, the impossibility of identifying all possible businesses arrangements that might be formed and considering the effect of such rule changes on multi-jurisdiction law practices.

Second, the task force explored recommending a pilot “sandbox” program in which ER 5.4 would be waived for entities that applied for and were granted permission to operate as multi-discipline legal service providers. This proposal was rooted in the idea that entrepreneurial lawyers and nonlawyers would pilot a range of different business forms, which would permit the Supreme

working as ethics counsel for the Arizona State Bar, membership on the Arizona Supreme Court Attorney Regulation Advisory Committee, and teaching and writing about ethics-related topics nationally. Lynda L. Shely, is a Scottsdale, Arizona, attorney who provides ethics advice and representation to lawyers and law firms in Arizona and the District of Columbia, presents nationally on ethics-related topics, served as Director of Ethics for the State Bar of Arizona, has been called as an ethics expert witness, is a member of the Association of Professional Responsibility Lawyers (APRL), and is active in ABA committees.

²³ Commission on the Future of Legal Services, *supra* note 2, at p. 42.

Court to determine how ER 5.4 should be amended and eliminate the guesswork involved in the first proposal. Hurdles to this proposal included identifying who would decide applications for waivers of the ethical rules and whether the limited duration of a pilot project would deter business formation because of the risk that the businesses would have to close if the pilot program did not result in permanent rule changes.

The task force ultimately concluded that no compelling reason exists for maintaining ER 5.4 because its twin goals of protecting a lawyer's independent professional judgment and protecting the public are reflected in other ethical rules which can be strengthened. The task force therefore voted to file a rule petition to eliminate ERs 5.4 and 5.7 and modify ERs 1.0 through 5.3 to ensure lawyer independence and public protection. Considering these changes, the task force also recommends eliminating ER 5.7.

After significant discussion, the task force relatedly recommends that the Supreme Court convene a group to explore entity regulation for firms in which nonlawyers have an ownership interest. Currently, Arizona's rules of professional responsibility apply only to lawyers. But entity regulation is not a unique concept. The United Kingdom regulates legal entities, and the Utah Work Group on Regulatory Reform recently made a proposal regarding the issue. Utah proposes developing a new regulatory body for legal services. As the Utah Supreme Court moves forward with revising the rules of practice, it will simultaneously pursue creation of a new regulator, operating under the supervision and direction of the Supreme Court, for the provision of legal services. Utah anticipates some form of an independent, non-profit regulator with delegated regulatory authority over some or all legal services.²⁴

²⁴ The Utah Work Group on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation*, 15, 21 (2019) available at <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>

Entity regulation should be explored as an additional tool to ensure lawyer independence, client confidentiality, and consumer protection. Given the limited time afforded the task force for its work, it did not explore in detail the advisability of legal entity regulation or what such regulation would entail. Task force members considered, however, whether entity regulation should, at least, (1) require a lawyer with a financial interest or managerial authority in a legal entity to be responsible for nonlawyer owners to the same extent as if the nonlawyers were lawyers, (2) require informed written consent from clients acknowledging both a nonlawyer's financial interest or managerial authority in the entity and the entity's commitment to the lawyer's independence of professional judgment, and (3) designate one person in the entity to be responsible for the nonlawyers' compliance with any regulations.

The proposed amendments are summarized below and are detailed in Appendix 1 accompanying this report.

B. Summary of Proposed Elimination of ERs 5.4 and 5.7 and Amendments to ERs 1.0 through 5.3.

The proposed amendments to Arizona's ERs 1.0 through 5.3 would remove the requirement restricting the ownership of any business that engages in the practice of law exclusively to lawyers. This recommendation is centered in the elimination of ER 5.4 and re-defining the term "firm" in ER 1.0(c). Proposed changes to the ethical rules also ensure that the concepts of a lawyer's independent professional judgment and protection of the public are emphasized in the remaining ethical rules. Several proposed amendments eliminate comments to the rules, incorporating any substantive comments into the rules themselves, deleting comments that are duplicative or unnecessary, and amending remaining comments to be more concise and instructive. All proposed rule changes are designed to ensure that the ethical rules governing conflicts, obligations to the client, professional independence of lawyers, and maintaining the

overarching goal of protecting the public that have traditionally been the core values of the rules of professional conduct remain, regardless whether services are provided by a business that involves a partnership between lawyers and nonlawyers, involve passive investment in a purely legal services business, or provides both legal and nonlegal services.

ER 5.4 Professional Independence of a Lawyer

ER 5.4, which prohibits sharing fees with nonlawyers and forming partnerships with nonlawyers if any part of the partnership's activities include the practice of law, is "directed mainly against entrepreneurial relationships with nonlawyers" and aimed at "protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers."²⁵ The ABA Model Rule 5.4 and its predecessor rules as far back as the 1928 Canons of Professional Ethics, "originated in legislation aimed at forbidding lawyers from being employed by corporations to provide services to members of the public."²⁶ The prohibition was not rooted in protecting the public but in economic protectionism. There was "no evidence that the corporations then supplying lawyers to clients were harming the public, and the transparent motivation behind the legislation was to protect lawyers' businesses."²⁷ In evaluating the need to continue ER 5.4, the task force considered whether the rule serves a modern purpose and concluded it no longer serves any purpose, and in fact may impede the legal profession's ability to innovate to fill the access-to-civil-justice gap.

ER 5.4's negative effect was evident during the great recession, when many lawyers expressed interest in partnering with nonlawyers to be a "one-stop shop" for consumers who

²⁵ ABA Formal Ethics Opinion 01-423 (2001).

²⁶ Bruce A. Green, *Lawyers Professional Independence: Overrated or Undervalued?* 46 *Akron L. Rev.* 599, 618 (2013).

²⁷ *Id.*

wanted to refinance home loans, stop foreclosures, or participate in short sales. Typically, lawyers endeavored to create partnerships with mortgage brokers and real estate agents to help consumers. But ER 5.4's bar to partnering with a nonlawyer to provide legal services prohibited lawyers from forming these relationships. And yet creating single entities to offer all those services may have served consumer-clients' best interests.

The legal profession cannot continue to pretend that lawyers operate in a vacuum, surrounded and aided only by other lawyers or that lawyers practice law in a hierarchy in which only lawyers should be owners. Nonlawyers are instrumental in helping lawyers deliver legal services, and they bring valuable skills to the table.

Eliminating ER 5.4 would allow, for example:

- A nonlawyer to have an ownership interest in a partnership in which a lawyer provides legal services to others outside the entity;
- A nonlawyer partner in a firm to provide nonlegal services to clients of the entity;
- A nonlawyer to serve as a firm's chief financial officer or chief technology officer; and
- A lawyer to pay nonlawyer personnel a percentage of fees earned by the law firm on a particular case.

Eliminating ER 5.4 will not remove protection afforded a lawyer's professional independence and the public. ER 1.8(f), for example, already directs that third-party payers such as insurance companies cannot interfere with a lawyer's independent professional judgment or the client-lawyer relationship.

ER 1.0 Terminology

The proposed amendments include a new definition of "firm" to account for ownership interests in legal businesses by nonlawyers. The amendments include broadening the definition of "screened" to clarify that reasonably adequate procedures to screen both lawyers and nonlawyers

with ownership interests must be undertaken, and the amended definition provides direction on what constitutes “reasonably adequate procedures.”

In addition, proposed amendments to ER 1.0 incorporate concepts from existing comments to the rule and other rules that the task force determined were important enough to be part of the rule’s text. Amendments also define previously undefined phrases in rules that are necessary to address the new concept of nonlawyers having an ownership interest in firms and those nonlawyers providing nonlegal services to firm clients.

ER 1.5 Fees

The proposed amendments to ER 1.5 are rooted in ensuring that the language of the rule reflects the change to the definition of “firm” in ER 1.0(c) and reflects the elimination of ER 5.4’s prohibition of a business providing legal services to be owned by lawyers and nonlawyers alike. The proposed rule also incorporates language from current comments to clearly provide that the rule applies to firms dividing a single billing to a client and firms jointly working on a matter. The rule further requires that division of responsibility must be reasonable.

ER 1.6 Confidentiality

The amendment to ER 1.6 requires that a lawyer make reasonable efforts to prevent inadvertent or unauthorized disclosure of confidential information about a client, even if the services the firm provides to the client are purely nonlegal. The task force recognized that by eliminating ER 5.4 and allowing lawyers and nonlawyers to partner together to form businesses that might provide both legal and nonlegal services, it remains imperative to protect clients and the confidentiality of representations. Therefore, the amendment to ER 1.6 preserves that protection and clarifies that regardless whether a client is receiving legal services from a lawyer or receiving nonlegal services from a nonlawyer, the traditional protections of the client’s information apply to all aspects of the business.

ER 1.7 Conflict of Interest: Current Clients

There are no proposed amendments to ER 1.7. However, the concept of personal-interest conflicts addressed in comment 10 to the rule were imported into the new definition in ER 1.0(o), and amendments to ERs 1.8, 1.10, and 5.3 address other conflict-related issues. This permits elimination of comment 10 while adding these essential concepts into the text of the ethical rules.

ER 1.8 Conflict of Interest: Current Clients: Specific Rules

An amendment to this rule adds subsection (m), which states that when lawyers refer clients for nonlegal services provided either by the lawyer or nonlawyers in the firm or refer clients to a separate entity in which the lawyer has a financial interest, they must comply with ERs 1.7 and 1.8(a). This addition takes content from comment 3 and moves it into the rule's text. In addition, comments 1, 2, and 3 are deleted because relevant parts of comments 1 and 3 are made part of a new definition of "business transaction" in ER 1.0(n) and comment 2 merely restates ER 1.8(a) and is therefore redundant. In addition, the personal-interest conflicts issue addressed in comments to ER 1.7 are included in a new provision to ER 1.8.

ER 1.10 Imputation of Conflicts of Interest: General Rule

ER 1.10(a) is amended to address nonlawyers. With the elimination of ER 5.4, nonlawyers will be able to play significant roles in firms, including having ownership interests. Therefore, the rules should explicitly address imputation of their conflicts. Amendments to the comments include deleting comments 1 through 4. Comment 1, which discusses a "firm," is no longer needed in light of the expanded definition of "firm" in ER 1.0(c). Comments 2 and 3 summarize the concepts of imputation, with one important exception that addresses conflicts if a lawyer owns all or part of an opposing party. That exception was expanded to include nonlawyers and was added to the rule's text as subsection (f), which provides that a conflict is imputed to the entire firm if a lawyer or nonlawyer owns all or part of an opposing party. Comment 4 contains important concepts the task

force determined should be part of the rule itself. New subsection (g) therefore allows disqualified nonlawyers to be screened from matters without imputing the conflict to the firm, unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm. Similarly, new subsection (h) allows lawyers to be screened if they are disqualified because of events or conduct that occurred before they became licensed lawyers, unless the lawyer is an owner, shareholder, partner, officer, or director of the firm.

ER 1.17 Sale of Law Practice or Firm

Current subsections (a) and (b) are removed considering the elimination of ER 5.4, which, in turn, rendered many comments to the rule unnecessary. Several new subsections were added to move important information from remaining comments into the rule's text. Subsection (a)(1) now requires the seller to disclose the purchaser's identity. Subsection (c) states that the purchaser cannot increase fees to clients to finance the sale, and the purchaser must honor existing arrangements between the seller and clients regarding fees and scope of work. New subsection (d) requires the seller to give notice to clients before allowing a purchaser to access detailed client information. New subsection (e) requires the seller to ensure that a purchaser is qualified and new subsection (f) advises that if courts must approve substitution, the matter cannot be included in the sale until obtaining that approval. Finally, new subsection (g) makes the rule inapplicable to transfers of legal representation unrelated to a sale of the firm. No comments are necessary for the proposed rule.

ER 5.1 Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors

Amendments to this rule were made in part because a lawyer may hold an ownership interest in a firm in a variety of ways. The rule is no longer limited to a "partner" and instead a broader reference to "ownership interests" was added to the title because of the change in the definition of "firm" in ER 1.0(c) and the elimination of ER 5.4. As with several other ERs

discussed here, the task force determined that comments to this rule addressed important concepts that should be part of the rule. The definition of “internal policies and procedures” was moved from the comment to subsection (b). Subsection (c) now states that whether a lawyer has supervisory duties over lawyers may vary depending on the circumstances. And, subsection (d) now provides guidance on what constitutes reasonable remedial action. No comments are necessary for the proposed rule.

ER 5.3 Responsibilities Regarding Nonlawyers

The task force determined that the rule should refer to both nonlawyers in the firm and nonlawyer assistants, who can be inside or outside the firm, and therefore a change to the title was made to identify the scope of the rule. As with ER 5.1(a), ER 5.3(a) now instructs that lawyers and firms must ensure lawyers and nonlawyers alike undertake reasonable measures to conform to the Rules of Professional Conduct. The remaining amendments move important information from the comments to the rule itself. A definition of “reasonable measures” was added to subsection (b), while direction on what constitutes a direct supervisor’s “reasonable efforts” was added in subsection (c)(1). New subsection (c)(3) requires that lawyers give directions appropriate under the circumstances to nonlawyers outside the firm and guidance on allocating responsibility for monitoring an external nonlawyer when the client directs that the lawyer select the particular nonlawyer was added to new subsection (c)(4). Finally, new subsection (d) requires that each firm designate one lawyer who is responsible for establishing policies and procedures in the firm to assure that all nonlawyers comply with the lawyers’ ethical obligations. The task force suggests that the State Bar may then require that the lawyer identify on the annual dues statement which lawyer in the firm is responsible under ER 5.3(d), similar to the requirement that each lawyer identify the lawyer responsible for the firm trust account procedures. This would provide a level

of entity accountability to assure that a specific attorney must establish appropriate nonlawyer ethics procedures.

ER 5.7 Responsibilities Regarding Law Related Services

In evaluating whether to recommend eliminating ER 5.4, the task force considered the need to maintain ER 5.7. Under the existing rule, and depending on the circumstances, a lawyer may be obligated to provide the recipient of law-related services the full panoply of protections enjoyed by the lawyer-client relationship.

Considering the recommendation to eliminate ER 5.4, and thus allow lawyers to partner with nonlawyers, ER 5.7 seems unnecessary and restrictive of innovation. The general conflict-of-interest and confidentiality rules, as well as the rules protecting the professional independence of lawyers, as amended, should suffice to protect clients.

Recommendation 2: Modify Arizona’s ERs 7.1 through 7.5 to incorporate many 2018 ABA Advertising Rule amendments and to align the rules with the recommendation to eliminate ERs 5.4 and 5.7 and amend ERs 1.0 through 5.3.

A. ABA Model Rule Changes and National Trends.

In 1977, the United States Supreme Court decided *Bates v. State Bar of Arizona*,²⁸ and in 1985 Arizona adopted the ABA Model Rules. Current ERs 7.1 through 7.5 (the “Advertising Rules”), which govern lawyer communications about legal services, have not substantively changed since their adoption in 1985, despite compelling reasons to make changes.²⁹ Technological advances in the delivery of legal services as well as cross-border marketing of legal services through the internet, television, radio, and even print advertising have changed the ways

²⁸ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

²⁹ Portions of this summary are derived from the Standing Committee on Ethics and Professional Responsibility’s 2018 Report and Resolution 101 for amendment of the ABA Model Rules on Professional Conduct on lawyer advertising.

consumers learn about available legal services. These changes, as well as the mobility of clients and lawyers, require more uniformity in the rules that regulate lawyer advertising among United States jurisdictions. Therefore, the task force recommends bringing the Advertising Rules into conformity with recent changes made by the ABA in 2018 and aligning the rules with current realities of lawyer advertising and law practice.

The task force's recommended amendments to the Advertising Rules accommodate three trends calling for simplicity and uniformity in the regulation of lawyer advertising. First, lawyers increasingly practice across state and international borders, and clients often need services in multiple jurisdictions. Second, technologies that were not prevalent in 1985 to search for professional services today are ubiquitous.³⁰ Third, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful.³¹

³⁰ See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 (“According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.”).

³¹ For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services. For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, *supra* note 30, at 7-18.

Empirical data from a survey sent to bar regulators by APRL regarding the enforcement of current advertising rules shows that complaints about lawyer advertising are rare; the vast majority of advertising complaints are filed by other lawyers and not consumers, and most complaints are handled informally, even when there is a provable advertising rule violation.³² APRL's survey data is consistent with charges received by the State Bar of Arizona regarding lawyer advertising. Based in part on this data, in August 2018 the ABA House of Delegates adopted model rule amendments while maintaining the primary regulatory standard for advertising – communications must be truthful and not misleading.³³ The State Bar of Arizona expressed support for these amendments through the vetting process. Many jurisdictions currently are considering adoption of the 2018 ABA Model Rule amendments – and some jurisdictions, such as Virginia, Washington, and Oregon already have updated their Rules with variations on the recommendations.

B. Summary of Proposed Amendments to ERs 7.1 through 7.5.

The proposed amendments to Arizona's ERs 7.1 through 7.5 incorporate many of the 2018 ABA Model Rule amendments and fulfill the task force's charge to identify issues and improvements in the delivery of legal services. As evidenced by Recommendation 1 above, the task force recommends eliminating or amending ethical rules that impede lawyers' abilities to provide cost-effective legal services.

The proposed amendments to the Advertising Rules would:

- retain the rules' primary regulatory mandate of refraining from making false and misleading communications;

³² ABA Report and Resolution 101 on Lawyer Advertising, August, 2018: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_dar_resolution_and_report_advertising_report_as_amended_by_rules_and_calendar_for_submission_004.pdf

³³ *Id.*

- set forth the requirements for who may identify themselves as a “certified specialist” in an area of law;
- maintain reasonable restrictions on direct solicitation of specific potential clients; and
- eliminate obsolete and anticompetitive provisions that unreasonably restrict the dissemination of truthful advertising.

The most significant proposed amendment, which goes beyond the 2018 ABA Model Rule amendments, would eliminate current ER 7.2(b)’s prohibition against giving *anyone* anything of “value” for recommending a lawyer or referring a potential client to a lawyer. Anecdotally, it has been observed that this provision is violated daily because, taken literally, this provision prohibits taking an existing client golfing to say thank you for a referral or giving a firm paralegal a gift card or sending flowers for referring a family member to the firm. Similarly, there are many ethics opinions issued both in Arizona³⁴ and around the United States that provide convoluted attempts to distinguish between what is permissible “group advertising” versus what is an impermissible “referral service.” Not only do these technical interpretations serve no productive regulatory purpose, but the unnecessary complexity in the regulations stifles lawyers’ abilities to embrace more efficient online marketing platforms for fear the website or service may be deemed a for-profit referral service.

Rule 7.2(b)’s prohibition against “giving anything of value” exists although there is no quantifiable data evidencing that *for-profit* referral services or even paying for referrals confuses or harms consumers. Consumers do not expect online marketing platforms to be nonprofit operations – which are the only referral services permissible under the current regulatory

³⁴ See State Bar of Ariz. Ops.05-08 (2005), 06-06 (2006); 10-01 (2010), and 11-02 (2011).

framework. Note that Florida, one of the most restrictive lawyer advertising jurisdictions in the country, already permits for-profit referral services.

The proposed changes to the Advertising Rules are set forth in Appendix 1. The following summarizes those changes.

ER 7.1 Communications Concerning a Lawyer's Services

The amended rule retains the existing prohibition against “false and misleading” communications about a lawyer’s services. Most bar regulators in the United States have expressed the view that this provision is the rule primarily relied on to regulate lawyer advertising. The current requirements for identifying a lawyer as a “certified specialist” were moved from current ER 7.4 into new ER 7.1(b) and the proposed amendment updates the language from restricting use of the term “specialist” to restricting only the use of the phrase “certified specialist,” consistent with the ABA Model Rule. This change avoids constitutional challenges to the overly restrictive prohibition in current ER 7.4, which limits use of the term “specialist.” The proposed changes would also bring Arizona’s rule in line with the ABA Model Rule language in noting that lawyers may not identify themselves as “*certified* specialists” unless they comply with the requirements set forth in Court rules. The reference in new ER 7.1(b) to new criteria for certified specialist will be contained in Supreme Court Rule 44, and this cross-reference will assist lawyers researching Arizona’s certified specialist advertising requirements. Explanatory comments from current ER 7.4 have been moved to the comments of ER 7.1 to reassure patent attorneys that their specialization is still recognized.

The amendments also move the requirement that all communications must contain the name of a lawyer or law firm and some “contact” information from ER 7.2(c) into new ER 7.1(c). Comments to 7.1 also now include explanatory comments regarding law firm names that were in current ER 7.5. This is consistent with the 2018 Amendments to the ABA Model Rules of

Professional Conduct and clarifies that disbarred lawyers' names and names of lawyers on disability inactive status cannot continue in a firm name.

ER 7.2 (RESERVED)

Current ER 7.2 sets forth specific rules concerning lawyer advertising. The task force recommends deleting that rule and moving the substance of current ER 7.2(c) to new ER 7.1(c). The consumer protection afforded by current ER 7.2 can be provided by less non-competitive provisions. For instance, the rules on conflicts of interest, including ERs 1.7, 1.8, and 1.10, protect clients/consumers because they restrict a lawyer's (and firm's) representation of a client if the lawyer's own interests could "materially limit" the lawyer's independent professional judgment in representing the client. Thus, a lawyer cannot be "forced" to represent a client simply because they were referred by someone who the lawyer pays as a referral source. The conflict of interest rules control who and how a lawyer may represent a client, and such representations must be free of any conflict that could materially limit the lawyer's objectivity. And disclosures revealing that a lawyer will pay referral fees sufficiently informs consumers about the referral system. Such disclosures may be required to comply with ER 7.1's "false and misleading" standard to assure that adequate information is conveyed to website visitors or referral sources about the fact that the site is not a nonprofit operation.

ER 7.3 Solicitation of Clients

Consistent with the 2018 Amendments to the ABA Model Rules, the title of this rule was modified, and a definition of "solicitation" was added. This rule governs direct marketing to individuals with specific needs for legal services, as opposed to general advertising on billboards, business cards, print advertisements, television commercials, websites, and the like. The proposed amendments are narrowly tailored to protect consumers who need legal services in particular matters from overreaching by lawyers. The amendments would preclude, for example, solicitation

letters sent to homeowners in a community where there are known construction defects, car accident victims, members of a neighborhood that has been affected by an environmental hazard, and individuals charged with crimes. Solicitation would *not* include sending a letter to everyone in a certain zip code simply to introduce a law firm to a general community that does not have a specific legal need (such as an estate planning firm sending letters to everyone in Paradise Valley or a family law attorney sending announcement postcards to all businesses in her business complex, announcing the opening of her office). Solicitation also would exempt class action court or rule-required notifications.

ER 7.3 retains the prohibition against in-person (face to face or door-to-door) and real-time electronic (such as telephone calls or Facetime) solicitation, unless the prospective client falls within certain categories of individuals not likely to be overwhelmed by a lawyer's advocacy/solicitation skills, such as other lawyers, a former client, or a family member or friend of the lawyer. And even for these categories of prospective clients, a lawyer cannot solicit them (or anyone) if they have made known that they do not want to be solicited or the communication involves coercion, harassment, or duress. At the same time, an amendment to ER 7.3 adds an exception to the prohibition against in-person solicitation for communications directly with business people who regularly hire lawyers for business legal services, consistent with the 2018 Amendments to the ABA Model Rules. The task force notes that this language was vetted extensively through ABA entities and Bar regulators to assure that the language could not be misinterpreted to mean, for instance, that a lawyer could call someone who regularly hires business lawyers to solicit business for criminal defense, bankruptcy, or family law matters. The language in the proposed amendment limits this category of prospective client to only those who regularly

retain counsel for business purposes and therefore are experienced at receiving calls, emails, and meetings with lawyers seeking to represent their companies.

The proposed amendments delete the current Rule's "ADVERTISING MATERIAL" notation requirement for envelopes (and filing requirement), consistent with the 2018 Amendments to the ABA Model Rules. Several jurisdictions, including, for instance, the District of Columbia, Massachusetts, Maine, Pennsylvania, North Dakota, Oregon, and Washington either have never had a notation requirement or deleted the requirement years ago. None of these jurisdictions indicate any consumer confusion in receiving written communications from lawyers. Nor is there any empirical evidence to indicate that the notation serves a necessary purpose in alerting consumers to the contents of an envelope. Given the changes in technology and methods of direct marketing consumers receive on a regular basis, there is far less likelihood of a consumer being confused about the purpose of a direct mail solicitation letter or email today, than perhaps existed in 1985 when the notation requirement was adopted.

ER 7.4 (RESERVED)

Current ER 7.4 concerns a lawyers' abilities to communicate their fields of practice. As noted previously, the requirements for identifying a lawyer as a "certified specialist" was moved to new ER 7.1(b). Comments to ER 7.4 regarding patent attorneys were moved to ER 7.1. The remainder of ER 7.4 has been deleted as duplicative of proposed ER 7.1.

ER 7.5 (RESERVED)

Current ER 7.5 concerns firm names and letterheads. The ABA deleted ER 7.5 as unnecessary, given that ER 7.5 simply described information in a firm name that might be false or misleading. The task force recommends deleting ER 7.5 because it is not needed to regulate law firm names. ER 7.1 is sufficient and the more commonly used regulation. As previously explained, the task force recommends moving ER 7.5's comments to ER 7.1.

Recommendation 3: Promote education and information on what unbundled legal services are to the bench, bar, and public to encourage expanded understanding and utilization of unbundled legal services.

When lawyers provide limited scope representation also known as “unbundled” legal services, clients hire them to perform a specific task or represent them for only a limited process or issue of the legal matter instead of the entire matter. There is no standard unbundled process because lawyers perform many different tasks and clients have different needs. Arizona has allowed lawyers to engage in limited scope representation since 2003.³⁵ However, the practice appears to be used predominately by lawyers who work in family law. One explanation for the lack of lawyers engaging in limited scope representation is a concern that once the limited representation ends between the client and the lawyer, the court will continue to require the lawyer to represent the client beyond the limited scope agreement.

The task force reviewed articles and best practices concerning unbundled legal services. Unbundled legal services have existed in the American legal system for some time as many legal engagements can be broken into discrete tasks. However, it is imperative that courts explicitly support this model of providing legal services to ensure that the bench, bar, and public fully understand what this type of legal service entails and ensure that consumers do not go without representation rather than pay the high cost of a full-service legal engagement.

To remedy these concerns the task force recommends:

A. The Supreme Court should explicitly support the delivery of unbundled legal services through a campaign of education for the bench and court staff in Arizona.

The task force recommends that the Supreme Court incorporate information on what unbundled legal services are, how to recognize an entry of limited appearance and notice of termination of appearance, and how to honor those limited engagements in cases. This education

³⁵ ER 1.2(c), Ariz. R. Sup. Ct. 42.

campaign should include educating court clerk offices and staff on unbundled legal services so that staff can ensure once a notice of termination of limited appearance is entered, the attorney is no longer noticed or required to appear in court for matters unrelated to the limited scope of service for which they had appeared. The task force recommends that the Court include information on unbundled legal services in new judge orientation programs and in annual judicial conference and leadership conference programs.

B. The State Bar should explicitly promote and educate the bar about unbundled legal services.

The task force recommends that the State Bar of Arizona encourage listings and promotion of lawyers offering unbundled legal services. The State Bar recently launched a Find-A-Lawyer portal that aids consumers in connecting with lawyers offering needed legal assistance in particular areas of the law. This website also allows consumers to indicate their ability to pay for such services which opens a pathway for lawyers conducting pro bono work to connect to clients in need of services with limited financial means. The task force recommends the State Bar assess the Find-A-Lawyer program to determine ways to allow consumers to identify attorneys who offer unbundled legal services to encourage the public to obtain representation rather than go it alone for the entirety of their matter.

The task force also recommends that the State Bar offer educational opportunities through regular CLE programs, the annual bar conference, and articles in the Bar's e-news and print journals about what unbundled legal series are, best practices for initiating and terminating a limited scope representation, including drafting limited scope fee agreements, and how to assess a matter to determine if unbundled legal services are appropriate.

C. Provide information to the public on the different types of lawyer representation, including limited scope representation, on AZCourtHelp.org and AZCourts.gov.

The task force explored opportunities to educate the public on what unbundled legal services are and how they differ from other types of legal services, particularly full-service legal representation. The Bar Foundation in conjunction with the Supreme Court hosts the AZCourtHelp.org webpage which is a statewide virtual legal resource center. Cathleen Cole, Content Manager for AZCourtHelp.org, developed a draft webpage that describes each type of legal representation that an attorney might provide. Descriptions of the various types of legal services include a summary of what each type of legal representation is and descriptions of what each type of service entails. The page on unbundled legal services includes a Notice of Limited Scope Representation form, a Notice of Completion of Limited Scope Representation form, and an example of a limited scope representation contract.

At the time of this report, the Bar Foundation had launched this webpage. The task force recommends that the Supreme Court continue to collaborate with the State Bar and the Bar Foundation to ensure that relevant and meaningful content remains available on the type of legal services pages to ensure that the public has every opportunity to learn about the types of legal services they might secure to assist them with their legal needs.

In addition, the task force recommends that the Administrative Office of Courts develop similar content on AZCourts.gov. The Court Programs Unit of the AOC also developed webpages located under “Resources” in the Self-Help Center that explain the various types of legal representation. In addition, the AOC is working on developing legal information sheets – essentially pages that answer frequently asked questions – for inclusion on the types of representation page. The task force recommends that the Court continue to support the efforts of

the AOC to provide educational information to the public about the types of legal services, particularly unbundled legal services, through the Court's website.

D. Issue an administrative order drawing attention to limited scope representation and adopting uniform notices.

The task force recommends that the Supreme Court issue an administrative order that notifies the Judiciary that ER 1.2 explicitly allows limited scope representation (unbundled legal services) by attorneys in Arizona if the appearances are reasonable under the circumstances. Low-income individuals and increasing numbers of unrepresented litigants cannot afford the costs of full-service legal representation. Although self-represented litigants may be armed with online court forms and self-help materials, without advice and counsel from an attorney, many come to court uninformed, unprepared, or simply overwhelmed.

The task force also recommends that the Supreme Court, by administrative order, adopt two form notices for all practice areas:

- A form Notice of Limited Scope Representation that a lawyer would file upon appearing and which notifies the court that the filing attorney is entering the case for a specific scope of representation (by date, time period, activity, or subject matter).
- A Notice of Completion of Limited Scope Representation that notifies the court when the attorney's appearance terminates. Through education, judicial officers should learn that such a withdrawal or termination of appearance does not require leave of court (1) if the notice of limited appearance specifically states the scope of the appearance by date or time period; or (2) upon the attorney filing a Notice of Completion, which must be served on each of the parties, including the attorney's client.

Finally the task force urges the Supreme Court to inform the bench through the administrative order that (1) service on an attorney who has entered a limited appearance is

required only for matters within the scope of the representation as stated in the notice, (2) any such service must also be made on the party, and (3) service on the attorney for matters outside the scope of the limited appearance does not extend the scope of the attorney's representation. These efforts will ensure that the bench, opposing parties or counsel, and court staff are aware of when an attorney appearing for a limited purpose should be served with pleadings or noticed for court appearances.

A proposed administrative order and forms can be found in Appendix 2 to this report.

Recommendation 4: Revise Rule 38(d), Arizona Rules of Supreme Court, to clarify when a law student at an accredited law school or a recent law graduate may practice law under the supervision of a lawyer admitted to practice in Arizona, what legal services the law student or law graduate may provide, and the duties and obligations of the supervising lawyer.

This recommendation was brought to the task force by members of the legal community. In Arizona, law students can practice law under the supervision of a licensed attorney in accordance with Arizona Supreme Court Rule 38(d). This limited student law practice is restricted to students who are either supervised by an attorney in a public or private legal office or by a clinical law professor in conjunction with a law school clinical program. Although Rule 38(d) currently allows recent law graduates to engage in a limited practice of law until the first offering of the Arizona bar examination,³⁶ the rule was drafted in a way that downplayed or masked this opportunity for recent law graduates. Current Rule 38(d) is unduly complicated and unclear in large part and fails to include certain program essentials. Thus, the proposed amendments revise and reorganize the rule for clarity and substantive completeness. As revised, the proposed rule

³⁶ Certification of a certified limited practice student shall commence on the date indicated on a notice of certification and shall remain in effect . . . [until] the certified student fails to take or pass the first general bar examination for which the student is eligible. Ariz. R. S. Ct. 38(d)(5)(F)(iv).

sets out the program requirements and practice restrictions for both law students and recent law graduates in a clear, organized, consistent, and complete manner.

The proposed amendments clarify that recent law graduates may be certified to engage in the limited practice of law under the supervision of an attorney. The proposed amendments also more clearly state that limited practice does not need to be tied to a clinical law program. At least 16 states allow recent law graduates to engage in the limited practice of law post-graduation and pre-bar admission. These state programs share common features:

- All programs have specified durations. For example, some programs authorize practice only during the period in which the graduate has applied to take the first bar examination after his or her graduation and is awaiting the results. Other programs include similar restrictions and incorporate a tiered expiration date for the authorization to practice, such as no later than 12 or 18 months after the graduate graduated from law school.
- Most of these programs authorize graduates to practice law to the same extent law students are authorized to practice law under programs like existing Rule 38(d)(5). Thus, graduates are permitted to meet with clients, go to court, try cases, argue motions, and the like. Most of the states authorize graduates to handle civil and criminal cases, although some restrict the criminal cases to misdemeanors or less-serious felonies.
- Several programs authorize graduates to practice for certain type of employers, such as legal-aid clinics, public defenders, prosecutor's offices, or city, county, and state offices or agencies.
- Many programs impose supervisory requirements that are similar to the supervisory requirements imposed under existing Rule 38(d).

- A few programs require the dean of the graduate's law school, or the graduate's proposed supervising attorney, to certify the graduate's good character and competence to the state supreme court or another entity. Other programs simply require the employer to comply with the requirements of the program and do not require the employer to file any other documentation with any court or state agency.

Although these other state programs vary in operational details, they all provide a means by which law students and non-licensed law graduates may practice law, and effectively result in expanding the delivery of legal services, especially by public agencies or public service groups that provide legal services to individuals with limited resources. These programs do this by allowing recent law school graduates in the process of becoming licensed to gain experience by practicing law under the supervision of admitted lawyers for a limited duration. Because this limited exception to licensure is anticipated to benefit the public, the task force's proposed amendments to Rule 38(d) fall squarely within the mandate to consider and evaluate new models for delivering legal services.

Further, the amendments would eliminate, or at least lessen, many of the practical problems experienced by law school graduates given the workload of the individuals involved in the admission and character and fitness process. The amendments permit recent law graduates to practice under the supervision of a lawyer after graduation from an ABA accredited law school if the graduate takes the first Arizona uniform bar examination, or the first uniform bar examination offered in another state for which the graduate is eligible. Certification to practice terminates automatically if the graduate fails the bar examination, if the Committee on Character and Fitness does not recommend to the Supreme Court the graduate's admission to practice, if the graduate is denied admission to practice law by the Supreme Court, or on the expiration of 12 months from

the date of the graduate's graduation from law school unless the Supreme Court extends the 12-month period. If the graduate passes the bar examination, certification terminates 30 days after the graduate has been notified of approval for admission to practice and eligibility to take the oath of admission. Certification to practice for both graduates and law students also terminates on the occurrence of other events such as failure to meet the requirements for certification.

Proposed amended Rule 38(d) is set forth in Appendix 3.

Recommendation 5: Revise Rule 31(d), Arizona Rules of Supreme Court, by restyling the rule into four separate rules, making the rule easier to navigate and understand.

The task force was charged with re-styling Rule 31(d), Arizona Rules of Supreme Court, which govern the practice of law. Over the years, Rule 31(d) has been expanded incrementally to include thirty-one exceptions, becoming cumbersome and difficult to navigate. Consistent with other restyling efforts, the task force separated current Rule 31 into four separate rules. Thus, proposed Rule 31 incorporates current Rule 31(a), proposed Rule 31.1 incorporates current Rule 31(b), proposed Rule 31.2 incorporates current Rule 31(c), and proposed Rule 31.3 incorporates current Rule 31(d). This restructuring is intended to make the rule easier to navigate and understand. Consistent with the Arizona Supreme Court's restyling conventions, the task force sought to state the rules using the active voice and eliminate ambiguous words (especially "shall") and archaic terms (e.g., herein, thereto, etc.). The rules were also restated in a positive—rather than prohibitory—manner (e.g., "a person may" rather than "a person may not,"; "a person or entity may" rather than "nothing in this rule prohibits").

The following is a summary of the changes recommended by the task force. The changes in restyled Rules 31 through 31.2 are mostly stylistic, with one major exception. Currently, the "authority to practice" in Rule 31(b) and the "unauthorized practice of law" in Rule 31(a)(2)(B) state that one is authorized to practice law only if he or she is an active member of the State Bar

of Arizona. One notable difference is restyled Rule 31.2(a), which specifically acknowledges that Rules 38 and 39 authorize non-Bar members (such as in-house counsel and out-of-state lawyers admitted *pro hac vice*) to practice law in Arizona.

The definition of “legal assistant/paralegal” was removed as that term is not used in current or restyled Rule 31. The definition of “mediator” was not included in the restyled rule. The definition of “unprofessional conduct” in current Rule 31(a)(2)(E) was not included in the restyled rule. The term “unprofessional conduct” is not used in Rule 31. In a rule petition seeking to restyle Rule 31, the task force also proposes an amendment to Supreme Court Rule 41 or 54 to include the definition of “unprofessional conduct” as those rules depend on that definition.

The most extensive changes occur to current Rule 31(d), which the proposed rule denominates as Rule 31.3. Rule 31(d) currently has thirty-one subsections with little reason to their order. To make the rule more useful, subsection (d) was reorganized into ten subsections in proposed Rule 31.3: (1) a “Generally” section; (2) Governmental Activities and Court Forms; (3) Corporations, Limited Liability Companies, Associations, and Other Entities; (4) Administrative Hearings and Agency Proceedings; (5) Tax-Related Activities and Proceedings; (6) Legal Document Preparers; (7) Mediators; (8) Legal Assistants and Out-of-State Attorneys; (9) Fiduciaries; and (10) Other.

The following matters merit specific mention. First, proposed restyled Rule 31.3(c)(i)(1) provides a definition of “legal entity.” Second, subsection (3) collapses the three current provisions regarding the representation of companies and associations in municipal or justice courts. Third, subsection (4) retains the provision authorizing a person to represent entities in superior court in general stream adjudications. Fourth, subsection (5) collapses seven current rules regarding the representation of various types of legal entities in administrative hearings or

administrative proceedings. Fifth, subsection (6) sets forth in a single location a general exception saying that a hearing officer or presiding officer can order an entity to be represented by counsel.

In addition, the task force considered rule petition R-18-0004, which the Supreme Court had continued pending the task force's recommendation. That petition seeks an amendment to the rule that would permit owners of closely held corporations and like entities, or their designees, to represent the entities in litigation. While the task force empathized with the plight of "mom and pop" entities that cannot afford counsel and yet are deprived of the ability to represent the entities in court, the task force does not recommend this proposal. Closely held corporations are not limited to one or two owners, and a myriad of unanticipated consequences could occur if entities are allowed to represent themselves. For example, nothing would prohibit a disbarred attorney from representing the entity. Also, task force members expressed concerns that unless every interest, particularly minority interests, agreed to the nonlawyer representation, the nonlawyer representative might not adequately represent the interests of the business, but rather may only represent majority interests. The task force's proposed restyling of Rule 31(d) addresses the organizational issues raised by the pending rule petition.

Finally, to the extent practicable, the task force endeavored to conform the rules to one another to avoid expressing identical requirements in different ways. With one possible exception, the task force does not recommend substantive changes to Rule 31. The task force clarified language in proposed 31.3(d), which addresses "Tax-Related Activities and Proceedings." Even assuming this clarification effects a substantive change, the task force believes the change is within its charge to simplify and clarify the Rule.

The restyled Rule 31 and a copy of existing Rule 31 are found in Appendix 4.

Recommendation 6: Develop, via a future steering committee, a tier of nonlawyer legal service providers, qualified by education, training, and examination, to provide limited legal services to clients, including representation in court and at administrative proceedings.

The task force recommends that Arizona develop a program to license nonlawyer “limited license legal practitioners,” (“LLLPs”) qualified by education, training, and examination, to provide legal advice and to advocate for clients within a limited scope of practice to be determined by future steering committees. The task force discussed at length the elements that would be required to establish an LLLP program, and we offer recommended next steps and component parts below. But the “in the weeds” details required for different areas of certification and regulation are many, and beyond the collective expertise of this task force. We therefore recommend that the Supreme Court appoint a steering committee (and perhaps subcommittees) to establish reasonable parameters for LLLPs, including (A) different areas and scopes of practice; (B) common ethical rules and discipline, (C) education, examination and licensing requirements, and (D) assessment and evaluation methods for proposed program. The task force highly recommends an early focus on family law as a subject area for LLLPs, as this is where the greatest need lies. However, the task force believes several other subject matter areas deserve serious consideration, including all limited jurisdiction civil practice matters, limited jurisdiction criminal matters that carry no prospect for incarceration, and many matters within administrative law.³⁷ Self-represented litigants encounter these practice areas every day in Arizona court with no access to legal assistance.

Members of a steering committee should include lawyers experienced in the subject area, judges who have presided over cases in the subject area, legal educators from law school and

³⁷ The task force also identified areas of the law where practice should specifically be excluded from the new tier due to their complexity and conflict with federal law. For example, federal law prohibits nonlawyers from giving legal advice in bankruptcy (*see* 11 U.S.C. § 110(e)(2)).

paralegal programs, court administrators, and public representatives. Litigants and potential litigants currently excluded from most legal services should play some role in the steering committee's process. Guiding principles should include access to justice, service to the public, economic sustainability, professional competence and accountability, and respect for our system of justice.

Arizona is not the first state to consider licensing nonlawyers to provide limited legal services. Washington and Utah have established programs to license nonlawyers to provide limited legal services, as has Ontario, Canada, all of which the task force heard from during its work. Other jurisdictions, including California, Colorado, Nevada, New Mexico, New York, and Oregon are also examining the potential for nonlawyers to provide limited legal services.

Evidence exists that licensing nonlawyers to provide limited legal services will not undermine the employment of lawyers. First, the legal needs targeted for LLLPs involve routine, relatively straight-forward, high-volume but low-paying work that lawyers rarely perform, if ever. Second, other recommendations in this report would allow lawyers to team with LLLPs to provide complementary services, thereby increasing business opportunities for lawyers. Moreover, to date no jurisdiction that allows certified nonlawyers to provide limited legal services has reported any diminution in lawyer employment. The task force acknowledges that some lawyers may prove instinctive skeptics on this issue, but the task force can find no empirical evidence that lawyers risk economic harm from certified LLLPs who provide limited legal services to clients with unmet legal needs.

The task force offers the following specific recommendations for consideration and refinement by a steering committee:

A. Areas of Practice and Scope of Practice

The steering committee should familiarize itself with the report and recommendation of the Delivery of Legal Services Task Force, consider the practice areas explored by the task force including hearing from members of the task force who were involved in the analysis of subject matter areas and educational needs, and address questions raised by the task force about areas of practice and scope of practice. Scope decisions include role definition, as well as identifying areas of law and particular tasks suitable for LLLPs to perform.

The task force recommends that the scope of the new tier — unlike the current role of LDPs — include the ability to provide legal advice and to make appearances in court on behalf of clients. The task force recommends that the steering committee consider whether LLLPs should be able to provide pre-litigation education about legal rights and responsibilities (for example, counseling tenants about how to avoid eviction and counseling debtors about avoiding debt collection litigation).

B. Oversight

The task force recommends that the steering committee develop ethical rules and regulation for LLLPs and create a disciplinary process for the unauthorized practice of law and ethical violations. In general, the task force recommends that such rules be approved by the Supreme Court in the same manner that the Court governs rules for attorneys. The task force further recommends that disciplinary matters for LLLPs be overseen by the State Bar of Arizona in the same manner that the State Bar governs attorney discipline.

Oversight is a critical aspect of the program. Making regulatory requirements that are too onerous will make the new tier unattractive and cost-prohibitive to both participants and users.³⁸

³⁸ The stifling effect of over-regulation on expansion of a new tier of service was one caution shared by the State of Washington.

At the same time, the market cannot be the only regulatory control. The steering committee should identify a balance between existing regulatory processes and the scope of practice LLLPs will be engaged in.

C. Education, Examination and Licensing

The steering committee should develop rules, regulations, and administration processes for application and examination to certify LLLPs. The task force recommends, based on requirements for lawyers and other legal paraprofessionals in Arizona, that the steering committee consider regulations in the following areas:

- application and licensing;
- examination; and
- development of curriculum to meet the requirements for obtaining a license.

Questions the task force did not have time or expertise to resolve include whether a minimum number of academic credits in legal ethics be required; whether only ABA-accredited legal training program be accepted; and whether equivalent credentials from other states or nations might satisfy the education requirements in whole or in part. The task force considered whether training should require an experiential learning component. If so, the task force recommends that any experiential learning requirement be integrated into a broader academic program, as opposed to a separate stand-alone endeavor. This recommendation comes after considering the barrier that high experiential learning requirements have posed to the existing Washington State Limited License Legal Technician program, and after considering what other states have shared with the task force about barriers that experiential learning requirements can pose for people in rural areas who apply for certification. Finally, the task force recommends that the steering committee might explore a separate path to certification for existing LDPs and paralegals, who may have had a head start on education and on-the-job experience.

D. Assessment and Evaluation of the Program

The task force recommends that the steering committee develop methods for measuring the appropriateness, effectiveness and sustainability of the LLLP program. Program goals should be to increase access to justice and to protect consumers of legal services. Appropriateness might require that the authorized tasks for LLLPs directly impact access to the courts and unmet legal needs. Appropriateness might also include whether the education requirements and regulations enable LLLPs to perform tasks competently.

Effectiveness might be measured by competence and usage. If self-represented litigants do not engage the services of LLLPs, of course the program fails. But other measures of effectiveness might include reduced burden on courts from self-represented litigants, improvements in procedural justice, improvements in litigant understanding, and improved litigant outcomes such as reduced costs for limited legal services and increased satisfaction ultimate legal outcomes.

Finally, the program should be assessed for sustainability, which would include economic viability for the public, for the court system, and for LLLPs.

Recommendation 7: Initiate, by administrative order, the Licensed Legal Advocate Pilot program developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law, to expand delivery of legal services to domestic violence survivors through the creation of a new tier of legal service provider.

In spring 2019, the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law (i4J) brought graduate students, undergraduate students and over 50 members of the community together in i4J's Innovating Legal Services course to explore a challenge framed as: "should Arizona create a new tier of civil legal professional, and what could that mean for survivors of domestic abuse?" That challenge was selected to provide a community-engaged "sandbox" that would supplement the task force's exploration of whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services. i4J partnered with

Emerge! Center Against Domestic Abuse and collaborated with community participants including judges, attorneys, lay legal advocates, social services providers, government representatives, domestic violence survivors, social scientists, interested community members, and other stakeholders.

The results of i4J's Innovating Legal Services course are presented in a report titled *[Report to the Arizona Supreme Court Task Force on Delivery of Legal Services: Designing a New Tier of Legal Professional for Survivors of Domestic Violence](#)* and a video summarizing that report.³⁹ Course co-instructors Stacy Butler and Jeffrey Willis shared the course's report and [video presentation](#) at a task force meeting.⁴⁰ The report demonstrates that domestic violence service providers like Emerge! serve thousands of domestic abuse survivors a year. Lay legal advocates employed by agencies like Emerge! provide information and explain processes within the legal system, but currently cannot provide legal advice.

The Innovating Legal Services course developed a proposal for a pilot program that would train lay legal advocates to become Licensed Legal Advocates (LLAs), able to provide legal advice to domestic violence survivors as they navigate Arizona's civil legal system. The proposed pilot removes the barrier imposed by unauthorized practice of law restrictions, giving the LLAs the ability to handle specifically-identified legal needs of participants at Emerge! and enhancing those participants' access to justice. The Innovating Legal Services course report identified above details the scope of service LLAs would be allowed to provide, as well as the training and education requirements LLAs would be required to complete to become an LLA. The report

³⁹ The full report and video are available under the "projects" tab of the i4J webpage, <https://law.arizona.edu/i4J>.

⁴⁰ Retired Pima County Superior Court Judge Karen Adam also served as a co-instructor in the course.

further details licensing and regulation requirements, bench, bar, and public education about LLAs, and an evaluation process for the pilot.

The task force recommends that the Supreme Court issue an administrative order establishing the Licensed Legal Advocate Pilot program, developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law, to expand delivery of legal services to domestic violence survivors through the creation of a new tier of legal services provider.

A draft administrative order can be found in Appendix 5 of this report.

Recommendation 8: Initiate, by administrative order, the DVLAP Legal Document Preparer Pilot program as proposed by the Arizona Bar Foundation.

The task force recommends that the proposal offered by the Bar Foundation on behalf of the Domestic Violence Legal Assistance Project (“DVLAP”) to create a DVLAP Legal Document Preparer Pilot program be adopted. The purpose of the Bar Foundation’s recommendation is to increase access to free assistance in the completion of civil legal forms for domestic violence victims. During the pilot program DVLAP Legal Document Preparers would provide this free assistance to domestic violence victims who are receiving services from DVLAP programs in Arizona. The Bar Foundation created this proposed pilot after service providers within DVLAP identified three issues: a need among domestic violence survivors for assistance with the completion of family law and other common court forms, capacity to leverage the role of lay legal advocates within the civil legal justice system, and challenges with applying the traditional process to become a certified legal document preparer to legal professionals working in a social service capacity.⁴¹ Because of the high demand for legal aid services, access to legal assistance from one

⁴¹ The Bar Foundation gave a presentation to the task force proposing this recommendation and reported that in conversations throughout 2014 and 2015, lay legal advocates and various stakeholders unanimously identified cost and time as the biggest barriers to lay legal advocates using the current process to become certified legal document preparers. Arizona Foundation for

of Arizona's three Legal Services Corporation funded legal aid organizations is often limited to basic advice on how to represent oneself, coupled with document preparation help. Lay legal advocates funded by DVLAP can provide legal information to survivors but cannot complete forms on their behalf. Using the existing LDP program and the infrastructure of the DVLAP program, this recommendation would create a pilot project allowing lay legal advocates employed by DVLAP-supported nonprofit domestic violence service and shelter programs to become DVLAP Legal Document Preparers. Under the proposed pilot, the minimum requirements for certification as an LDP under ACJA § 7-208 would be made less restrictive for DVLAP Legal Document Preparers (DVLAP LDPs") participating in the pilot as follows:

- While LDPs with a high school diploma or GED must have two years of law-related experience,⁴² a DVLAP lay legal advocate with a high school diploma or GED would be eligible to become a DVLAP LDP after one year of supervision by an attorney in a partnering DVLAP legal aid office.
- While LDPs with a four-year college degree must have one year of law-related experience, a DVLAP lay legal advocate with a four-year college degree would be eligible to become a DVLAP LDP after six months of supervision by an attorney in a partnering DVLAP legal aid office.
- DVLAP LDP would pay a lower certification fee.

Legal Services and Education, *Legal Advocate Preparer: Expanding the Role of Lay Legal Advocate*, p. 3 (August 2019), <https://www.azcourts.gov/Portals/74/LSTF/Meetings/08142019/4LegalAdvocatePreparerProposa1081419LSTF.pdf?ver=2019-08-12-091436-423>.

⁴² ACJA § 7-208(3)(b)(6) states that "law related experience" is one or a combination of the following: under the supervision of a licensed attorney, providing services in preparation of legal documents prior to July 1, 2003, under the supervision of a certified legal document preparer after July 1, 2003, or as a court employee.

- DVLAP LDP would be qualified through the LDP certification exam process and a separate exam measuring DVLAP LDP competency in substantive areas of law.

In exchange for this relaxed eligibility requirement, the scope of work in which a DVLAP LDP can engage is more limited than the scope of work authorized for LDPs pursuant to ACJA § 7-208. For example, an LDP can assist a self-represented litigant in identifying and completing legal documents at the litigant's direction, without the supervision of an attorney, for any form "for which the legal document preparer's level of competence will result in the preparation of an accurate document."⁴³ Conversely, an DVLAP LDP would only be authorized to assist a self-represented litigant in identifying and completing civil legal forms related to a domestic violence victim's family law needs (separation/divorce, legal decision making and/or parenting time, child support, guardianship, and modifications of post-decree matters), housing matters (landlord/tenant related to health, safety and eviction matters, foreclosure, and public housing issues), and areas of law related to stability, safety and rights (including obtaining/preserving protective orders, public benefits, victims' rights, and safety planning matters such as securing documents). Unlike LDPs, an DVLAP LDP in this pilot program would have a limited certification to provide document preparation services only for DVLAP clients and would not be allowed to charge for those services.

In another recommendation made elsewhere in this report, the task force has recommended that LDPs be allowed to respond if directly addressed by a judge. DVLAP LDP would similarly be able to attend court with DVLAP clients to the same extent that LDPs can attend court with their clients. Otherwise, DVLAP LDP would be subject to the same restrictions as LDPs, such as not giving legal advice or advocating on behalf of domestic violence victims.

⁴³ ACJA § 7-208(J)(4)(b).

All pilot project participants must be employed by nonprofit organizations approved by the Arizona Bar Foundation and DVLAP, and only domestic violence victims accessing services through DVLAP can receive assistance from DVLAP LDP. The Bar Foundation’s report, shared with the task force, detailed the minimum requirements for becoming a DVLAP LDP and set forth a 24-month pilot project timeline.⁴⁴ The Bar Foundation would administrator the pilot project and verify eligibility for each pilot project participant. All pilot project participants would be orientated to the purpose and goals of the pilot project and addendums to the current DVLAP funding agreements or Memorandums of Understanding would be executed with each party acknowledging the roles and responsibilities of each participant. Throughout the duration of the pilot project, each participant would be required to report quarterly on all activities related to the preparation of documents, number of domestic violence victims served, supervision and training processes, and participate in the evaluation of the pilot project, including implementation of client and stakeholder satisfaction surveys.

Recommendation 9: Make the following changes to improve access to and quality of the legal services provided by certified Legal Document Preparers.

The task force was charged with reviewing the LDP program and related Arizona Code of Judicial Administration (“ACJA”) requirements and, if warranted, making recommendations for revisions to the existing rules and code sections that would improve access to and quality of legal services provided by legal document preparers. Since 2003, Arizona has certified LDPs to prepare legal documents for self-represented litigants. Rule 31, Arizona Rules of Supreme Court, defines

⁴⁴ *Legal Advocate Preparer: Expanding the Role of Lay Legal Advocate, Design of the Legal Advocate Preparer Pilot Project*, p. 8-11 (August 2019), available at <https://www.azcourts.gov/Portals/74/LSTF/Meetings/08142019/4LegalAdvocatePreparerProposa1081419LSTF.pdf?ver=2019-08-12-091436-423>.

the practice of law and provides an exception that defines the scope of legal practice allowed to LDPs.⁴⁵ Section 7-208(A) defines a “legal document preparer” as “an individual or business entity certified pursuant to [ACJA § 7-208] to prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public who is engaging in self representation in any legal matter”⁴⁶ LDPs spoke to the task force and testified before a workgroup relating their work experiences and sharing suggestions for improvement in the LDP program. In addition, members of the task force with experience in the LDP program shared their observations and suggestions.

After review, the task force makes the following recommendations:

A. Amend ACJA § 7-208 to allow LDPs to speak in court when addressed by a judge.

The task force learned that some judges will directly address an LDP in court, knowing that the LDP will be assisting the litigant in completing the necessary legal documents required by the court. LDPs of course want to be responsive to a judge, but they are also mindful of potential disciplinary action under current rules that prohibit an LDP from assisting consumers by speaking in court unless “ordered” by the court to do so. The task force recommends a single word change to ACJA § 7-208(J)(5)(b) to clarify that LDPs may assist a consumer in court when “authorized” (as opposed to “ordered”) by the court. This proposed amendment does not give an LDP the right to attend court on behalf of a client or to advocate for a client. But, allowing an LDP to interact with a judge who purposefully opens a dialogue with the LDP in the interests of justice should be permitted. The proposed amendment is as follows:

⁴⁵ ACJA § 7-208.

⁴⁶ ACJA § 7-208(A).

*A legal document preparer shall not attend court with a consumer for the purpose of assisting the consumer in the court proceeding, unless otherwise ~~ordered~~ authorized by the court.*⁴⁷

B. Amend ACJA § 7-208 to further define permissible and prohibited activities of LDPs.

Since 2003, LDPs have assisted self-represented litigants with the completion of legal forms and documents. However, there is some confusion as to the scope of documents LDPs can complete. The task force recognized that LDPs sometimes need to conduct basic legal research to do their jobs competently, such as prepare up-to-date documents that comply with new statutes or court rules. However, LDPs cannot give legal advice. The line between conducting legal research to assist a self-represented litigant in the form of completing a legal document and conducting research for purposes of giving legal advice can be blurred. A perceived lack of clarity in the current rules governing LDPs has led to some confusion, with some LDPs hesitant to conduct any legal research and other LDPs going so far as to draft substantive motions and briefs based on their legal research.

The task force recommends the ACJA § 7-208 be amended to provide clarity. First, § 7-208 should clarify that an LDP may conduct legal research so far as needed to understand general legal principles required to assist a client identify and complete a competent legal form or document. Second, the rule should also clarify that an LDP cannot perform legal research for providing legal options or legal advice to a client. LDP's are limited to completing forms and documents that conform to instructions and decisions communicated by clients. Similarly, an LDP cannot perform legal research for purposes of advocating a legal theory on behalf of a client. Specifically, LDPs cannot engage in legal analysis, i.e., conducting legal research and then

⁴⁷ ACJA § 7-208(J)(5)(b).

applying that research to the facts of the client’s case to advocate for an outcome. This means LDPs cannot draft substantive legal motions,⁴⁸ supporting memoranda, or appellate briefs to be filed in any court. These types of legal activities are beyond the certification and the limited scope of practice allowed to LDPs. However, LDPs can produce motions in family court cases using the “motions form.” The task force envisions that the recommended LLLP program might well file substantive motions and advocate on behalf of clients within the scope of the LLLPs particular certification(s).

The task force urges the Supreme Court to direct the Certified Legal Document Preparers Board and the Certification and Licensing Division to work together to draft a petition to amend ACJA § 7-208 in accordance with this recommendation. The task force also recommends that the amendment reference specific examples of court filings that LDPs can and cannot prepare.

C. The Arizona Supreme Court should pursue a campaign of educating the bench and members of the bar on what a legal document preparer is, what they can do, and what they are prohibited from doing.

The task force recommends that the Supreme Court produce information sheets (referred to as Legal Info Sheets) that can be available in paper and electronically for self-help centers in courts, and the court websites, AZCourtHelp.org, and Azcourts.gov, about LPD services. Presentations should be delivered at the annual judicial conference to educate the bench about LDPs. Moreover, the State Bar should educate its membership about LDPs through presentations at the annual bar convention, articles in e-news and the Arizona Attorney Magazine or other appropriate forums and publications.

⁴⁸ There was some debate within the task force regarding what constitutes a substantive legal motion. As stated below, the task force recommends that the Certified Legal Document Preparers Board and the Certification and Licensing Division develop a definition accompanied by a comment with examples for clarity.

D. Recommend ACJA § 7-208 be amended to remove the restrictions prohibiting legal document preparers from assisting clients who are represented by counsel.

The task force has recommended elsewhere in this report that ER 5.4 be eliminated, removing the barrier for attorneys to partner with nonlawyers, such as LDPs.⁴⁹ Moreover, the task force has recommended elsewhere in this report that the Supreme Court take steps to expand the utilization of limited scope representation. Anecdotally, limited scope representation occurs most often in family law matters, an area in which LDPs often assist clients too. An LDP might well assist in drafting most of the documents required for a divorce, but a lawyer may be needed to advise on discrete legal questions.

This recommendation would allow otherwise self-represented litigants to benefit from the services of both an LDP and an attorney. Amendment to § 7-208 as recommended is not intended to create a relationship between an LDP and attorney akin to that of a paralegal working under the supervision of an attorney. Rather, the amendment will allow both legal services providers to work with a client simultaneously (with transparency and disclosure) where the client continues to direct the work of the LDP consistent with existing rules.

E. Recommend that there be increased access to training, especially online, for LDPs, particularly for LDPs in rural areas.

Many rural communities rely on LDPs due to the small number of attorneys in their area as compared with the number of low-income residents in those communities. The task force recommends that the Supreme Court direct increased access to training and continuing education courses for LDPs concerning core skills and the LDP code of conduct. The task force further recommends that these training and education materials be developed in a way that would allow LDPs to participate online.

⁴⁹ See Recommendation 1 herein.

F. Amend the ACJA and any other rules governing the investigation of and seeking of legal sanctions for engaging in unauthorized practice of law when the actions in question involve a person acting in a manner that a legal document preparer would act if certified.

The task force learned through the course of its work that persons have wrongly held themselves out as certified LDPs to the detriment of self-represented litigants. It is difficult to pursue these persons for engaging in the unauthorized practice of law (“UPL”) in a swift and consistent manner. Typically, a superior court judge orders the persons to cease the UPL on threat of sanctions. The task force recommends that UPL matters be brought before the Presiding Disciplinary Judge (PDJ) rather than a superior court judge. This recommendation is supported by several considerations.

First, the sections of the ACJA governing LDPs and LDP sanctions already provides authority for cease and desist orders against persons not certified but otherwise acting in the manner of a certified LDP.⁵⁰ The current process brings UPL claims before superior court judges who may not be intimately familiar with the certified LDP program, its governing regulations, or the risks to consumers from uncertified persons pretending to be LDPs. Conversely the PDJ’s function centers on regulatory matters, specifically enforcement of ethical rules and regulations surrounding the practice of law by attorneys and the limited practice afforded to LDPs. The PDJ already presides over LDP Board disciplinary sanctions and is therefore familiar with ACJA 7-208 and Arizona Rule of Supreme Court, Rule 31. It would be consistent with Arizona’s existing process regulating the practice of law to have the PDJ preside over UPL matters related to persons who pretend to be, but are not, certified LDPs. The task force also recommends that the Supreme Court identify any rule or statutory changes necessary for assessment of a civil fine against those persons found to be engaging in the kind of UPL discussed here.

⁵⁰ ACJA § 7-201(E)(6).

The task force acknowledges that there are inherent difficulties in enforcing the limited sanctions available to address UPL cases. But, having these matters go through the PDJ would result in consistent application of the rules, sharing of these decisions on the PDJ's website and further increasing the confidence of the bench and bar in the LDP program.

Recommendation 10: Advance and encourage local courts to establish positions or programs where nonlawyers are located within the court to provide direct person-to-person legal information about court processes to self-represented litigants.

Arizona courts have initiated programs to make information about legal processes available to self-represented litigants. Some programs reach self-represented litigants statewide, such as self-help resources like legal information sheets and legal information videos available on AZCourts.gov and AZCourtHelp.org. Few Arizona courts, however, offer programs that provide direct “person to person” assistance to self-represented litigants. Two counties offer such services in Arizona, each different from the other, but both developed based on local resources and other practical considerations. For example, the Superior Court of Santa Cruz County employs a court coordinator who meets with self-represented litigants by appointment to assist them in identifying proper forms and giving them legal information about court processes. The court coordinator discloses to all litigants that she cannot give legal advice, that she may meet with an opposing litigant, and that litigant information is confidential. Conversely, the Maricopa County Superior Court Providing Access to Court Services (“PACS”)/AmeriCorps navigator program uses undergraduate students serving as AmeriCorps Navigators alongside staff in the Court's Law Library Resource Center (“LLRC”). Self-represented litigants can go to the LLRC to research law, obtain forms and receive assistance in completing them, file documents in the LLRC (versus the clerk's office), and get assistance with finding a courtroom or other court location. The LLRC also partners with the Arizona State University, Sandra Day O'Connor Legal Center to provide court customers with 15 minutes of free on-site legal advice from volunteer attorneys two days per

week. This program has an office in the Superior Court of Coconino County as well. The remaining Arizona courts do not have programs where a self-represented litigant can get direct person-to-person assistance.

Many Arizona residents live in rural communities, where significant distances separate home and the nearest courthouse. More importantly, rural residents have fewer opportunities to confer with lawyers or LDPs than urban and suburban residents.⁵¹ Arizona's rural areas, like rural areas across the nation, are experiencing population declines and aging attorney populations.⁵² Therefore, the attorney population in rural areas is diminishing while the average age of lawyers in rural areas is increasing, meaning rural residents are increasingly more likely to be self-represented.⁵³ In addition, rural courts are closing, increasing the justice gap in rural communities.⁵⁴

Urban and suburban areas face their own challenges meeting the needs of self-represented litigants. Burgeoning dockets can be slowed as judges attempt to accommodate the lack of legal knowledge possessed by self-represented litigants.

⁵¹ Conference of State Court Administrators *Courts Need to Enhance Access to Justice in Rural America*, p. 1-3 (2018), available at <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Policy-Paper-1-28-2019.ashx>.

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

⁵⁴ Example, in 2018 the Santa Cruz County Board of Supervisors voted to close the court in Sonoita, forcing residents to travel another 30 miles or more, no small distance to rural residents, to Nogales for court services.

The task force’s review of various court coordinator and court navigator programs here and elsewhere⁵⁵ demonstrates that well-trained and appropriately supervised nonlawyers can perform a wide array of tasks to help self-represented litigants understand and manage their cases.

Understanding the need for each jurisdiction to identify and adopt a program that is sustainable, the task force recommends that the Supreme Court pursue means to advance establishment of nonlawyer staff who are located within the court and who provide direct person-to-person court and civil process navigation assistance to self-represented litigants in local courts.

III. Conclusion

The task force undertook the Supreme Court’s assigned tasks with great enthusiasm and worked as diligently as possible within the limited time allotted to make significant recommendations to “move the ball forward” in closing the civil justice gap. Some in the bar and in the public may have grave concerns about some recommendations. Skepticism is healthy and welcomed in debating the merits of our recommendations. When all is said and done, we are hopeful that our system of justice in Arizona is remolded to accommodate the needs of all Arizonans needing legal assistance without sacrificing the high ethical and performance standards necessary to protect the public.

⁵⁵ See report from the Justice Lab at Georgetown Law Center, titled [Nonlawyer Navigators in State Courts: An Emerging Consensus](#).

OPPOSITION STATEMENT⁵⁶

Hon. Peter B. Swann
Chief Judge, Arizona Court of Appeals, Division I

I wholeheartedly embrace the basic mission of the Task Force to make access to legal services more affordable to all. And I concur with recommendation numbers 2-5, 7, 8, and 10 in its report. I write separately, however, because I view recommendation number 1 as posing a serious threat to the long-term health of the justice system, and I view recommendations number 6 and 9 as ineffective proposals that create more risk of public harm than opportunity for good.

The Report begins with a discussion of a problem whose existence cannot be disputed: legal services are too expensive, and most citizens are priced out of the ability to secure meaningful justice through the courts. The Report does not, however, examine the barriers to justice erected by the court system itself: understaffing, which contributes to delay and cost, and bloated, one-size-fits-all procedural rules that are designed for the most complex cases. The recommendations then take an odd turn: rather than examining the reasons that the system is so difficult and expensive to navigate, the Task Force's first recommendation is to cast aside ethical rules in an effort to make the practice of law more profitable. Such a proposal would make Arizona unique in the nation, and a leader in the race to the bottom of legal ethics.

I was honored to serve on the Civil Justice Reform Committee and the Restyling Task Forces for the Civil and Family Rules. In my opinion, the rules that came from those efforts are among the most cogent sets of procedural rules in effect in any jurisdiction. But the existing rules

⁵⁶ The task force discussed many of Judge Swann's concerns (some are newly raised in his opposition statement) and ultimately rejected them. The task force modestly supported having court-employed navigators but lacked sufficient time to formulate a recommendation. (See Recommendation 10.) Finally, because the minority position was received after the last task force meeting, the task force was unable to discuss it and address specific points.

should ensure the effective litigation of *all* cases, and in this regard they fail. Though the current rules do an excellent job of implementing the “Cadillac” system of trial by jury and cutting-edge discovery techniques, they are completely ineffective at offering a simple path to dispute resolution for self-represented litigants, and they offer no streamlined procedures for small cases.⁵⁷ The complexity of the system – indeed the very need for legal services in many cases – is a problem of our own making. I respectfully submit that the Task Force should have directed its attention to *systemic* reforms, and not to finding ways to direct even more resources to an already-too-resource-hungry system. If the court system is too complex for the average citizen, then we must create a simpler and more efficient system – not new industries that will continue to consume the public’s money.

Bad legal advice is never a bargain. And nothing in the Report suggests that allowing nonlawyers to own law firms or otherwise practice law will increase the *quality* of legal services. Yet the recommendations from which I dissent here are designed to enhance the role of nonlawyers in the delivery of legal services at every level. The argument seems to be that “something is better than nothing,” and because traditional legal representation is often unaffordable, a corps of new service providers is the answer. This argument ignores the underlying reality that our system is ill-designed to assist the very people it tries to help.

⁵⁷ For reasons addressed at length by the Civil Justice Reform Committee, Arizona’s system of compulsory arbitration has proven ineffective at ensuring access to justice. The Task Force nonetheless declined to devote time to alternative procedures that would better enable self-represented litigants to handle their own matters without the cost of a lawyer, LDP or LLLP.

Recommendation 1:

Recommendation number one is to eliminate the ethical rules prohibiting nonlawyer ownership of law practices. To be clear, this recommendation would allow anyone, including disbarred lawyers, large corporations, and venture capitalists to have full equity stakes in law firms while escaping any duties to the clients. No other state has adopted such a proposal.⁵⁸ And while I take pride in Arizona’s spirit of innovation, this proposal is neither innovative nor responsible. The proposal would surely open vistas of new sources of wealth for lawyers, but it would not benefit the public.

The Task Force’s discussions of this proposal often questioned why the current rules against nonlawyer equity, which have existed in every state for at least decades, exist at all. The Report proclaims “Ethical rules have been called out as contributing to the justice gap as demonstrated by [the Henderson Report].” Indeed, the Report relies exclusively on the Henderson Report for this proposition. The fact that a professor has “called out” ethical rules is, to my mind, no more persuasive than the fact that a substantial part of the population has “called out” lawyers as greedy crooks. Both beliefs are no doubt sincere – I submit that neither is correct.

There is no empirical proof that ethical rules have created the problems with the delivery of legal services. I find this perspective troubling, and therefore highlight a few of the reasons for the existing rule.

The relationship between attorney and client is the most sacred of fiduciary relationships. The duties of loyalty and confidentiality that are present in every representation are foundational to a functioning justice system. Proponents of the recommendation will point out that they are

⁵⁸ Washington, D.C. and Utah have made modest efforts at exploring alternate business structures, but the Task Force recommendation takes an absolutist approach, and expressly rejects the approaches of these jurisdictions.

proposing no changes to the rules governing loyalty and confidentiality. But this is at most theoretically half-correct. As a matter of law, practice, and human nature, the fiduciary duties owed to partners and other investors are quite real. And the interest of an investor may well be in conflict with that of a client.

Investors owe no duty of loyalty to the clients of the lawyers in whom they invest. The lawyers in such relationships would retain the full duty of undivided loyalty to the client, yet assume fiduciary duties to conduct the representations to maximize profit for the nonlawyer partner. It does not take great imagination to understand that undivided loyalty would be a practical impossibility in such a relationship.

Because the recommendation does not include a proposal for entity regulation (opting instead to leave the question for future study), a nonlawyer investor with interests directly adverse to the client would generally not impute that conflict to the lawyer. Under the proposed revisions to ER1.10, nonlawyer conflicts would be imputed only in the rare circumstance when the nonlawyer owns the opposing party. Lawyers would then be free to represent clients despite conflicts of interest that would rightly disqualify a law firm operating under the current rules. Though it might be comforting to suppose that no lawyer would take advantage of such a situation, it is not realistic.

Much of the need for legal services exists in Arizona's smaller communities. The recommendation contains no limits on the types of entities that could be formed, or on their size. Under the proposal, an entity could effectively buy up a majority of the practices in these communities, consuming brick-and-mortar law firms and leaving residents of those communities with no real choice but to be represented by a lawyer beholden to the entity. Under the proposal, both sides of a dispute could even be represented by lawyers beholden to the *same* entity.

The risks of such conflicts are not theoretical. Under the current rules, *all* individuals with an ownership stake in a law firm must be lawyers. All such individuals owe the *same* duty of loyalty to the client. The proposal would shatter that unified duty, and require that clients entrust their rights, their lives, and their secrets to a lawyer who has an affirmative duty (not merely a desire) to maximize profit – even at the expense of the client.

A glimpse of this phenomenon can be seen in the use of captive law firms by insurance companies. Insurance defense counsel already experience an evolved form of control over representation through aggressive cost restraints. And while few insurance defense counsel would candidly deny those restrictions sometimes interfere with their ability to provide the best service to their clients, they are nonetheless able to serve ethically when there is significant alignment of interests between the insurer and the insured. In these cases, the insurer bears the financial risk of any enforced lack of diligence. Imagine, however, that there was *no* alignment of interests between the insurer and insured, and the insurer did *not* bear the risk of shoddy legal work. What incentive would the insurer then have except to drive quality down?

The latter, nearly unimaginable, scenario is exactly what the recommendation entails. Any entity could substitute itself for the insurer in the above example, control local markets, drive costs (and quality) down, and control fees. But apart from the rare legal malpractice judgment, the nonlawyer would bear no practical risk if the results of its business practices were an increase in unjust or unfavorable results. And the risk of a malpractice judgment could neatly be reduced by requiring clients to sign retainer agreements with comprehensive arbitration clauses.

I fail to see how the public would be benefitted by a system that allows law firm owners to run the business aspect of the practice without regard to the interests of clients or serious conflicts,

and without meaningful economic risk or ethical regulation. The goal of the Supreme Court should be to promote access to justice, not merely access to for-profit services.

The Court should consider the harm that will befall the public perception of a justice system that strips away ethical constraints on lawyers in favor of corporate profits. Public confidence in lawyers is already low. Yet public confidence in the courts remains high, and that confidence is the basis of the legitimacy of the justice system itself. If the Arizona Supreme Court is perceived as placing a thumb on the scale in favor of lawyers and investors, it is difficult to see how that public confidence will be enhanced. “Trickle down economics” might be the subject of fair debate, but “trickle down justice” is not. There is simply no likelihood that nonlawyers will enhance the quality of justice in Arizona, and I urge the Court not to place Arizona on the track to be the first jurisdiction to be seduced by such an argument.

Recommendation 6:

Arizona ranks 51st in lawyers per capita in the United States, including the District of Columbia and Puerto Rico.⁵⁹ And with so few lawyers, Arizona is still home to one of the largest trial courts in the nation. This is important, because it undercuts the relevance of the national economic data underlying the speculations advanced in the “watershed” Henderson paper on which the Report places such heavy reliance. Because the relative supply and demand for legal services in Arizona is far out of line with much of the country, the relevance of Professor Henderson’s economic models is questionable. But if one thing is clear, it is that Arizonans are not clamoring for more lawyers. Nor is there a public thirst for practitioners who never attended law school and charge a “mere” \$100 per hour. What the public rightfully wants is a system of

⁵⁹ For raw lawyer-population data, see ABA National Lawyer Population Survey, 2019, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf

justice that is itself more scalable and responsive to its diverse needs – a system it can navigate for free.

A theme in the Task Force deliberations was a sense that because services like LegalZoom exist, the Court should embrace them and create a new industry of nonlawyers to offer similar services. By the same reasoning, the existence of WebMD should prompt the state to allow anyone to take a few courses, pass a test, and prescribe medication. Both arguments are fallacious, and any expansion of legal services provided by nonlawyers should instead be justified by a firm conviction that the services will benefit the public without significant risk. Recommendation number 6 does not satisfy that test.

Indeed, experienced practitioners understand that services such as LegalZoom actually create massive risk for clients. While basic forms can be useful tools, it is dangerous in the extreme to assume that they constitute adequate legal services. Rarely are an individual's legal needs so "standard" that a simple form will ensure the efficient or effective protection of legal rights. And the use of such devices without adequate advice concerning the implications of various courses of action can transform a simple problem into ruinous litigation. I fail to grasp how a corps of individuals with minimal legal training and experience can expect to protect their clients' interests.

The Task Force's response to my question, of course, is that many legal problems are fairly simple and do not require the full resources of a lawyer. To be sure, services are often effectively rendered today by a paralegal operating under the supervision of a lawyer. But that supervision is critical: in our complex justice system, every move entails great risk of unintended consequences and it is naive to assume that a nonlawyer will be effective in providing the advice needed to guard against such risks. A simple problem poorly managed can become a complex problem, and the Task Force's tacit assumption that "simple" matters can safely be left to forms is simply wrong.

My objections to recommendation number 6 is not simply a kneejerk defense of a guild. I recognize that nonlawyers can and do serve critical roles in assuring access to justice. To that end, I regret that the Task Force did not include in its recommendations my proposal to create a system of court navigators who could provide meaningful information to litigants at the courthouse. I regret that it did not propose the creation of alternative procedural tracks for self-represented litigants in smaller disputes. And yet I agree with its support for targeted *nonprofit* programs aimed at providing services in specific case types. Programs carefully developed by each of Arizona's two law schools and the Arizona Bar Foundation reflect the type of careful planning and targeted services that are likely to provide services to those in crisis who could not otherwise afford them. By contrast, the sweeping recommendations of the Task Force to create a new class of practitioner, the LLLP, have been the product of a few days of discussion, and the details are left to a future steering committee.

By acknowledging that a steering committee would be needed to do the real work of defining the LLLP tier, the Task Force highlights the extreme difficulty of turning a "new tier" into a successful program. The Task Force worked for nine months, yet its recommendation provides only the most skeletal description of the proposed LLLP program. Put simply, the concept is not fully baked. In view of the large number of issues (both known and unknown) that remain unaddressed, I suggest that the Court either reject the recommendation outright or request further detailed study before deciding to create such a tier. It would be unwise to decide to create the LLLP program until its precise contours can be described and debated.

Recommendation 9:

I agree with most of the components of Recommendation number 9. I disagree, however, with subpart (a), which would authorize LDPs to speak in court. Though the Task Force acknowledges that LDPs are engaged in the practice of law (a prerequisite to the Court's regulation of LDPs), it speaks with two inconsistent voices. On the one hand, it seeks to expand the role of LDPs by letting them address a court. On the other hand, it sets LDPs up for failure by prescribing unworkable limitations on their ability to do legal research. I find both proposals untenable.

Legal research is a First Amendment right. Any person is free to conduct legal research, and I cannot see how the Court can lawfully prohibit such research. But even if a prohibition were constitutionally possible, where is the public good in such a proposal? The Court has already created the LDP tier of practitioners, and any notion that they do not provide legal advice is folly. Legal advice is inherent in any aspect of the practice of law, and a LDP cannot properly fill out a form or prepare an original document without creating legal consequences.

It is essential, if we are to have such a tier in Arizona, that LDPs be empowered to provide the best service possible to clients. An uninformed LDP is an ineffective or even dangerous LDP, and I submit that LDPs should face no restrictions on research activities. If we cannot trust LDPs to conduct legal research, then we should not allow them to practice law in any form. But I have no reason to believe that LDPs would not be able to conduct legal research appropriately as long as the services they offer do not exceed the scope authorized by the code. I would therefore delete the restriction.

APPENDIX

APPENDIX 1: Proposed Amended ERs (Clean and Redline)⁶⁰

ER 1.0 Terminology (Clean)

(a) – (b) No Change.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in any affiliation, or any entity that provides legal services for which it employs lawyers. Whether two or more lawyers constitute a firm can depend on the specific facts.

(d) – (f) No Change.

(g) – (i) [Formerly (h) – (j)] No Change.

(j) "Screened" denotes the isolation of a lawyer or nonlawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or nonlawyer is obligated to protect under these Rules or other law.

(1) Reasonably adequate procedures include:

(i) Written notice to all affected firm personnel that a screen is in place and the screened lawyer or nonlawyer must avoid any communication with other firm personnel about the screened matter;

(ii) Adoption of mechanisms to deny access by the screened lawyer or nonlawyer to firm files or other information, including information in electronic form, relating to the screened matter;

(iii) Acknowledgment by the screened lawyer or nonlawyer of the obligation not to communicate with any other firm personnel with respect to the matter and to avoid any contact with any firm files or other information, including information in electronic form, relating to the matter;

(iv) Periodic reminders of the screen to all affected firm personnel.

(v) Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

⁶⁰ This Appendix presents all of the ERs covered by Recommendations 1 and 2. A clean version of each ER is followed immediately by a redline version of that ER.

(2) Screening measures must be implemented as soon as practical after a lawyer, nonlawyer or firm knows or reasonably should know that there is a need for screening.

(k) – (m) [Formerly (l) – (n)] No Change.

(n) “Business transaction,” when used in reference to conflicts of interests:

(1) includes but is not limited to

(i) The sale of goods or services related to the practice of law to existing clients of a firm’s legal practice;

(ii) A lawyer referring a client to nonlegal services performed by others within a firm or a separate entity in which the lawyer or the lawyer’s firm has a financial interest;

(iii) Transactions between a lawyer or a firm and a client in which a lawyer or firm accepts nonmonetary property or an interest in the client’s business as payment of all or part of a fee.

(2) does not include

(i) Ordinary fee arrangements between client and lawyer;

(ii) Standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others and over which the lawyer has no advantage with the client.

(o) “Personal interests,” when used in reference to conflicts of interests, include but are not limited to:

(1) The probity of a lawyer’s own conduct, or the conduct of a nonlawyer in the firm, in a transaction;

(2) Referring clients to a nonlawyer within a firm to provide nonlegal services; or

(3) Referring clients to an enterprise in which a firm lawyer or nonlawyer has an undisclosed or disclosed financial interest.

(p) “Authorized to practice law in this jurisdiction” denotes a firm that employs lawyers or nonlawyers who provide legal services as authorized by Rule 31.

(q) “Nonlawyer” denotes a person not licensed as a lawyer in this jurisdiction or who is licensed in another jurisdiction but is not authorized by these rules to practice Arizona law.

(r) “Nonlawyer assistant” denotes a person, whether an employee or independent contractor, who is not licensed to practice law in this jurisdiction, including but not limited to secretaries, investigators, law student interns, and paraprofessionals. Law enforcement personnel are not considered the nonlawyer assistants of government lawyers.

Comment [2019 amendments]
Confirmed in Writing

[1] No Change.

Firm

[2] Similar questions can also arise with respect to lawyers in legal aid, legal services organizations, and other entities that include nonlawyers and provide other services in addition to legal services. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules. For instance, an organization that provides legal, accounting, and financial planning services to clients is a “firm” for purposes of these Rules for which a lawyer is responsible for assuring that reasonable measures are in place to safeguard client confidences and avoid conflicts of interest by all employees, officers, directors, owners, shareholders, and members of the firm regardless of whether or not the nonlawyers participate in providing legal services. *See Rules 5.1, 5.2 and 5.3.*

Fraud

[3] – [5] No Change, except renumbered from comments [5] – [7].

ER 1.0 Terminology (Redline)

(a) – (b) No Change.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in ~~a law partnership, professional corporation sole proprietorship, or other association, or lawyers employed in a legal services organization or the legal department of a corporation or other organization~~ any affiliation, or any entity that provides legal services for which it employs lawyers. Whether ~~government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation~~ two or more lawyers constitute a firm can depend on the specific facts.

(d) – (f) No Change.

(g) ~~“Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.~~

(~~h~~ g) No Change other than renumbered.

(~~i~~ h) No Change other than renumbered.

(~~j~~ i) “No Change other than renumbered.

(~~k~~ j) “Screened” denotes the isolation of a lawyer or nonlawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably

adequate under the circumstances to protect information that the isolated lawyer or nonlawyer is obligated to protect under these Rules or other law.

(1) Reasonably adequate procedures include:

- (i) Written notice to all affected firm personnel that a screen is in place and the screened lawyer or nonlawyer must avoid any communication with other firm personnel about the screened matter;
- (ii) Adoption of mechanisms to deny access by the screened lawyer or nonlawyer to firm files or other information, including information in electronic form, relating to the screened matter;
- (iii) Acknowledgment by the screened lawyer or nonlawyer of the obligation not to communicate with any other firm personnel with respect to the matter and to avoid any contact with any firm files or other information, including information in electronic form, relating to the matter
- (iv) Periodic reminders of the screen to all affected firm personnel.
- (v) Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

(2) Screening measures must be implemented as soon as practical after a lawyer, nonlawyer or firm knows or reasonably should know that there is a need for screening.

(~~l~~ k) – (~~n~~ m) No Change, other than renumbered.

(n) “Business transaction,” when used in reference to conflicts of interests:

(1) includes but is not limited to

- (i) The sale of goods or services related to the practice of law to existing clients of a firm’s legal practice;
- (ii) A lawyer referring a client to nonlegal services performed by others within a firm or a separate entity in which the lawyer or the lawyer’s firm has a financial interest;
- (iii) Transactions between a lawyer or a firm and a client in which a lawyer or firm accepts nonmonetary property or an interest in the client’s business as payment of all or part of a fee.

(2) does not include

- (i) Ordinary fee arrangements between client and lawyer;
- (ii) Standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others and over which the lawyer has no advantage with the client.

(o) “Personal interests,” when used in reference to conflicts of interests, include but are not limited to:

(1) The probity of a lawyer’s own conduct, or the conduct of a nonlawyer in the firm, in a transaction;

(2) Referring clients to a nonlawyer within a firm to provide nonlegal services; or

(3) Referring clients to an enterprise in which a firm lawyer or nonlawyer has an undisclosed or disclosed financial interest.

(p) “Authorized to practice law in this jurisdiction” denotes a firm that employs lawyers or nonlawyers who provide legal services as authorized by Rule 31.

(q) “Nonlawyer” denotes a person not licensed as a lawyer in this jurisdiction or who is licensed in another jurisdiction but is not authorized by these rules to practice Arizona law.

(r) “Nonlawyer assistant” denotes a person, whether an employee or independent contractor, who is not licensed to practice law in this jurisdiction, including but not limited to secretaries, investigators, law student interns, and paraprofessionals. Law enforcement personnel are not considered the nonlawyer assistants of government lawyers.

Comment [2003 2019 amendment]

Confirmed Writing

[1] No Change.

Firm

~~[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~

~~[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

~~[4-2] Similar questions can also arise with respect to lawyers in legal aid, and legal services organizations, and other entities that include nonlawyers and provide other services in~~

addition to legal services. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules. For instance, an organization that provides legal, accounting, and financial planning services to clients is a “firm” for purposes of these Rules for which a lawyer is responsible for assuring that reasonable measures are in place to safeguard client confidences and avoid conflicts of interest by all employees, officers, directors, owners, shareholders, and members of the firm regardless of whether or not the nonlawyers participate in providing legal services. See Rules 5.1, 5.2, and 5.3.

Fraud

[3 5] – [5 7] No Change, other than renumbered.

Screened

[8] ~~This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.~~

[9] ~~The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.~~

[10] ~~In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.~~

ER 1.5 Fees (Clean)

(a) – (d) No Change.

(e) Two or more firms jointly working on a matter may divide a fee resulting from a single billing to a client if:

(1) the basis for division of the fees and the firms among whom the fees are to be divided are disclosed in writing to the client;

(2) the client consents to the division of fees, in a writing signed by the client;

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

Comment [2019 amendment]

Reasonableness of Fee and Expenses

[1] No Change.

Basis or Rate of Fee

[2] – [3] No Change.

Terms of Payment

[4] – [5] No Change.

Prohibited Contingent Fees

[6] No Change.

Disclosure of Refund Rights for Certain prepaid Fees

[7] No Change.

Disputes Over Fees

[8] No Change, except renumbered from comment [10].

ER 1.5 Fees (Redline)

(a) – (d) No Change.

~~(e) A division of s fee between lawyers who are not in the same firm may be made only~~
Two or more firms jointly working on a matter may divide a fee resulting from a single billing to a client if:

~~(1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the~~

representation; the basis for division of the fees and the firms among whom the fees are to be divided are disclosed in writing to the client;

(2) the client ~~agrees~~ consents to the division of fees, in a writing signed by the client, ~~to the participation of all the lawyers involved and the division of the fees and responsibilities between lawyers;~~ and

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

Comment [2003 2019 amendment]

Reasonableness of Fee and Expenses

[1] No Change.

Basis or Rate of Fee

[2] – [3] No Change.

Term of Payment

[4] – [5] No Change.

Prohibited Contingent Fees

[6] No Change.

Disclosure of Refund Rights for Certain Prepaid Fees

[7] No Change.

Division of Fee

~~[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers, if the division is in proportion to the services performed by each lawyer or all lawyer assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be completely and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).~~

~~[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.~~

Dispute Over Fees

[10 8] No Change, other than renumbered.

ER 1.6 Confidentiality (Clean)

(a) – (d) No change.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, even if the firm provides the client with only nonlegal services.

2003 Comment [amended 2019]

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client, including representation by the firm for only nonlegal services. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] - [4] No Change.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other, and nonlawyers in the firm, information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] No Change.

Disclosure Adverse to Client

[7] – [20] No Change

Withdrawal

[21] No Change.

Acting Competently to Preserve Confidentiality

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision including individuals who are providing nonlegal services through the firm. Lawyers shall establish reasonable safeguards within firms to assure that all information learned from or about a firm client shall remain confidential even if the only services provided to the client are nonlegal services. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made

reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]–[4].

[23] No Change.

Former Client

[24] No Change.

ER 1.6 Confidentiality (Redline)

(a) – (d) No change.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, even if the firm provides the client with only nonlegal services.

2003 Comment [amended ~~2009~~ 2019]

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client, including representation by the firm for only nonlegal services. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] - [4] No Change.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other, and nonlawyers in the firm,

information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] No Change.

Disclosure Adverse to Client

[7] – [20] No Change

Withdrawal

[21] No Change.

Acting Competently to Preserve Confidentiality

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision including individuals who are providing nonlegal services through the firm. Lawyers shall establish reasonable safeguards within firms to assure that all information learned from or about a firm client shall remain confidential even if the only services provided to the client are nonlegal services. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]–[4].

[23] No Change.

Former Client

[24] No Change.

ER 1.7 Conflict of Interest: Current Clients (Clean)

No change to the black letter rule.

Comment [2019 amendment]

[1] – [9] No Change.

[10] – [33] No change except renumbered from [11] – [34]

ER 1.7 Conflict of Interest: Current Clients (Redline)

No change to the black letter rule.

Comment [~~2003~~ 2019 amendment]

[1] – [9] No Change.

Personal Interest Conflicts

~~[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of the lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, a lawyer may not allow related business interest to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See ER 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also ER 1.10 (personal interest conflicts under ER 1.7 ordinarily are not imputed to other lawyers in a law firm).~~

~~[11 10] – [12 11]~~ No Change other than renumbered.

~~[13 12] – [34 33]~~ No change other than renumbered.

ER 1.8 Conflict of Interest: Current Clients: Specific Rules (Clean)

(a) – (l) No Change.

(m) A lawyer or firm must comply with ER 1.7 if the client expects the lawyer or firm to represent the client in a business transaction or when the lawyer's or firm's financial interest otherwise poses a significant risk that the representation of the client will be materially limited by the lawyer's or firm's financial interest in the transaction.

Comment [2019 amendment]

[1] The risk to a client is greatest when the client expects the lawyers to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that that lawyer must comply, not only with requirements of paragraph (a), but also with requirements of ER 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyers dual role as both legal adviser and participant in the transaction, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyer in the form or refer clients through a separate entity in which the lawyer has a financial interest, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that ER 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[2] – [19] No Change, excepted renumbered from comments [4] to [21].

ER 1.8 Conflict of Interest: Current Clients: Specific Rules (Redline)

(a) – (l) No Change.

(m) A lawyer or firm must comply with ER 1.7 if the client expects the lawyer or firm to represent the client in a business transaction or when the lawyer's or firm's financial interest otherwise poses a significant risk that the representation of the client will be materially limited by the lawyer's or firm's financial interest in the transaction.

Comment [2003 ~~2019~~ amendment]

Business Transactions Between Client and Lawyer

~~[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyers and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the~~

lawyer's legal practice. See ER 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by ER 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. IN such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See ER 1.0(e) (definition of informed consent).

[3 1] The risk to a client is greatest when the client expects the lawyers to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with requirements of paragraph (a), but also with requirements of ER 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyers dual role as both legal adviser and participant in the transaction, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyer in the firm or refer clients through a separate entity in which the lawyer has a financial interest, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that ER 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4 2] – [24 19] No Change, other than renumbered.

ER 1.10 Imputation of Conflicts of Interest: General Rule (Clean)

(a) While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or nonlawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers and nonlawyers in the firm.

(b) – (e) [No change.]

(f) If a lawyer or nonlawyer in a firm owns all or part of an opposing party, the personal disqualification of the lawyer or nonlawyer is imputed to all others in the firm.

(g) If a nonlawyer is personally disqualified, the nonlawyer may be screened and the nonlawyer’s personal disqualification is not imputed to the rest of the firm unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm.

(h) If a lawyer is personally disqualified from representing a client due to events or conduct in which the person engaged before the person became licensed as a lawyer, the lawyer may be screened, and the lawyer’s personal disqualification is not imputed to the rest of the firm unless the lawyer is an owner, shareholder, partner, officer or director of the firm.

Comment [2019 amendment]

[1] – [7] No change, except renumbered from current [5] – [11].

ER 1.10 Imputation of Conflicts of Interest: General Rule (Redline)

(a) While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or nonlawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers and nonlawyers in the firm.

(b) – (e) No change.

(f) If a lawyer or nonlawyer in a firm owns all or part of an opposing party, the personal disqualification of the lawyer or nonlawyer is imputed to all others in the firm.

(g) If a nonlawyer is personally disqualified pursuant to paragraph (a), the nonlawyer may be screened and the nonlawyer’s personal disqualification is not imputed to the rest of the firm unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm.

(h) If a lawyer is personally disqualified from representing a client due to events or conduct in which the person engaged before the person became licensed as a lawyer, the lawyer

may be screened, and the lawyer's personal disqualification is not imputed to the rest of the firm unless the lawyer is an owner, shareholder, partner, officer or director of the firm.

Comment [2003 and 2016 2019 amendment]

Definition of Firm

~~[1] For purposes of the Rules of Professional Conduct, the term 'firm' denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in a legal services organization of the legal department of a corporation or other organization. See ER 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See ER 1.0 Comments [2]—[4].~~

Principles of Imputed Disqualification

~~[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by ERs 1.9(b) and 1.10(b).~~

~~[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, for example, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm are reasonably likely to be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm. A disqualification arising under ER 1.8(l) from a family or cohabitating relationship is persona and ordinarily is not imputed to other lawyers with whom the lawyers are associated.~~

~~[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that a person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and firm have a legal duty to protect. See ERs 1.0(k) and 5.3.~~

~~[5 1] – [11 7] No change, other than renumbered.~~

ER 1.17 Sale of Law Practice or Firm (Clean)

(a) A firm may sell or purchase a law practice, or a practice area of a firm, including good will, if the seller gives written notice to each of the seller's clients regarding:

- (1) the proposed sale, including the identity of the purchaser;
- (2) the client's right to retain other counsel or to take possession of the file; and
- (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(b) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(c) A sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

(d) Before providing a purchaser access to detailed information relating to the representation, including client files, the seller must provide the written notice to a client as described above.

(e) Lawyers participating in the sale of a law practice or a practice area must exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently; avoid disqualifying conflicts, and secure the client's informed consent for those conflicts that can be agreed to and the obligation to protect information relating to the representation.

(f) If approval of the substitution of the purchasing lawyer for a selling firm is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(g) This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

[Note: All Comments to existing ER 1.17 were deleted.]

ER 1.17 Sale of Law Practice or Firm (Redline)

(a) A lawyer or a law firm may sell or purchase a law practice, or an area of law practice a practice area of a firm, including good will, if the following conditions are satisfied seller gives written notice to each of the seller's clients regarding:

~~(a) The seller ceases to engage the private practice of law, or in the area of practice that has been sold, in the geographic area(s) in which the practice has been conducted;~~

~~(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;~~

~~(c) The seller gives written notice to each of the seller's clients regarding;~~

~~(1) the proposed sale, including the identity of the purchaser;~~

~~(2) the client's right to retain other counsel or to take possession of the file; and~~

~~(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.~~

~~(b) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.~~

~~(d) The fees charged clients shall not be increased by reason of the sale.~~

~~(c) A sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.~~

~~(d) Before providing a purchaser access to detailed information relating to the representation, including client files, the seller must provide the written notice to a client as described above.~~

~~(e) Lawyers participating in the sale of a law practice or a practice area must exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently; avoid disqualifying conflicts, and secure the client's informed consent for those conflicts that can be agreed to and the obligation to protect information relating to the representation.~~

~~(f) If approval of the substitution of the purchasing lawyer for a selling firm is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.~~

~~(g) This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.~~

Comment [2003 rule]

[All comments to ER 1.17 were deleted]

ER 5.1 Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors (Clean)

(a) A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these,

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

(b) A lawyer having supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the persons who is being supervised and the amount of work involved. Whether a lawyer has supervisory authority may vary given the circumstances.

(c) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

ER 5.1 Responsibilities of ~~Partners, Managers, and Supervisory Lawyers~~ Lawyers Who Have Ownership Interests or are Managers or Supervisors (Redline)

~~(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a firm, shall make reasonable efforts to ensure~~

~~that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.~~

(a) A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these.

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

(b) A lawyer having ~~direct~~ supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person who is being supervised and the amount of work supervised. Whether a lawyer has supervisory authority may vary given the circumstances.

(c) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner~~ has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

Comment [2003 amendment]

[Note: All Comments to existing ER 5.1 were deleted.]

ER 5.3. Responsibilities Regarding Nonlawyers (Clean)

(a) A lawyer who in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers, including those who have equity interests in the firm, is compatible with the professional obligations of the lawyer. Reasonable measures include but are not limited to adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and.

(2) to ensure that nonlawyers comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all firm client information.

(b) A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

(c) A lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has managerial authority in the firm and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) When a firm includes nonlawyers who have an equity interest or managerial authority in the form, any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.

[Note: All Comments to existing ER 5.3 were deleted.]

ER 5.3. Responsibilities Regarding Nonlawyers Assistants (Redline)

~~With respect to a nonlawyer employed or retained by or associated with a lawyer:~~

~~(a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's is compatible with the professional obligations of the lawyer;~~

~~(a) a lawyer having direct supervisory authority over the nonlawyer~~ A lawyer in a firm shall make reasonable efforts to ensure that the person's conduct firm has in effect measures giving reasonable assurance that the conduct of nonlawyers, including those who have equity interests in the firm, is compatible with the professional obligations of the lawyer; ~~and~~ Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and.

(2) to ensure that nonlawyers comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all firm client information.

(b) A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable

assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

(c) ~~a~~ A lawyer shall be responsible for conduct of ~~such a person~~ a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner or has comparable~~ managerial authority in the firm ~~in which the person is employed, or has direct supervisory authority over the person,~~ and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) When a firm includes nonlawyers who have an equity interest or managerial authority in the firm, any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.

Comment [2003 amendment]

[Note: All Comments to existing ER 5.3 were deleted.]

ER 5.4 Professional Independence of a Lawyer (Clean)

[Note: The entirety of this rule was deleted.]

~~ER 5.4 Professional Independence of a Lawyer (Redline)~~

~~(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:~~

~~(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~

~~(2) a lawyer who purchases the practice of a deceased, disabled, or dis appeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or to other representative of that lawyer the agreed upon purchase price;~~

~~(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement; and~~

~~(4) a lawyer may share court awarded legal fees or fees otherwise received and permissible under these rules with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.~~

~~(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.~~

~~(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.~~

~~(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:~~

~~(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;~~

~~(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or~~

~~(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.~~

Comment [2003 amendment]

[1] The provisions of this Rule express traditional limitations on the sharing of fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment

~~of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.~~

~~[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also ER 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).~~

ER 5.7 Responsibilities Regarding Law-Related Service (Clean)

[Note: The entirety of this rule was deleted.]

~~ER 5.7. Responsibilities Regarding Law-Related Services (Redline)~~

~~(a) A lawyer may provide, to clients and to others, law-related services, as defined in paragraph (b), either:~~

~~(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or~~

~~(2) by a separate entity which is controlled by the lawyer individually or with others.~~

~~Where the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer shall be subject to the provisions of the Rules of Professional Conduct in the course of providing such services. In circumstances in which law-related services are provided by a separate entity controlled by the lawyer individually or with others, the lawyer shall not be subject to the Rules of Professional Conduct, in the course of providing such services, only if the lawyer takes reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not apply.~~

~~(b) The term law-related services denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.~~

Comment [2003 rule]

~~[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflict interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.~~

~~[2] ER 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that~~

apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., ER 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with ER 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a) of the Rule cannot be met. In such a case a

lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by ER 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (ERs 1.7 through 1.11, especially ERs 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of ER 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with ERs 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also ER 8.4.

[12] Variations in language of this Rule from ABA Model Rule 5.7 as adopted in 2002 are not intended to imply a difference in substance.

ER 7.1. Communications Concerning a Lawyer's Services (Clean)

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

(a) A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

(b) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the lawyer complies with Arizona Supreme Court Rule 44 requirements.

(c) Any communication made pursuant to this Rule shall include the name and contact information for at least one lawyer or law firm responsible for its content.

[1] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[2] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of a clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[3] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. ER 8.4(c). See also ER 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm Names

[4] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A firm name cannot include the name of a lawyer who is disbarred or on disability inactive status because to continue to use a disbarred lawyer's name is misleading. A lawyer or law firm may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name

or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[5] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction. Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading. It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[6] Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in this Rule to communications concerning a lawyer’s services.

Certified Specialists

[7] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[8] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a United States Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a United States Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[9] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ER 7.1 Communications Concerning a Lawyer's Services (Redline)

A lawyer shall not make ~~or knowingly permit to be made on the lawyer's behalf~~ a false or misleading communication about the lawyer or the lawyer's services.

(a) A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

(b) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the lawyer complies with Arizona Supreme Court Rule 44 requirements.

(c) Any communication made pursuant to this Rule shall include the name and contact information for at least one lawyer or law firm responsible for its content.

Comment [2003 Rule 2019 amendment]

~~[1] This Rule governs all communications about a lawyer's services, including advertising permitted by ER 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. A clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is false or misleading.~~

~~[2 1] Misleading Truthful statements ~~that are misleading~~ are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is ~~also~~ misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.~~

~~[3 2] Promising or guaranteeing a particular outcome or result is misleading. A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of a clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.~~

~~[4 3] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. ER 8.4(c). See also ER 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.~~

Firm Names

[4] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A firm name cannot include the name of a lawyer who is disbarred or on disability inactive status because to continue to use a disbarred lawyer's name is misleading. A lawyer or law firm may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[5] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction. Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading. It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. Whether a communication about a lawyer or legal services is false or misleading is based upon the perception of a reasonable person.

[6] Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in this Rule to communications concerning a lawyer's services. See comment to ER 5.5(b)(2) regarding advertisements and communications by non-members. A non-member lawyer's failure to inform prospective clients that the lawyer is not licensed to practice law by the Supreme Court of Arizona or has limited his or her practice to federal or tribal legal matters may be misleading.

Certified Specialists

[7] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[8] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an

advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[9] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ER 7.2 [RESERVED] (Clean)

ER 7.2 [RESERVED] Advertising Communications Concerning a Lawyer's Services: Specific Rules (Redline)

~~(a) Subject to the requirements of ERs 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~

~~(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:~~

~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(2) pay the usual charges of a legal service plan or a not for profit or qualified lawyer referral service, which may include, in addition to any membership fee, a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any such percentage fee shall not exceed ten percent, and shall be used only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of pro bono legal services. The fees paid by a client referred by such service shall not exceed the total charges that the client would have paid had no such service been involved. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and~~

~~(3) pay for a law practice in accordance with ER 1.17.~~

~~(c) Any communication made pursuant to this Rule shall include the name and contact information for at least one lawyer or law firm responsible for its content.~~

~~(d) Every advertisement (including advertisement by written solicitation) that contains information about the lawyer's fees shall be subject to the following requirements:~~

~~(1) advertisements and written solicitations indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (A) that the client will be liable for expenses regardless of outcome unless the repayment of such is contingent upon the outcome of the matter and (B) whether the percentage fee will be computed before expenses are deducted from the recovery;~~

~~(2) range of fees or hourly rates for services may be communicated provided that the client is informed in writing at the commencement of any client lawyer relationship that the total fee within the range which will be charged or the total hours to be devoted will vary depending upon that particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;~~

~~(3) fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, may be communicated provided that the client is informed~~

~~in writing at the commencement of any client-lawyer relationship that the quoted fee will be available only to clients whose matters fall within the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged;~~

~~(4) a lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee, or range of fees, for at least ninety (90) days unless the advertisement specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.~~

~~(e) Advertisements on the electronic media may contain the same information as permitted in advertisements in the print media. If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm.~~

~~(f) Communications required by paragraphs (e) and (d) shall be clear and conspicuous. To be “clear and conspicuous” a communication must be of such size, color, contrast, location, duration, cadence, and audibility that an ordinary person can readily notice, read, hear, and understand it.~~

Comment [2003 rule]

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This ER permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons~~

~~of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see ER 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor ER 7.3 prohibits communications authorized by law, such as notice to members of a class action litigation.~~

~~[5] Except as permitted under paragraphs (b)(1)–(b)(3), lawyers are not permitted to pay others for recommending the lawyer's services or channeling professional work in a manner that violates ER 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings, group advertisements, and online referral services that list lawyers by practice area do not constitute impermissible "recommendations."~~

~~[3] Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this ER, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator is consistent with ERs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with ER 7.1 (communications concerning a lawyer's services). To comply with ER 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. Giving or receiving a de minimis gift that is not a quid pro quo for referring a particular client is permissible. See also ER 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); ER 8.4 (duty to avoid violating the ERs through the actions of another).~~

~~[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. Published and electronic group advertising and directories are not lawyer referral services, but participation in such listings is governed by ERs 7.1 and 7.4. A lawyer referral service, on the other hand, is any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers or that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this ER only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that~~

is approved by an appropriate regulatory authority, such as the State Bar of Arizona, as affording adequate protections for the public.

~~[7] The reasonable operating expenses of a legal service plan or lawyer referral service include payment of the actual expenses of operating, conducting, promoting and developing the service, including expenditures for capital purposes for the service, as determined on a reasonable accounting basis and with provision for reasonable reserves. Public service activities of a legal service plan or lawyer referral service include the following: (a) furnishing or providing funding for legal services to persons and entities financially unable to pay for all or part of such services; (b) developing and implementing programs to educate members of the public with respect to the law, the judicial system, the legal profession, or the need, manner of obtaining, and availability of legal services; and (c) creating and administering programs to improve the administration of justice or aid in relations between the Bar and the public.~~

~~[8] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See ER 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these ERs. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in person, telephonic, or real-time contacts that would violate ER 7.3.~~

~~[9] Paragraph (f) requires communications under paragraphs (c) and (d) to be clear and conspicuous. In addition to the requirements of paragraph (f), a statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, in a manner that is readily noticeable, readable, and understandable, and it must not be obscured in any manner.~~

ER 7.3. Solicitation of Clients (Clean)

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or firm's pecuniary gain, unless the contact is with a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf even when not otherwise prohibited by paragraph (b), if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment; or

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer seeking pecuniary gain solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of under influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. Those forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm the person's judgment.

[4] The contents of advertisements and communications permitted under ER 7.2 can be permanently recorded so that they cannot be disputed. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of ER 7.1. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of ER 7.1, that involves coercion, duress or harassment within the meaning of ER 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ER 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress ordinarily is not appropriate, including, for example, the elderly, disabled, or those whose first language is not English.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

ER 7.3 Solicitation of Clients (Clean)

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

~~(a b)~~ A lawyer shall not solicit professional employment by live person-to-person ~~in person, live telephone or real-time electronic contact~~ ~~solicit professional employment from the person contacted or employ or compensate another to do so~~ when a significant motive for the lawyer's doing so is the lawyer's or firm's pecuniary gain, unless the ~~person contacted~~ contact is with a:

(1) ~~is a lawyer; or~~

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

~~(b c)~~ A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf ~~from the person contacted by written, recorded or electronic communication or by in person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph ~~(ab)~~, if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment; or

(3) ~~the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~(e) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known or believed likely to be in need of legal services for a particular matter shall include the words "Advertising Material" in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

~~(1) At the time of dissemination of such written communication, a written copy shall be forwarded to the State Bar of Arizona at its Phoenix office.~~

~~(2) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.~~

~~(3) If a contract for representation is mailed with the written communication, the contract shall be marked "sample" in red ink and shall contain the words "do not sign" on the client signature line.~~

~~(4) The lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose how the identity and specific legal need of the potential recipient were discovered.~~

~~(d e)~~ Notwithstanding the prohibitions in ~~paragraph (a)~~ this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in live person-to-person ~~or telephone~~ contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

2003 Comment [2009 2019 amendment]

[1] ~~A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a A lawyer's communication typically does is not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet electronic searches. See ER 8.4 (duty to avoid violating the ERs through the actions of another).~~

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. There is a A potential for abuse overreaching exists when a lawyer seeking pecuniary gain solicits solicitation a person involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to be in need of legal services. This These forms of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The This potential for abuse overreaching inherent in direct in-person, live person-to-person contact telephone or real-time electronic solicitation justifies its prohibition, particularly since

lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not ~~involve real-time contact and do not~~ violate other laws ~~governing solicitations~~. Those forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in live person-to-person, telephone or real-time electronic~~ persuasion that may overwhelm the person's judgment.

[4] ~~The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under ER 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of ER 7.1. The contents of direct in-live person-to-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

[5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~ overreaching against a former client or a person with whom the lawyer has a close personal, or family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for ~~abuse~~ overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. ~~Consequently, the general prohibition in ER 7.3(a) and the requirements of ER 7.3(c) are not applicable in those situations. Also, p Paragraph (ab)~~ is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[6] ~~But even permitted forms of solicitation can be abused. Thus, any A solicitation which that contains false or misleading information which is false or misleading within the meaning of ER 7.1, which that involves coercion, duress or harassment within the meaning of ER 7.3(b-c)(2), or which that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ER 7.3(b-c)(1) is prohibited. Moreover, if after sending a letter or other communication to a person as permitted by paragraph (c), the lawyer receives no response, any further effort to communicate with the person may violate the provisions of ER 7.3(b). Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress ordinarily is not appropriate, including, for example, the elderly, disabled, or those whose first language is not English.~~

[7] This ER Rule ~~is does~~ not ~~intended~~ to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. ~~Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under ER 7.2.~~

[8] ~~The requirement in ER 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

[9] ~~Lawyers may comply with the requirement of paragraph (c)(1) by submitting (a) a copy of every written, recorded or electronic communication soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter, or (b) a single copy of any identical communication published or sent to more than one person and a list of the names and mailing or e-mail addresses or fax numbers of the intended recipients and the dates identical solicitations were published or sent. Lawyers may comply with the requirement of paragraph (c)(1) by submitting the required communications and information to the State Bar on a monthly basis.~~

[10] ~~The State Bar may dispose of the submissions received pursuant to paragraph (c)(1) after one year following receipt.~~

[11] ~~Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with ERs 7.1, 7.2 and 7.3(b). See ER 8.4(a).~~

ER 7.4 [RESERVED] (Clean)

ER 7.4. [RESERVED]— Communication of Fields of Practice (Redline)

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:~~

~~(1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;~~

~~(2) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and (3) a lawyer certified by the Arizona Board of Legal Specialization or by a national entity that has standards for certification substantially the same as those established by the board may state the area or areas of specialization in which the lawyer is certified. Prior to stating that the lawyer is a specialist certified by a national entity, the entity must be recognized by the board as having standards for certification substantially the same as those established by the board. If the national entity has not been recognized by the board, it may make application for recognition by completing an application form provided by the board.~~

~~(b) Communications to the Arizona Board of Legal Specialization and its Advisory Commissions relating to an applicant's qualifications for specialization certification shall be absolutely privileged, and no civil action predicated thereon may be instituted or maintained against any evaluator, staff or witness who communicates with or before the Board or its Advisory Commissions. Members of the Board of Legal Specialization, its Advisory Commission, and others involved in the specialization certification process shall be immune from suit for any conduct in the course of their official duties.~~

Comment

~~[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" in a particular field is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.~~

~~[2] Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

ER 7.5 [RESERVED] (Clean)

~~ER 7.5. [RESERVED] Firm Names and Letterheads (Redline)~~

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates ER 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

COMMENT TO 2003 AND 2012 AMENDMENTS

~~[1] [2012 Amendment] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation that complies with ER 7.1.~~

~~[2] [2003 Amendment] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

~~[3] [2003 Amendment] "Of counsel" designation may be used to state or imply a relationship between lawyers only if the relationship is close, personal, continuous, and regular.~~

APPENDIX 2: Draft Administrative Order and Forms Re: Limited Scope Representation

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
LIMITED SCOPE REPRESENTATION)	Administrative Order
(DELIVERY OF UNBUNDLED LEGAL)	No. 2019 - _____
SERVICES))	
)	
)	
_____)	

Low-income individuals and increasing numbers of unrepresented litigants cannot afford the costs of full-service legal representation. Limited scope representation, or unbundled legal services, describes a legal service delivery method whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end.

Although self-represented litigants may avail themselves of online court forms and self-help materials, without advice and counsel from an attorney, those litigants may come to court uninformed, unprepared, or simply overwhelmed. Others may be unable to afford the cost of legal representation for every aspect of their case. These situations impede access to justice. Limited scope representation provides unrepresented litigants an option for effective representation they may more easily afford.

Unbundling of legal services is authorized and does not violate the Arizona Rules of Professional Conduct as long as the attorney’s representation is reasonable under the circumstances. (Arizona Ethics Rule 1.2 governs limited scope representation).

Approved limited scope representation forms are commonly used in civil and family law matters, (Rule 5.3 of the Rules of Civil Procedure and Rule 9 of the Family Law Rules of Procedure). The delivery of Legal Services Task Force recommended that a general notice of limited scope representation and notice of completion of limited scope representation be developed for any area of law that may not already offer a form. See Appendix A to this Order for Notice of Limited Scope Representation and Notice of Completion of Limited Scope Representation.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED, that to the extent not inconsistent with the Rules of this Court, an attorney may enter a limited appearance when representing a client.

IT IS ORDERED, that in accordance with Rule 1.2 of the Arizona Rules of Professional Conduct, an attorney may enter a limited appearance in a court proceeding including, but not limited to, discovery, motions practice, or hearings.

IT IS ORDERED, that an attorney's appearance may be limited by date, time period, activity, or subject matter, when specifically stated in a Notice of Limited Appearance filed and served prior to or simultaneous with the proceeding(s) for which the attorney appears.

IT IS ORDERED, that the attorney's limited appearance terminates when that attorney files a Notice of Completion of Limited Scope Representation, which must be served on each of the parties, including the limited appearance attorney's own client.

IT IS ORDERED, that (1) service on an attorney who has entered a limited appearance is required only for matters within the scope of the representation as stated in the notice; (2) any such service also must be made on the party; and (3) service on the attorney for matters outside the scope of the limited appearance does not extend the scope of the attorney's representation.

IT IS ORDERED, that this Administrative Order shall take effect on the date of this Order.

Dated this _____ day of _____, 2019.

ROBERT BRUTINEL
Chief Justice

FOR CLERK'S USE ONLY

ARIZONA SUPERIOR COURT
IN _____ COUNTY

IN THE MATTER OF:

CASE NO.: _____

(Plaintiff/Petitioner)

**NOTICE OF
LIMITED SCOPE
REPRESENTATION**

(Defendant/Respondent)

THE CLERK OF THE COURT will please note that I am entering an appearance limited to (select one and specify):

date:
_____.

time period:
_____.

activity:
_____.

subject matter:
_____.

My appearance will terminate upon my filing a Notice of Completion.

My client and I agree that my appearance is limited and does not extend beyond what is specified above without mutual and informed consent and unless a new Notice of Limited Scope Representation is filed.

Notices and documents concerning my limited scope representation must be served on me and my client. All notices and documents regarding matters outside the scope of my representation

must be served only on my client and any other counsel who has entered an appearance on my client's behalf.

I hereby certify that the foregoing information is true and correct to the best of my knowledge and belief and that on the _____ day of _____, 20____, I served a copy of this Notice of Limited Scope Representation on all parties or their counsel and on my client by hand, first-class mail, or electronically by agreement of the parties, court rule or court order.

Signature

Street address

Print name and Bar number

City, state, zip code

Phone number

Email address

Date

FOR CLERK'S USE ONLY

ARIZONA SUPERIOR COURT
IN _____ COUNTY

IN THE MATTER OF:

CASE NO.: _____

(Plaintiff/Petitioner)

(Defendant/Respondent)

**NOTICE OF
COMPLETION OF
LIMITED SCOPE
REPRESENTATION**

THE CLERK OF THE COURT will please note that as of the ____ day of _____,
20___, I completed the (select one):

date:

time period:

activity:

subject matter:

specified in my Notice of Limited Scope Representation. The filing of this Notice of Completion terminates my appearance without necessity of leave of court. I informed my client that my appearance was temporary and will terminate upon the filing of this Notice of Completion.

Any subsequent notices or documents pertaining to this case must now be served on my client and any other counsel who has entered an appearance on my client's behalf.

I hereby certify that the foregoing information is true and correct to the best of my knowledge

and belief and that on the _____ day of _____, 20____, I served a copy of this Notice of Completion of Limited Scope Representation on all parties or their counsel and on my client by hand, first-class mail, or electronically by agreement of the parties, court rule or court order.

Signature

Street address

Print name and Bar number

City, state, zip code

Phone number

Email address

Date

APPENDIX 3: Rule 38(d), Arizona Rules of Supreme Court

Proposed Rule 38(d), Arizona Rules of Supreme Court (Clean)

(d) Clinical Law Professors, Law Students, and Law Graduates

1. *Purpose.* This purpose of this rule is to provide law students and recent law school graduates with supervised instruction and training in the practice of law for a limited time, and to facilitate volunteer opportunities for those individuals in pro bono contexts.

2. *Definitions.*

A. “Law school” means a law school either provisionally or fully accredited by the American Bar Association.

B. “Certified limited practice student” is a law student of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice student.

C. “Certified limited practice graduate” is a law graduate of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice graduate.

D. “Clinical Law Professor” is a faculty member teaching a clinical law program at a law school in Arizona either provisionally or fully accredited by the American Bar Association.

E. “Dean” means the dean, the academic associate dean, or the dean’s designee of the accredited law school where the law student is enrolled or the law graduate was enrolled on graduation.

F. “Period of supervision” means the dates for which the supervising attorney has declared, on the application for certification or recertification, that he or she will be responsible for any work performed by the certified limited practice student or the certified limited practice graduate under his or her supervision.

G. “Supervising attorney” is an active member of the State Bar of Arizona in good standing who has practiced law or taught law in an accredited law school as a full-time occupation for at least two years, and agrees in writing to supervise the certified limited practice student or certified limited practice graduate pursuant to these rules, and is identified as the supervising attorney in the application for certification or recertification. The supervising attorney may designate a deputy, assistant, or other staff attorney to supervise the certified limited practice student or certified limited practice graduate when permitted by these rules.

H. “Volunteer legal services program” means a volunteer legal services program managed by an approved legal services organization in cooperation with an accredited law school. Approved legal service organizations are defined in paragraph (e)(2)(C) of this rule.

3. *General Provisions.*

A. Limited Bar Membership. To the extent a professor, law student, or law graduate is engaged

in the practice of law under this rule, the professor, law student, or law graduate shall, for the limited purpose of performing professional services authorized by this rule, be deemed an active member of the state bar (but not required to pay fees). The provisions of this rule shall govern rather than the provisions of other rules relating to admission and discipline.

B. Nonapplicability of Attorney Discipline Rules to Terms of the Certification. The procedures otherwise provided by law or court rule governing the discipline of lawyers shall not be applicable to the termination of the certification of a clinical law professor, certified limited practice student, or certified limited practice graduate pursuant to these rules. Termination of certification shall be without prejudice to the privilege of the professor, law student, or law graduate to apply for admission to practice law if the professor, law student, or law graduate is in other respects qualified for such admission.

C. Effect of Certification on Application for Admission to Bar. The certification of a clinical law professor, law student, or law graduate shall not be considered as an advantage or a disadvantage to the professor, law student, or law graduate in an application for admission to the state bar.

D. Privileged Communications. The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by and among professors, supervising and designated attorneys, certified limited practice students, and certified limited practice graduates.

4. *Clinical Law Professors.*

A. Activities of Clinical Law Professors. A clinical law professor who is certified pursuant to this rule may appear as a lawyer solely in connection with supervision of students in a clinical law program in a law school in Arizona. A clinical law professor may appear in any court or before any administrative tribunal in this state in the matters enumerated in paragraph (d)(5)(C) of this rule on behalf of any person, if the person on whose behalf the appearance is being made has consented in writing to that appearance. Such written consent shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

B. Requirements and Limitations for Clinical Law School Professors. To appear as a lawyer pursuant to these rules, the clinical law professor must:

- i. be admitted by examination to the bar of any state or the District of Columbia;
- ii. neither ask for nor receive any compensation or remuneration of any kind for such services from the person on whose behalf the services are rendered;
- iii. certify in writing that the clinical law professor has read and is familiar with the Arizona Rules of Professional Conduct and the Rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of lawyers; and

iv. submit evidence that the clinical law professor has successfully completed the course on Arizona law described in [Rule 34\(j\)](#).

C. Certification of the Clinical Law Professor. The certification shall be signed by the clinical law professor and the dean of the law school on the form prescribed by the clerk of the Court and shall be filed with the clerk and the state bar. The certification shall remain in effect until withdrawn.

D. Duty to Ensure Adequate Supervision and Guidance of Certified Limited Practice Student. The clinical law professor must ensure that certified limited practice students receive adequate supervision and guidance while participating in the law school's clinical law program.

E. Termination of Certification.

i. The dean at any time, with or without cause or notice or hearing, may terminate a certification of a clinical law professor by filing a notice of the termination with the clerk of the Supreme Court. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

ii. The Court at any time, with or without cause or notice or hearing, may terminate a certification of a clinical law professor by filing notice of the termination with the clerk of this Court. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

5. Law Students

A. Law Student Eligibility for Limited Practice Certification. To be eligible to become a certified limited practice student, an applicant must

i. have successfully completed legal studies amounting to at least two semesters, or the equivalent academic hour credits if the law school or the student is on some basis other than a semester, at an accredited law school;

ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice student from the person on whose behalf the services are rendered; this requirement does not prevent a supervising lawyer, legal services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law student, or prevent any such lawyer or agency from requesting compensation or remuneration for legal services as otherwise authorized;

iii. certify in writing that the student has read and is familiar with the Arizona Rules of Professional Conduct, the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and

iv. be certified by the dean of the law school where the student is enrolled as being in good

academic standing, of good character, and as having either successfully completed or being currently enrolled in and attending academic courses in civil procedure, criminal law, evidence, and professional responsibility.

B. Application to become a Certified Limited Practice Student or Extend the Certification Period

i. All applications to become a certified limited practice student or to extend the period of certification must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated fee. The clerk of the Court shall send a copy of all approved student limited practice certifications to the admissions department of the state bar.

ii. The application for certification or extension must be signed by the applicant, the dean, of the law school in which the applicant is enrolled, and the supervising attorney.

iii. The applicant must attest that he or she meets all of the requirements of this rule; will immediately notify the clerk of the Court if he or she no longer meets the requirements of the rules; and has read and will abide by the Arizona Rules of Professional Conduct and these rules.

iv. The dean of the law school in which the applicant is enrolled must attest that the applicant meets the requirements of these rules, and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the Clerk of the Court if the certified limited practice student no longer meets the requirements of these rules.

v. The supervising attorney must specify the period during which he or she will be responsible for supervising the applicant and attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice Student; Presence of Supervising or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice student may appear in any court or before any administrative tribunal in this state on behalf of any person who has consented in writing to that appearance if the supervising attorney has provided written approval of that appearance. The written consent and approval shall be filed in the record of the case and shall be brought to the attention of the judge or presiding officer and the certified limited practice student must advise the court on the occasion of the student's initial appearance in the case of the certification to appear as a law student pursuant to these rules.

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice student in the following circumstances:

- a. In any civil case in justice, municipal, and magistrate court, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;
 - b. In any civil case in superior court or before any administrative tribunal.
 - c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;
 - d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;
 - e. In any misdemeanor criminal defense case, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and
 - f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.
 - g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.
- ii. Other Client Representation Activities. Under the supervision of the supervising attorney, but outside the supervisor's presence, a certified limited practice student may:
- a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice student is eligible to appear, but such pleadings or documents must be signed by the supervising attorney or designated attorney;
 - b. prepare briefs, motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney or designated attorney;
 - c. assist indigent inmates of correctional institutions or other persons who request such assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. If there is a lawyer of record in the matter, all assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney or designated attorney;
 - d. give legal advice and perform other appropriate legal services, but only with the consent of the supervising attorney or designated attorney.

iii. Other Non-Representation Activities. In connection with a volunteer legal services program and at the invitation or request of a court or tribunal, a certified limited practice student may appear as a law student volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the student's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice student has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title "Certified Limited Practice Student."

i. A certified limited practice student may use the title "Certified Limited Practice Student" only in connection with activities performed pursuant to these rules.

ii. When a certified limited practice student's name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the student is a certified limited practice student pursuant to these rules; state the name of the supervising attorney; be signed by the supervising attorney or designated attorney; and otherwise comply with these rules.

iii. A certified limited practice student shall not hold himself or herself out as an active member of the state bar.

iv. Nothing in these rules prohibits a certified limited practice student from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. Duties of the Supervising Attorney. The supervising attorney must:

i. supervise and assume professional responsibility for any work performed by the certified limited practice student while under his or her supervision;

ii. assist and counsel the certified limited practice student in the activities authorized by these rules and review such activities with the certified limited practice student, all to the extent required for the proper training of the certified limited practice student and the protection of the client;

iii. read, approve, and sign any pleadings, briefs or other documents prepared by the certified

limited practice student before the filing thereof, and read and approve any document prepared by the certified limited practice student for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney shall still provide general supervision;

iv. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited practice student has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice student during the period of certification, the certified limited practice student must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice student. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

G. Duration and Termination of Certification. Certification of a certified limited practice student shall begin on the date specified in the certification and shall remain in effect for the period specified in the certification unless sooner terminated by the earliest of the following occurrences:

i. The certified limited practice student requests termination of the certification in writing or notifies the clerk of the Court that he or she no longer meets the requirements of these rules. In such event the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

ii. The supervising attorney notifies the clerk of the Court in writing that his or her supervision of the certified limited practice student will cease before the date specified in the notice of certification. In such event, the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar. The dean may issue a modified certification reflecting the substitution of a new supervising attorney.

iii. The dean at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

iv. The Court at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

v. One or more of the requirements for certification no longer exists or the certified limited practice student or supervising attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule, or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

6. *Law Graduates*

A. Law Graduate Eligibility for Limited Practice Certificate. To be eligible to become a certified limited practice graduate, an applicant must:

- i. have graduated from an accredited law school;
- ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice graduate from the person on whose behalf the services are rendered; this requirement does not prevent a supervising lawyer, legal services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law graduate, or prevent any such lawyer or agency from requesting compensation or remuneration for legal services as otherwise authorized;
- iii. certify in writing that the law graduate has read and is familiar with the Arizona Rules of Professional Conduct, the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and
- iv. be certified by the dean of the accredited law school where the law graduate was enrolled on graduation as having graduated in good academic standing and being of good character.

B. Application to Become a Certified Limited Practice Graduate

- i. All applications to become a certified limited practice graduate must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated fee. The clerk of the Court shall send a copy of all approved graduate limited practice certifications to the admissions department of the state bar.
- ii. The application for certification must be signed by the applicant, the dean of the law school where the applicant was enrolled on graduation, and the supervising attorney.
- iii. The applicant must attest that he or she meets all of the requirements of this rule, will immediately notify the clerk of the Court if he or she no longer meets the requirements of the rules, and has read and will abide by the Arizona Rules of Professional Conduct and these rules.
- iv. The dean of the law school where the applicant was enrolled on graduation must attest that the applicant meets the requirements of these rules, and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the clerk of the Court if the certified limited practice graduate no longer meets the requirements of these rules.
- v. The supervising attorney must specify the period during which he or she will be responsible for and will supervise the applicant and attest that he or she has read and will abide by, the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice Graduate; Presence of Supervising Attorney or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice graduate may appear in any court or before any administrative tribunal in this state on behalf of any person who has consented in writing to that appearance if the supervising attorney has also provided written approval of that appearance. In each case, the written consent and approval must be filed in the case and be brought to the attention of the judge or the presiding officer. In addition, the certified limited practice graduate must advise the court at the law graduate's first appearance in the case of the certification to appear as a law graduate pursuant to these rules.

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice graduate in the following circumstances:

a. In any civil case in justice, municipal, and magistrate court unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;

b. In any civil case in superior court or before any administrative tribunal;

c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;

d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;

e. In any misdemeanor criminal defense case unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and

f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.

g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.

ii. Other Client Representation Activities. Under the general supervision of the supervising attorney or designated attorney, but outside his or her presence, a certified limited practice graduate may:

a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice graduate is eligible to appear, but such pleadings or documents must be signed by the supervising attorney or designated attorney if filed in the superior court, Arizona Court of Appeals, Arizona Supreme Court, or with an administrative tribunal;

b. prepare briefs, motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney or designated attorney;

c. assist indigent inmates of correctional institutions or other persons who request assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. If there is a lawyer of record in the matter, all assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney or designated attorney;

d. give legal advice and perform other appropriate legal services, but only after consultation with and consent of the supervising attorney or designated attorney.

iii. Other Non-Representation Activities. In connection with a volunteer legal services program and at the invitation and request of a court or tribunal, a certified limited practice graduate may appear as a law graduate volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the certified limited practice graduate's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice graduate has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title "Certified Limited Practice Graduate."

i. A certified limited practice graduate may use the title "Certified Limited Practice Graduate" only in connection with activities performed pursuant to these rules.

ii. When a certified limited practice graduate's name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the law graduate is a certified limited practice graduate pursuant to these rules, state the name of the supervising attorney, be signed by the supervising attorney or designated attorney if required by these rules, and otherwise comply with these rules.

iii. A certified limited practice graduate shall not hold himself or herself out as an active member of the state bar.

iv. Nothing in these rules prohibits a certified limited practice graduate from describing his or

her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. Duties of the Supervising Attorney. The supervising attorney must:

- i. supervise and assume professional responsibility for any work performed by the certified limited practice graduate while under his or her supervision;
- ii. assist and counsel the certified limited practice graduate in the activities authorized by these rules and review such activities with the certified limited practice graduate, all to the extent required for the proper training of the certified limited practice graduate and the protection of the client;
- iii. read and approve all pleadings, briefs, or other documents prepared by the certified limited practice graduate as required by these rules; sign any pleading, brief, or other document if required by these rules, and read and approve any document prepared by the certified limited practice graduate for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney must still provide general supervision;
- iv. assume professional responsibility for all pleadings, briefs, or other documents filed in any court or with an administrative tribunal by the certified limited practice graduate under his or her supervision;
- v. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited graduate has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice graduate during the period of certification, the certified limited practice graduate must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice graduate. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

G. Duration and Termination of Certification. Certification of a certified limited practice graduate shall begin on the date specified in the certification and shall remain in effect for the period specified in the certification unless sooner terminated by the earliest of the following occurrences:

- i. The certified limited practice graduate requests termination of the certification in writing or notifies the Clerk of the Court that he or she no longer meets the requirements of these rules. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.
- ii. The supervising attorney notifies the clerk of the Court in writing that his or her supervision

of the certified limited practice graduate will cease before the date specified in the certification. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

iii. The dean at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

iv. The Court at any time, with or without cause or notice or hearing, files notice of the termination with the clerk of the Court.

v. One or more of the requirements for certification no longer exists or the certified limited practice graduate or supervising attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

vi. The law graduate fails to take the first Arizona uniform bar examination, or the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

vii. The law graduate fails to pass the first Arizona uniform bar examination for which the law graduate is eligible or fails to obtain a score equal to or greater than the acceptable score established by the Committee on Examinations on the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

viii. Thirty days after the Court notifies the law graduate that he or she has been approved for admission to practice law and is eligible to take the oath of admission.

ix. The Committee on Character and Fitness does not recommend to the Court that the law graduate be admitted to practice law.

x. The law graduate is denied admission to practice law by the Court.

xi. The law graduate is admitted to practice law.

xii. Expiration of 12 months from the date of the law graduate's graduation from law school unless, before expiration of the 12-month period and for good cause shown by the law graduate, the Court extends the 12-month period.

Rule 38, Arizona Rules of Supreme Court (Redline)

(a) – (c) No Change.

(d) Clinical Law Professors, ~~and Law Students, and Law Graduates~~

1. *Purpose.* ~~This rule is adopted to encourage law schools to provide clinical instruction of varying kinds~~ The purpose of this rule is to provide law students and recent law school graduates with supervised instruction and training in the practice of law for a limited time, and to facilitate volunteer opportunities for those individuals in pro bono contexts.

2. *Definitions.*

A. ~~“Accredited law school”~~ “Law school” means a law school either provisionally or fully ~~approved and~~ accredited by the American Bar Association.

B. “Certified limited practice student” is a law student ~~or a graduate~~ of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice student.

C. “Certified limited practice graduate” is a law graduate of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice graduate.

D. “Clinical Law Professor” is a faculty member teaching a clinical law program at a law school in Arizona either provisionally or fully accredited by the American Bar Association.

~~C.~~ E. “Dean” means the dean, the academic associate dean, or the dean’s designee of the accredited law school where the law student is enrolled or the law graduate was enrolled on graduation.

~~D.~~ “Designated attorney” is, ~~exclusively in the case of government, any deputy, assistant or other staff attorney authorized and selected by a supervising attorney to supervise the certified limited practice student where permitted by these rules.~~

~~E.~~ F. “Period of supervision” means the dates for which the supervising attorney has declared, on the application for certification or recertification, that he or she will be responsible for any work performed by the certified limited practice student or the certified limited practice graduate under his or her supervision.

~~F.~~ “Personal presence” means the supervising attorney or designated attorney is in the physical presence of the certified limited practice student.

G. “Rules” means Rule 38, Rules of Supreme Court.

~~H.~~ G. “Supervising attorney” is an ~~attorney admitted to Arizona full or limited practice who~~ active member of the State Bar of Arizona in good standing who has practiced law or taught

law in an accredited law school as a full-time occupation for at least two years, and agrees in writing to supervise the certified limited practice student or certified limited practice graduate pursuant to these rules, and is identified as the supervising attorney in and whose name appears on the application for certification or recertification. The supervising attorney may designate a deputy, assistant, or other staff attorney to supervise the certified limited practice student or certified limited practice graduate when permitted by these rules.

H. “Volunteer legal services program” means a volunteer legal services program managed by an approved legal services organization in cooperation with an accredited law school. Approved legal service organizations are defined in paragraph (e)(2)(C) of this rule.

3. *General Provisions.*

A. Limited Bar Membership. To the extent a professor, ~~or a law student, or law graduate~~ is engaged in the practice of law under this rule, the professor, ~~or law student, or law graduate~~ shall, for the limited purpose of performing professional services authorized by this rule, be deemed an active member of the state bar (but not required to pay fees). The provisions of this rule shall govern rather than the provisions of other rules relating to admission and discipline.

B. Nonapplicability of Attorney Discipline Rules to Terms of the Certification. The procedures otherwise provided by law or court rule governing the discipline of lawyers shall not be applicable to the termination of the certification of a clinical law professor, ~~or a certified limited practice student, or certified limited practice graduate~~ pursuant to ~~this rule~~ these rules. Termination of certification shall be without prejudice to the privilege of the professor, ~~or the law student, or law graduate~~ to ~~make application~~ apply for admission to practice law if the professor, ~~or the law student, or law graduate~~ is in other respects qualified for such admission.

C. Effect of Certification on Application for Admission to Bar. The certification of a clinical law professor, ~~or a limited practice law student, or law graduate~~ shall ~~in no way not~~ be considered as an advantage or a disadvantage to the professor, ~~or the law student, or law graduate~~ in an application for admission to the state bar.

D. Privileged Communications. The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by and among professors, supervising and designated attorneys (~~and designated attorneys~~), and certified limited ~~student~~ practice students, and certified limited practice graduates.

4. *Clinical Law Professors.*

A. Activities of Clinical Law Professors. A clinical law professor ~~not a member of the state bar but who is~~ certified pursuant to this rule may appear as a lawyer solely, in connection with supervision of students in a clinical law program approved by the dean and faculty of in a law school in Arizona ~~either provisionally or fully approved and accredited by the American Bar Association~~. A clinical law professor may appear in any court or before any administrative tribunal in this state in the matters enumerated in paragraph (d)(5)(C) of this rule on behalf of any person, if the person on whose behalf the appearance is being made has consented in writing

to that appearance. Such written consent shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

B. Requirements and Limitations for Clinical Law School Professors. ~~In order to make an appearance~~ To appear as a lawyer pursuant to ~~this~~ these rules, the clinical law professor must:

~~i. be duly employed as a faculty member of a law school in Arizona either provisionally or fully approved or accredited by the American Bar Association for the purpose, *inter alia*, of instructing and supervising a clinical law program approved by the dean and faculty of such law school;~~

~~ii.~~ i. be admitted by examination to the bar of ~~another~~ any state or the District of Columbia;

~~iii.~~ ii. neither ask for nor receive any compensation or remuneration of any kind for such services from the person on whose behalf the services are rendered;

~~iv.~~ iii. certify in writing that the clinical law professor has read and is familiar with the Arizona Rules of Professional Conduct and the Rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of lawyers; and

~~v.~~ iv. submit evidence that the clinical law professor has successfully completed the course on Arizona law described in [Rule 34\(j\)](#).

C. Certification of the Clinical Law Professor. The certification shall be signed by the clinical law professor and the dean of the law school on the form prescribed by the clerk of ~~this~~ the Court and shall be filed with the clerk and the state bar. The certification shall remain in effect until withdrawn.

D. Duty to Ensure Adequate Supervision and Guidance of Certified Limited Practice Student. ~~It shall be the responsibility of t~~The clinical law professor must to ensure that certified limited practice students receive adequate supervision and guidance while participating in the law school's clinical law program. In the case of a certified student who has graduated and participates in the program pending the taking of the bar examination, the clinical law professor shall, on a monthly basis, based on such reporting from the certified limited practice student and the supervising attorney as the law school shall require, confirm that the certified graduate has received and is receiving adequate attorney supervision and guidance.

E. ~~Withdrawal or~~ Termination of Certification.

i. The dean at any time, with or without cause or notice or hearing, may withdraw terminate a certification of a clinical law professor at any time by filing a notice to that effect, with or without stating the cause for the withdrawal, of the termination with the clerk of this Court, who shall forthwith mail copies thereof to the clinical law professor and the State Bar of Arizona the Supreme Court. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

ii. The Court ~~at any time, with or without cause or notice or hearing,~~ may terminate ~~the a~~ certification of a clinical law professor ~~at any time without cause and without notice or hearing~~ by filing notice of the termination with the clerk of this Court ~~and with the state bar~~. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

5. *Practical Training of Law Students*

A. Law Student Eligibility for Limited Practice Certification. To be eligible to become a certified limited practice student, ~~a law student applicant~~ an applicant must

i. have successfully completed legal studies amounting to at least two semesters, or the equivalent academic hour credits if the law school or the student is on some basis other than a semester, at an accredited law school, ~~subject to the time limitation set forth in these rules;~~

ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice student from the person on whose behalf the services are rendered, ~~but this shall not;~~ this requirement does not prevent a supervising lawyer, legal aid bureau services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law student, nor shall it or prevent any such lawyer or agency from making such charges for its services as it may otherwise properly require requesting compensation or remuneration for legal services as otherwise authorized;

iii. certify in writing that the student has read and is familiar with the Arizona Rules of Professional Conduct, ~~and~~ the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and

iv. be certified by the dean of the ~~accredited~~ law school where the student is enrolled (~~or was enrolled on graduation~~), ~~or by the dean's designee,~~ as being in good academic standing, of good character, and as having either successfully completed or being currently enrolled in and attending academic courses in civil procedure, criminal law, evidence, and professional responsibility.

B. Application ~~for~~ to become a Certified Limited Practice Student or Extend the Certification Period

i. All applications ~~for student~~ to become a certified limited practice certification student or ~~requests to change or add a supervising attorney or to extend the period of certification pursuant to these rules~~ must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated ~~appropriate nonrefundable processing~~ fee. The clerk of the Court shall send a copy of all approved student limited practice certifications to the admissions department of the state bar.

ii. ~~The application for certification shall require the signature of the applicant, the dean, associate dean, or assistant dean of the accredited law school in which the applicant is enrolled,~~

and the signature of the supervising attorney. The application for certification or extension must be signed by the applicant, the dean, of the law school in which the applicant is enrolled, and the supervising attorney.

iii. The applicant ~~shall~~ must attest that he or she meets all of the requirements of ~~the~~ these rules; ~~agrees to and shall will~~ immediately notify the clerk of the Court ~~in the event~~ if he or she no longer meets the requirements of the rules; and ~~that he or she has read, is familiar with~~ and will abide by the Arizona Rules of Professional Conduct ~~of the State of Arizona~~ and these rules.

iv. The dean, ~~associate dean, or assistant dean~~ of the ~~accredited~~ law school in which the applicant is enrolled ~~shall~~ must attest that the applicant meets the requirements of these rules; ~~that he or she shall immediately notify the clerk of the Court in the event that the certified limited practice student no longer meets the requirements of these rules; and that he or she has no knowledge of facts or information that would indicate that the applicant is not and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the Clerk of the Court if the certified limited practice student no longer meets the requirements of these rules.~~

v. The supervising attorney ~~shall~~ must specify the period during which he or she will be responsible for ~~and will supervise~~ supervising the applicant and attest that he or she has read; ~~is familiar with,~~ and will abide by the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice ~~Certification~~ Student; Physical Presence of Supervising or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice student may appear in any court or before any administrative tribunal in this state on behalf of any person ~~if that person on whose behalf the student is appearing who~~ who has consented in writing to that appearance ~~and if the supervising attorney has also indicated in writing provided written approval of that appearance. In each case, The written consent and approval shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal. In addition, and~~ and the certified limited practice student ~~shall orally~~ must advise the court on the occasion of the student's initial appearance in the case of the certification to appear as a law student pursuant to these rules. ~~A certified limited practice student may appear in the following matters:~~

a. ~~Civil Matters. In civil cases in justice, municipal, and magistrate courts, the supervising lawyer (or designated lawyer) is not required to be personally present in court if the person on whose behalf an appearance is being made consents to the supervising lawyer's absence.~~

b. ~~Criminal Matters on Behalf of the State. In any criminal matter on behalf of the state or any political subdivision thereof with the written approval of the supervising attorney (or designated attorney), the supervising attorney (or designated attorney) must be present except when such appearance is in justice, municipal, or magistrate courts.~~

~~e. Felony Criminal Defense Matters. In any felony criminal defense matter in justice, municipal, and magistrate courts, and any criminal matter in superior court, the supervising attorney (or designated attorney) must be personally be present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.~~

~~d. Misdemeanor Criminal Defense Matters. In any misdemeanor criminal defense matter in justice, municipal, or magistrate courts, the supervising attorney (or designated attorney) is not required to be personally present in court, so long as the person on whose behalf an appearance is being made consents to the supervising attorney's absence; however, the supervising attorney shall be present during trial.~~

~~e. Appellate Oral Argument. A certified limited practice student may participate in oral arguments in the Arizona Supreme Court and Court of Appeals, but only in the presence of the supervising attorney (or designated attorney) and with the specific approval of the court for that case.~~

~~Notwithstanding anything hereinabove set forth, the court may at any time and in any proceeding require the supervising attorney (or designated attorney) to be personally present for such period and under such circumstances as the court may direct.~~

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice student in the following circumstances:

a. In any civil case in justice, municipal, and magistrate court, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;

b. In any civil case in superior court or before any administrative tribunal.

c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;

d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;

e. In any misdemeanor criminal defense case, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and

f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.

g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.

ii. Other Client Representation Activities. Under the ~~general~~ supervision of the supervising attorney ~~(or designated attorney)~~, but outside ~~his or her personal~~ the supervisor's presence, a certified limited practice student may:

a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice student is eligible to appear, but such pleadings or documents must be signed by the supervising attorney ~~(or designated attorney)~~;

b. prepare briefs, ~~abstracts~~ motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney ~~(or designated attorney)~~;

c. ~~provide assistance to~~ assist indigent inmates of correctional institutions or other persons who request such assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. ~~(If there is a lawyer of record in the matter, all such assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney (or designated attorney))~~;

d. ~~render~~ give legal advice and perform other appropriate legal services, but only ~~after prior consultation with and upon the express~~ with the consent of the supervising attorney ~~(or designated attorney)~~.

iii. Other Non-Representation Activities. ~~A certified limited practice student may perform any advisory or non-representational activity which could be performed by a person who is not a member of the state bar, subject to the approval by the supervising attorney (or designated attorney).~~ In connection with a volunteer legal services program and at the invitation or request of a court or tribunal, a certified limited practice student may appear as a law student volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the student's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice student has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title "Certified Limited Practice Student."

~~i. In connection with activities performed pursuant to these rules, a~~ A certified limited practice student may use the title “Certified Limited Practice Student” only ~~and may not use the title in connection with activities not performed pursuant to these rules.~~

ii. When a certified limited practice student’s name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the student is a certified limited practice student pursuant to these rules; state the name of the supervising attorney; be signed by the supervising attorney or designated attorney; and otherwise comply with these rules.

iii. A certified limited practice student ~~may not and shall not in any way~~ hold himself or herself out as ~~a regularly admitted or~~ an active member of the state bar.

iv. Nothing ~~contained~~ in these rules prohibits a certified limited practice student from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. ~~Requirements and~~ Duties of the Supervising Attorney. The supervising attorney ~~shall~~ must:

~~i. be an active member of the state bar under these rules, and before supervising a certified limited practice student shall have practiced law or taught law in an accredited law school as a full-time occupation for at least two years;~~

~~ii. supervise no more than five (5) certified limited practice students concurrently; provided, however, that a supervising attorney who is employed full time to supervise law students as part of an organized law school or government agency training program may supervise up to, but in no case more than fifty (50) certified students;~~

~~iii. i. supervise and~~ assume personal professional responsibility for any work performed by the certified limited practice student while under his or her supervision;

~~iv. ii. assist and counsel the certified limited practice student in the activities authorized by these rules and review such activities with the certified limited practice student, all to the extent required for the proper training of the certified limited practice student and the protection of the client;~~

~~v. iii. read, approve, and sign any pleadings, briefs or other documents prepared by the certified limited practice student before the filing thereof, and read and approve any document prepared by the certified limited practice student for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney shall still provide general supervision;~~

~~vi. provide the level of supervision to the certified limited practice student required by these rules (exclusively in the case of government agencies, a designated attorney may, in the place of the supervising attorney, perform the obligation set forth in this subparagraph, but the Supervising Attorney shall still provide supervision); and~~

~~vii. in the case of a certified student who is participating in a clinical program post-graduation pending the taking of the bar examination, report to the clinical law professor and the dean of the law school, as the law school shall require, on a monthly basis regarding the supervising attorney's supervision and guidance of the certified student.~~

~~vii. iv. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited practice student has or will cease before the date indicated on the certification.~~

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice student during the period of certification, the certified limited practice student must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice student. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

F. G. Duration and Termination of Certification. Certification of a certified limited practice student shall commence begin on the date indicated on specified in the certification and shall remain in effect for the period specified in the notice of certification unless sooner terminated pursuant to by the earliest of the following occurrences:

~~i. Termination by the Student. The certified limited practice student may requests termination of the certification in writing or notify notifies the clerk of the Court that he or she no longer meets the requirements of this rule, and these rules. In such event the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.~~

~~ii. Termination by the Supervising Attorney. The supervising attorney may notify notifies the clerk of the Court in writing that his or her supervision of the certified limited practice student will cease before the date specified in the notice of certification. In such event, the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar, and The dean may issue a modified certification reflecting the substitution of a new supervising attorney, as necessary.~~

~~iii. Termination by the Dean. A certification of student limited practice may be terminated by The dean at any time, with or without cause and without notice or hearing, by filing files notice of the termination with the clerk of the Court. A certification of student limited practice shall be terminated if one or more of the requirements for the certification no longer exists or the certified limited practice student, supervising attorney or designated attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.~~

~~iv. Failure to take or Pass the Bar Examination. A certification of a student limited practice shall be terminated if the certified student fails to take or pass the first general bar examination~~

for which the student is eligible. The Court at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

~~v. Termination by the Arizona Supreme Court. A certification of student limited practice may be terminated by the Arizona Supreme Court any time, without cause and without notice or hearing, by filing notice of the termination with the clerk of the Court. A certification of student limited practice shall be terminated if~~ One or more of the requirements for the certification no longer exists or the certified limited practice student, or supervising attorney or designated attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule, or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

6. Law Graduates

A. Law Graduate Eligibility for Limited Practice Certificate. To be eligible to become a certified limited practice graduate, an applicant must:

i. have graduated from an accredited law school;

ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice graduate from the person on whose behalf the services are rendered; this requirement does not prevent a supervising lawyer, legal services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law graduate, or prevent any such lawyer or agency from requesting compensation or remuneration for legal services as otherwise authorized;

iii. certify in writing that the law graduate has read and is familiar with the Arizona Rules of Professional Conduct, the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and

iv. be certified by the dean of the accredited law school where the law graduate was enrolled on graduation as having graduated in good academic standing and being of good character.

B. Application to Become a Certified Limited Practice Graduate

i. All applications to become a certified limited practice graduate must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated fee. The clerk of the Court shall send a copy of all approved graduate limited practice certifications to the admissions department of the state bar.

ii. The application for certification must be signed by the applicant, the dean of the law school where the applicant was enrolled on graduation, and the supervising attorney.

iii. The applicant must attest that he or she meets all of the requirements of this rule, will

immediately notify the clerk of the Court if he or she no longer meets the requirements of the rules, and has read and will abide by the Arizona Rules of Professional Conduct and these rules.

iv. The dean of the law school where the applicant was enrolled on graduation must attest that the applicant meets the requirements of these rules, and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the clerk of the Court if the certified limited practice graduate no longer meets the requirements of these rules.

v. The supervising attorney must specify the period during which he or she will be responsible for and will supervise the applicant and attest that he or she has read and will abide by, the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice Graduate; Presence of Supervising Attorney or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice graduate may appear in any court or before any administrative tribunal in this state on behalf of any person who has consented in writing to that appearance if the supervising attorney has also provided written approval of that appearance. In each case, the written consent and approval must be filed in the case and be brought to the attention of the judge or the presiding officer. In addition, the certified limited practice graduate must advise the court at the law graduate's first appearance in the case of the certification to appear as a law graduate pursuant to these rules.

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice graduate in the following circumstances:

a. In any civil case in justice, municipal, and magistrate court unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;

b. In any civil case in superior court or before any administrative tribunal;

c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;

d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;

e. In any misdemeanor criminal defense case unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and

f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.

g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.

ii. Other Client Representation Activities. Under the general supervision of the supervising attorney or designated attorney, but outside his or her presence, a certified limited practice graduate may:

a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice graduate is eligible to appear, but such pleadings or documents must be signed by the supervising attorney or designated attorney if filed in the superior court, Arizona Court of Appeals, Arizona Supreme Court, or with an administrative tribunal;

b. prepare briefs, motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney or designated attorney;

c. assist indigent inmates of correctional institutions or other persons who request assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. If there is a lawyer of record in the matter, all assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney or designated attorney;

d. give legal advice and perform other appropriate legal services, but only after consultation with and consent of the supervising attorney or designated attorney.

iii. Other Non-Representation Activities. In connection with a volunteer legal services program and at the invitation and request of a court or tribunal, a certified limited practice graduate may appear as a law graduate volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the certified limited practice graduate's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice graduate has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title “Certified Limited Practice Graduate.”

i. A certified limited practice graduate may use the title “Certified Limited Practice Graduate” only in connection with activities performed pursuant to these rules.

ii. When a certified limited practice graduate’s name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the law graduate is a certified limited practice graduate pursuant to these rules, state the name of the supervising attorney, be signed by the supervising attorney or designated attorney if required by these rules, and otherwise comply with these rules.

iii. A certified limited practice graduate shall not hold himself or herself out as an active member of the state bar.

iv. Nothing in these rules prohibits a certified limited practice graduate from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. Duties of the Supervising Attorney. The supervising attorney must:

i. supervise and assume professional responsibility for any work performed by the certified limited practice graduate while under his or her supervision;

ii. assist and counsel the certified limited practice graduate in the activities authorized by these rules and review such activities with the certified limited practice graduate, all to the extent required for the proper training of the certified limited practice graduate and the protection of the client;

iii. read and approve all pleadings, briefs, or other documents prepared by the certified limited practice graduate as required by these rules; sign any pleading, brief, or other document if required by these rules, and read and approve any document prepared by the certified limited practice graduate for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney must still provide general supervision;

iv. assume professional responsibility for all pleadings, briefs, or other documents filed in any court or with an administrative tribunal by the certified limited practice graduate under his or her supervision;

v. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited graduate has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice graduate during the period of certification, the certified limited practice graduate must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute

supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice graduate. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

G. Duration and Termination of Certification. Certification of a certified limited practice graduate shall begin on the date specified in the certification and shall remain in effect for the period specified in the certification unless sooner terminated by the earliest of the following occurrences:

i. The certified limited practice graduate requests termination of the certification in writing or notifies the Clerk of the Court that he or she no longer meets the requirements of these rules. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

ii. The supervising attorney notifies the clerk of the Court in writing that his or her supervision of the certified limited practice graduate will cease before the date specified in the certification. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

iii. The dean at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

iv. The Court at any time, with or without cause or notice or hearing, files notice of the termination with the clerk of the Court.

v. One or more of the requirements for certification no longer exists or the certified limited practice graduate or supervising attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

vi. The law graduate fails to take the first Arizona uniform bar examination, or the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

vii. The law graduate fails to pass the first Arizona uniform bar examination for which the law graduate is eligible or fails to obtain a score equal to or greater than the acceptable score established by the Committee on Examinations on the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

viii. Thirty days after the Court notifies the law graduate that he or she has been approved for admission to practice law and is eligible to take the oath of admission.

ix. The Committee on Character and Fitness does not recommend to the Court that the law graduate be admitted to practice law.

x. The law graduate is denied admission to practice law by the Court.

xi. The law graduate is admitted to practice law.

xii. Expiration of 12 months from the date of the law graduate's graduation from law school unless, before expiration of the 12-month period and for good cause shown by the law graduate, the Court extends the 12-month period.

APPENDIX 4: Rule 31, Arizona Rules of Supreme Court

Proposed Restyled Arizona Rule of Supreme Court 31 (Clean).

Rule 31. Supreme Court Jurisdiction

(a) Jurisdiction. The Arizona Supreme Court has jurisdiction over any person or entity engaged in the authorized or unauthorized “practice of law” in Arizona, as that phrase is defined in (b).

(b) Definition. “Practice of law” means providing legal advice or services to or for another by:

- (1) preparing or expressing legal opinions to or for another person or entity;
- (2) representing a person or entity in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation;
- (3) preparing a document, in any medium, on behalf of a specific person or entity for filing in any court, administrative agency, or tribunal;
- (4) negotiating legal rights or responsibilities on behalf of a specific person or entity; or
- (5) preparing a document, in any medium, intended to affect or secure a specific person’s or entity’s legal rights.

Rule 31.1. Authorized Practice of Law.

(a) Requirement. A person may engage in the practice of law in Arizona, or represent that he or she is authorized to engage in the practice of law in Arizona, only if:

- (1) the person is an active member in good standing of the State Bar of Arizona under Rule 32; or
- (2) the person is specifically authorized to do so under Rules 31.3, 38, or 39.

(b) Lack of Good Standing. A person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status, is not a member in good standing of the State Bar of Arizona under Rule 31.1(a)(1).

Rule 31.2. Unauthorized Practice of Law. Except as provided in Rule 31.3, a person or entity who is not authorized to practice law in Arizona under Rule 31.1(a) must not:

- (a)** engage in the practice of law in Arizona; or
- (b)** use the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “J.D.,” “Esq.,” or other equivalent words that are reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in Arizona.

Rule 31.3. Exceptions to Rule 31.2.

(a) Generally. Notwithstanding Rule 31.2, a person or entity may engage in the practice of law in a limited manner as authorized in Rule 31.3(b) through (e), but the person or entity who engages in such an activity is subject to the Arizona Supreme Court’s jurisdiction concerning that

activity. A person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status, may not engage any of the activities specified in this Rule 31.3 unless this rule authorizes a specific activity.

(b) Governmental Activities and Court Forms.

(1) ***In Furtherance of Official Duties.*** An elected official or employee of a governmental entity may perform the duties of his or her office and carry out the government entity's regular course of business.

(2) ***Forms.*** The Supreme Court, Court of Appeals, superior court, and limited jurisdiction courts may create and distribute forms for use in Arizona courts.

(c) Legal Entities.

(1) ***Definition.*** "Legal entity" means an organization that has legal standing under Arizona law to sue or be sued in its own right, including a corporation, a limited liability company, a partnership, an association as defined in A.R.S. §§ 33-1202 or 33-1802, or a trust.

(2) ***Documents.*** A legal entity may prepare documents incidental to its regular course of business or other regular activity if they are for the entity's use and are not made available to third parties.

(3) ***Justice and Municipal Courts.*** A person may represent a legal entity in a proceeding before a justice court or municipal court if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the proceeding;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

(4) ***General Stream Adjudication Proceeding.*** A person may represent a legal entity in superior court in a general stream adjudication proceeding conducted under A.R.S. §§ 45-251 et seq. (including a proceeding before a master appointed under A.R.S. § 45-255) if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the proceeding;

(C) such representation is not the person's primary duty to the entity but is secondary or incidental to other duties related to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the corporation or association (other than receiving reimbursement for costs).

(5) ***Administrative Hearings and Agency Proceedings.*** A person may represent a legal entity in a proceeding before the Office of Administrative Hearings, or before an Arizona administrative agency, commission, or board, if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the particular proceeding;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

(6) **Exception.** Despite Rule 31.3(c)(3) through (c)(5), a court, the hearing officer, or the officer presiding at the agency or commission proceeding, may order the entity to appear only through counsel if the court or officer determines that the person representing the entity is interfering with the proceeding's orderly progress or imposing undue burdens on other parties.

(d) Tax-Related Activities and Proceedings.

(1) A person may prepare a tax return for an entity or another person.

(2) A certified public accountant or other federally authorized tax practitioner (as that term is defined in A.R.S. § 42-2069(D)(1)) may:

(A) render individual and corporate financial and tax advice to clients and prepare tax-related documents for filing with governmental agencies;

(B) represent a taxpayer in a dispute before the State Board of Tax Appeals if the amount at issue is less than \$25,000; and

(C) practice before the Internal Revenue Service or other federal agencies if authorized to do so.

(3) A property tax agent (as that term is defined in A.R.S. § 32-3651), who is registered with the Arizona State Board of Appraisal under A.R.S. § 32-3642, may practice as authorized under A.R.S. § 42-16001.

(4) A person may represent a party in a small claims proceeding in Arizona Tax Court conducted under A.R.S. §§ 12-161 et seq.

(5) In any tax-related proceeding before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Arizona Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, a person may represent a taxpayer if:

(A) the person is:

(i) a certified public accountant,

(ii) a federally authorized tax practitioner (as that term is defined in A.R.S. § 42-2069(D)(1)); or

(iii) in matters in which the amount in dispute, including tax, interest and penalties, is less than \$5,000, the taxpayer's duly appointed representative; or

(B) the taxpayer is a legal entity (including a governmental entity) and:

(i) the person is full-time officer partner, member, manager, or employee of the entity;

- (ii) the entity has specifically authorized the person to represent it in the proceeding;
- (iii) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and
- (v) the person is not receiving separate or additional compensation for such representation (other than receiving reimbursement for costs).

(e) Other.

(1) ***Children with Disabilities.*** In any administrative proceeding under 20 U.S.C. §§ 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a person may represent a party if:

(A) the hearing officer determines that the person has special knowledge or training with respect to the problems of children with disabilities; and

(B) the person is not charging a fee for representing the party (other than receiving reimbursement for costs).

Despite these provisions, the hearing officer may order the party to appear only through counsel or in some other manner if he or she determines that the person representing the party is interfering with the proceeding's orderly progress or imposing undue burdens on other parties.

(2) ***Department of Fire, Building and Life Safety.*** In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, a person may represent a party if:

(A) the party has specifically authorized the person to represent the party in the proceeding; and

(B) the person is not charging a fee for the representing the party (other than receiving reimbursement for costs).

(3) ***Fiduciaries.*** A person licensed as a fiduciary under A.R.S. § 14-5651 may perform services in compliance with Arizona Code of Judicial Administration § 7-202 without acting under the supervision of an attorney authorized under Rule 31.1(a) to engage in the practice of law in Arizona. Despite this provision, a court may suspend the fiduciary's authority to act without an attorney if it determines that lay representation is interfering with the proceeding's orderly progress or imposing undue burdens on other parties.

(4) ***Legal Document Preparers and Limited Licensed Legal Practitioners.*** Certified legal document preparers and limited licensed legal practitioners may perform services in compliance with the Arizona Code of Judicial Administration. This exception is not subject to the restriction in the second sentence of Rule 31.3(a) if a disbarred or suspended attorney has been certified as a legal document preparer or licensed as a limited license legal practitioner as provided in the Arizona Code of Judicial Administration.

(5) ***Mediators.***

(A) A person who is not authorized under Rule 31.1(a) to engage in the practice of law in Arizona may prepare a written agreement settling a dispute or file such an agreement with the appropriate court if:

(i) the person is employed, appointed, or referred by a court or government entity and is serving as a mediator at the direction of the court or a governmental entity; or

(ii) the person is participating without compensation in a nonprofit mediation program, a community-based organization, or a professional association.

(B) Unless specifically authorized in Rule 31.3(e)(5)(A), a mediator who is not authorized under Rule 31.1(a) to engage in the practice of law in Arizona and who prepares or provides legal documents for the parties without attorney supervision must be certified as a legal document preparer in compliance with the Arizona Code of Judicial Administration § 7-208.

(6) *Nonlawyer Assistants and Out-of-State Attorneys.*

(A) A nonlawyer assistant may act under an attorney's supervision in compliance with ER 5.3 of the Arizona Rules of Professional Conduct. This exception is not subject to the restriction in Rule 31.3(a) concerning a person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status.

(B) An attorney licensed in another jurisdiction may engage in conduct that is permitted under ER 5.5 of the Arizona Rules of Professional Conduct.

(7) *Personnel Boards.* An employee may designate a person as a representative who is not necessarily an attorney to represent the employee before any board hearing or any quasi-judicial hearing dealing with personnel matters, but no fee may be charged (other than for reimbursement of costs) for any services rendered in connection with such hearing by any such designated representative who is not authorized under Rule 31.1(a) to engage in the practice of law in Arizona.

(8) *State Bar Fee Arbitration.* A person may represent a legal entity in a fee arbitration proceeding conducted by the State Bar of Arizona Fee Arbitration Committee, if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the particular proceeding;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

Current Rule 31, Arizona Rules of Supreme Court

Rule 31 Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law

1. *Jurisdiction.* Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

2. *Definitions.*

A. "Practice of law" means providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) preparing or expressing legal opinions;
- (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
- (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
- (5) negotiating legal rights or responsibilities for a specific person or entity.

B. "Unauthorized practice of law" includes but is not limited to:

- (1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a); or
- (2) using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

C. "Legal assistant/paralegal" means a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule.

D. "Mediator" means an impartial individual who is appointed by a court or government entity or engaged by disputants through written agreement to mediate a dispute. Serving as a mediator is not the practice of law.

E. "Unprofessional conduct" means substantial or repeated violations of the Oath of Admission

to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

(c) Restrictions on Disbarred Attorneys' and Members' Right to Practice. No member who is currently suspended or on disability inactive status and no former member who has been disbarred shall practice law in this state or represent in any way that he or she may practice law in this state.

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1. In any proceeding before the Department of Economic Security or Department of Child Safety, including a hearing officer, an Appeal Tribunal or the Appeals Board, an individual party (either claimant or opposing party) may be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

2. An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.

3. An officer of a corporation or a managing member of a limited liability company who is not an active member of the state bar may represent such entity before a justice court or police court provided that: the entity has specifically authorized such officer or managing member to represent it before such courts; such representation is not the officer's or managing member's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the entity was an original party to or a first assignee of a conditional sales contract, conveyance, transaction or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose.

4. A person who is not an active member of the state bar may represent a party in small claims procedures in the Arizona Tax Court, as provided in Title 12, Chapter 1, Article 4 of the Arizona Revised Statutes.

5. In any proceeding in matters under Title 23, Chapter 2, Article 10 of the Arizona Revised Statutes, before any administrative law judge of the Industrial Commission of Arizona or review board of the Arizona Division of Occupational Safety and Health or any successor agency, a corporate employer may be represented by an officer or other duly authorized agent of the corporation who is not charging a fee for the representation.

6. An ambulance service may be represented by a corporate officer or employee who has been specifically authorized by the ambulance service to represent it in an administrative hearing or rehearing before the Arizona Department of Health Services as provided in Title 36, Chapter 21.1, Article 2 of the Arizona Revised Statutes.

7. A person who is not an active member of the state bar may represent a corporation in small claims procedures, so long as such person is a full-time officer or authorized full-time employee of the corporation who is not charging a fee for the representation.

8. In any administrative appeal proceeding of the Department of Health Services, for behavioral health services, pursuant to A.R.S. § 36-3413 (effective July 1, 1995), a party may be represented by a duly authorized agent who is not charging a fee for the representation.

9. An officer or employee of a corporation or unincorporated association who is not an active member of the state bar may represent the corporation or association before the superior court (including proceedings before the master appointed according to A.R.S. § 45-255) in the general stream adjudication proceedings conducted under Arizona Revised Statutes Title 45, Chapter 1, Article 9, provided that: the corporation or association has specifically authorized such officer or employee to represent it in this adjudication; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation or association; and the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provision, the court may require the substitution of counsel whenever it determines that lay representation is interfering with the orderly progress of the litigation or imposing undue burdens on the other litigants. In addition, the court may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

10. An officer or full-time, permanent employee of a corporation who is not an active member of the state bar may represent the corporation before the Arizona Department of Environmental Quality in an administrative proceeding authorized under Arizona Revised Statutes. Title 49, provided that: the corporation has specifically authorized such officer or employee to represent it in the particular administrative hearing; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation; the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation; and the corporation has been provided with a timely and appropriate written general warning relating to the potential effects of the proceeding on the corporation's and its owners' legal rights.

11. Unless otherwise specifically provided for in this rule, in proceedings before the Office of Administrative Hearings, or in fee arbitration proceedings conducted under the auspices of the State Bar of Arizona Fee Arbitration Committee, a legal entity may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not

receiving separate or additional compensation (other than reimbursement for costs) for such representation.

12. In any administrative appeal proceeding relating to the Arizona Health Care Cost Containment System, an individual may be represented by a duly authorized agent who is not charging a fee for the representation.

13. In any administrative matter before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, a taxpayer may be represented by (1) a certified public accountant, (2) a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), or (3) in matters in which the dispute, including tax, interest and penalties, is less than \$5,000.00 (five thousand dollars), any duly appointed representative. A legal entity, including a governmental entity, may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

14. If the amount in any single dispute before the State Board of Tax Appeals is less than twenty-five thousand dollars, a taxpayer may be represented in that dispute before the board by a certified public accountant or by a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1).

15. In any administrative proceeding pursuant to 20 U.S.C. § 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a party may be represented by an individual with special knowledge or training with respect to the problems of children with disabilities as determined by the administrative law judge, and who is not charging the party a fee for the representation. The hearing officer shall have discretion to remove the individual, if continued representation impairs the administrative process or causes harm to the parties represented.

16. Nothing in these rules shall limit a certified public accountant or other federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), from practicing before the Internal Revenue Service or other federal agencies where so authorized.

17. Nothing in these rules shall prohibit the rendering of individual and corporate financial and tax advice to clients or the preparation of tax-related documents for filing with governmental agencies by a certified public accountant or other federally authorized tax practitioner as that term is defined in A.R.S. § 42-2069(D)(1).

18. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision

of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).

19. Nothing in these rules shall prohibit the supreme court, court of appeals, superior courts, or limited jurisdiction courts in this state from creating and distributing form documents for use in Arizona courts.

20. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

21. Nothing in these rules shall prohibit the preparation of tax returns.

22. Nothing in these rules shall affect the rights granted in the Arizona or United States Constitutions.

23. Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity.

24. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. This exemption is not subject to paragraph (c) of this rule, as long as the disbarred attorney or member has been certified as provided in § 7-208 of the Arizona Code of Judicial Administration.

25. Nothing in these rules shall prohibit a mediator as defined in these rules from preparing a written mediation agreement or filing such agreement with the appropriate court, provided that:

(A) the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or

(B) the mediator is participating without compensation in a nonprofit mediation program, a community-based organization, or a professional association.

In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of judicial Administration, Part 7, Chapter 2, Section 7-208.

26. Nothing in these rules shall prohibit a property tax agent, as that term is defined in A.R.S. § 32-3651, who is registered with the Arizona State Board of Appraisal pursuant to A.R.S. § 32-3642, from practicing as authorized pursuant to A.R.S. § 42-16001.

27. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

28. In matters before the Arizona Corporation Commission, a public service corporation, an interim operator appointed by the Commission, or a nonprofit organization may be represented by a corporate officer, employee, or a member who is not an active member of the state bar if

(A) the public service corporation, interim operator, or nonprofit organization has specifically authorized the officer, employee, or member to represent it in the particular matter,

(B) such representation is not the person's primary duty to the public service corporation, interim operator, or nonprofit organization, but is secondary or incidental to such person's duties relating to the management or operation of the public service corporation, interim operator, or nonprofit organization, and

(C) the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

Notwithstanding the foregoing provisions, the Commission or presiding officer may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented.

29. In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, an individual may be represented by a duly authorized agent who is not charging a fee for the representation, other than reimbursement for actual costs.

30. A person licensed as a fiduciary pursuant to A.R.S. § 14-5651 may perform services in compliance with Arizona code of judicial administration, Part 7, Chapter 2, Section 7-202. Notwithstanding the foregoing provision, the court may suspend the fiduciary's authority to act without an attorney whenever it determines that lay representation is interfering with the orderly progress of the proceedings or imposing undue burdens on other parties.

31. Nothing in these rules shall prohibit an active member or full-time employee of an association defined in A.R.S. §§ 33-1202 or 33-1802, or the officers and employees of a management company providing management services to the association, from appearing in a small claims action, so long as:

(A) the association's employee or management company is specifically authorized in writing by the association to appear on behalf of the association;

(B) the association is a party to the small claims action.

APPENDIX 5: Draft Administrative Order Implementing Licensed Legal Advocate Pilot Program

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
AUTHORIZING A LICENSED) Administrative Order
LEGAL ADVOCATE PILOT PROGRAM) No. 20__ - _____
)
)
)
)
)

“Promoting Access to Justice” is Goal 1 of the Judiciary’s Strategic Agenda, *Justice for the Future: Planning for Excellence, 2019-2024*. The Task Force on the Delivery of Legal Services, established by Administrative Order 2018-111, was charged with reviewing the regulation of the delivery of legal services as well as examining and recommending whether nonlawyers, with specified qualifications, should be allowed to provide limited legal services.

At the same time the Task Force was pursuing its charge, the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law (i4J) brought graduate students, undergraduate students and over 50 members of the community together in i4J’s Innovating Legal Services course to explore a challenge framed as: “should Arizona create a new tier of civil legal professional, and what could that mean for survivors of domestic abuse?” The Innovating Legal Services course developed a proposal for a pilot program that would train lay legal advocates to become Licensed Legal Advocates (LLAs), able to legally advise DV survivors as they navigate Arizona’s civil legal system. The proposed pilot removes the barrier imposed by unauthorized practice of law restrictions, giving the LLAs the ability to handle specifically-identified legal needs of participants at Emerge! and enhancing those participants’ access to justice. The details of the pilot program are captured in a report titled *Report to the Arizona Supreme Court Task Force on Delivery of Legal Services: Designing a New Tier of Legal Professional for Survivors of Domestic Violence*, which was presented to the Task Force.

The Task Force found the pilot program was consistent with its charge. In October 2019, the Task Force recommended to the Arizona Judicial Council (AJC) that the Supreme Court establish the Licensed Legal Advocate Pilot Program. The AJC recommended adoption of the [report/recommendation].

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that:

1. The Licensed Legal Advocate Pilot Program shall run for a period of 24 months from the date of implementation.
2. Rule 31(d) of the Arizona Rules of Supreme Court is deemed modified as set forth in Appendix A for the duration of the Licensed Legal Advocates Pilot Program.
3. Licensed legal advocates may provide legal advice in the following areas:
 - a. Identifying urgent legal needs at intake and providing advice regarding next steps of action with respect to those needs;
 - b. Assisting self-represented DV survivors with the completion of DV and family law forms and providing legal advice necessary to adequately complete those forms;
 - c. Providing advice regarding preserving potential court evidence and preparing for court hearings and mediations; and
 - d. Assisting survivors at court hearings by being able to sit with the survivor and quietly advise them as requested by the survivor or the court.
4. Licensed Legal Advocates are subject to the Licensed Legal Advocates Rules of Professional Conduct, as set forth in Appendix B, adapted from the Arizona Rules of Professional Conduct for the duration of the Licensed Legal Advocates Pilot Program.
5. Qualifications of Licensed Legal Advocates are set forth in Appendix C.
6. A licensing exam for the Licensed Legal Advocates Pilot Program shall be developed and administered by the Certification and Licensing Division of the AOC, who shall oversee licensure of Licensed legal Advocates.
7. The Licensed Legal Advocate Pilot Program shall be administered by the Pilot Program Director in coordination with the AOC.

Dated this _____ day of _____, 20__.

ROBERT BRUTINEL
Chief Justice

Task Force on Delivery of Legal Services

Report and Recommendations

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October 4, 2019

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Legal Innovation After Reform:

EVIDENCE FROM REGULATORY CHANGE

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Much of this report is based on work conducted in the Law and Policy Lab course, *Can Opening Up the Legal Services Market Increase Access to Justice?*, which ran over the winter and spring quarters of 2022. We are grateful for the work of the lab students who did much of the underlying research and conducted most of the interviews: Nya Hardaway, Jessica Lu, Khalil Waddell, Vasu Nigam, KC Shah, and Kimberly Odoko. We are also thankful for Ling Ritter's work as a research assistant on this project.



Legal Innovation After Reform:

EVIDENCE FROM REGULATORY CHANGE

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Executive Summary

Efforts to rethink the regulation of legal services are gaining momentum in the United States, fueled by a yawning justice gap and growing evidence that regulatory barriers are at least partly to blame. Two states, Utah and Arizona, have already embarked on reforms that relax long-standing restrictions on who can practice law and who can own law firms in order to spur new approaches to delivering legal services. And a number of other states are considering whether to follow their lead. Yet key questions remain about what regulatory reforms can achieve:

- 1. What types of innovation in legal services delivery models will different reform approaches generate?**
- 2. Who will be served by those innovations?**

This report presents results from a comprehensive analysis of the legal service entities that are emerging in response to rule reforms. The analysis is based on two types of data. First, to understand what types of innovation are *possible*, we conducted in-depth, semi-structured interviews with 37 entities that have obtained authorization in liberalizing jurisdictions, half in Utah and Arizona and half in the U.K., where reform efforts are more mature. Second, to understand *how much* innovation may result in U.S. legal markets and *who* it may serve, we conducted a comprehensive analysis of the application, authorization, and other public-facing materials from all 57 of the authorized entities in Utah and Arizona as of June 30, 2022.

Key Insights

Our canvass of emerging innovations in Utah and Arizona, supplemented by evidence from England and Wales, yields five key insights:

- **Regulatory reforms are spurring substantial innovation in five different ways.** Looking across authorized entities in liberalizing jurisdictions reveals a range of innovations, both in the ownership structure of providers and in their service delivery models. In particular, we have identified five innovation types: (1) traditional law firms making changes to their capital or business structure or service model; (2) “law companies” practicing law; (3) “non-law companies” as new entrants to the legal sector; (4) intermediary platforms; and (5) entities using nonlawyers and technology to practice law.



Among authorized entities in Utah and Arizona, 35% are traditional law firms that have added a nonlawyer partner, accessed new sources of capital, or introduced a new service delivery model. For example:

- **LawHQ** is a plaintiff-side firm that has entered the Utah sandbox in order to raise capital to develop an app to both find plaintiffs and collect evidence for litigation against telephone spammers.

Another 35% are law companies, meaning entities with nonlawyer ownership, who were already delivering legal services to corporate or consumer clients. Most of the law companies that have sought authorization in Utah and Arizona have done so in order to incorporate lawyers into the tiers of services they provide. For example:

- **LegalZoom**, an Arizona ABS status, sought authorization so it could hire lawyers who provide additional services beyond the document assembly and other “scrivener” services that the company already provides to millions of consumers.
- **Hello Divorce** is owned by a California divorce lawyer who wanted to reach more clients and realized they didn’t all need her bespoke services. Using non-lawyer financing, she developed a software platform and a tiered set of flat-fee packages, beginning with DIY tiers with easy-to-use forms and access to automated legal information and moving to assistance from human professionals at higher tiers. In most states, including California, if consumers want to access lawyer services, they must be referred out to the company’s sister law firm. Hello Divorce cannot charge a flat fee for access to both the technology platform and lawyer assistance.

In the Utah sandbox, the entire business is housed under one roof, giving consumers one-stop access to a mix of DIY tools and lawyers when and how they want them.

Eighteen percent of entities are non-law companies— that is, new entrants to legal markets— that have either set up “one-stop-shops” that combine law and non-law expertise or have begun to offer legal services as an adjunct to their primary line of business. For example:

- **Law on Call** is the legal subsidiary of an established registered agent company, operating through the Utah sandbox, that offers its small business clients access to a team of licensed lawyers through a \$9 subscription fee.

Three companies, all in the Utah sandbox, are **intermediary platforms**—marketplace platforms connecting lawyers and consumers and often providing practice support systems to lawyers such as case management and billing. For an example:

- **Off the Record** connects consumers with traffic citations with lawyers. The platform also serves to facilitate the lawyer-client relationship and provides lawyers technological practice support. Within the sandbox, Off the Record can share fees directly with lawyers and facilitate client payment through the platform.

The final category in our innovation taxonomy identifies **entities using nonlawyers or software to practice law**, a service model innovation only available within the Utah sandbox through the UPL waiver. These services are frequently developed as lower-price offerings. An example is:

- **Rasa**, a B-corporation using both AI-enabled software and nonlawyer providers to help Utahns determine whether they are eligible to expunge their criminal records and then execute the process.

■ **Lawyers are playing a central role in the entities and the innovation within them.** In innovative entities across both Utah and Arizona, lawyers remain central to the development and delivery of services—whether as employee practitioners, through oversight and compliance roles, or through entity ownership and leadership. In Utah, innovation also takes the form of services delivered via nonlawyers and software. Even here, traditional law firms are driving innovation by seeking authorization to offer tiered services at different price points, such as DIY services via technology platform at the bottom price tier, with higher tiers of service that progressively mix in nonlawyer and lawyer guidance.

- **A majority of entities are using both technology and other innovations to deliver services in new ways, mostly to consumers and small businesses.** In total, 61% of entities across the two reform states identified a technological innovation as part of their ABS or sandbox authorization. Most of these (54%) are tools that are primarily public-facing—for instance, to connect providers and clients—and not practicing law within the conventional meaning of UPL. Nearly half of entities also described pricing innovations, such as subscription or flat-fee pricing as part of their model. And most authorized entities are serving consumers and small businesses. A large majority of legal service entities in Utah and Arizona—84 percent, or 48 entities—report providing services to consumers and/or small businesses. This percentage is similar across the two states. This finding tracks the experience in England and Wales.
- **UPL reform appears to be critical to serving lower-income populations.** The Utah sandbox—which allows entities to seek waivers of UPL—contains the only entities, all of them non-profits, that report that they primarily serve indigent and low-income people. By contrast, Arizona’s “ABS-only approach” is thus far yielding important but limited changes to the conventional law firm model of legal services delivery that predominantly serves a middle-income and small business clientele.
- **Reform efforts to this point do not appear to pose a substantial risk of consumer harm.** Data and information reported by Utah and Arizona regulators indicate that authorized entities do not appear to draw a substantially higher number of consumer complaints, as compared to their lawyer counterparts. In particular, Utah’s June 2022 data reported one complaint per 2,123 services delivered, and Arizona has received no complaints. This is generally on par with the number of complaints lodged against lawyers.

Though these insights are subject to caveats, they provide us with data-based insight into the realities of liberalizing the rules around ownership of legal businesses and the practice of law. Those realities can and should inform and drive policymaking going forward.

Introduction

Efforts to rethink the regulation of legal services are gaining momentum in the United States, fueled by a yawning justice gap and growing evidence that regulatory barriers are at least partly to blame. Two states, Utah and Arizona, have already embarked on reforms that relax long-standing restrictions on who can practice law and who can own law firms in order to spur new approaches to delivering legal services. And a number of other states are considering whether to follow their lead.

Yet key questions remain about what regulatory reforms can achieve. In particular: If rules are relaxed, what types of innovation in legal services will result? And who will be served by those innovations? Drawing on newly available evidence from Utah and Arizona, this Report seeks to answer both questions.

The Challenge of Regulatory Reform

Two core realities are fueling current regulatory reform efforts. First, the U.S. justice gap is deep and costly. Studies consistently find that a substantial number of Americans' civil legal needs go unmet.¹ Many Americans who cannot obtain legal assistance must navigate the complex legal system alone, often with serious consequences. Millions of individuals at life-altering moments in their lives—facing eviction, loss of child custody, deportation, wage theft, asset collection, denial of legitimate health insurance claims, and more—try to navigate a bewildering legal system without legal guidance.² Indeed, in state courts, in an astonishing three-quarters of civil cases, at least one party is unrepresented, usually the defendant.³ Meanwhile, many who are understandably daunted by the prospect of proceeding pro se simply “lump it,” doing nothing at all to protect or to vindicate their rights.⁴

The second reality fueling reform efforts is a growing academic consensus that the above justice gap is caused, at least in part, by restrictive regulation of legal practice.⁵ Rules prohibiting unauthorized practice of law, or UPL, constrain the supply of legal help by barring nonlawyers from providing legal services.⁶ Meanwhile, Rule of Professional Conduct 5.4 and its state-level equivalents ban lawyers sharing fees with nonlawyers, thus blocking access to outside capital and equity-based compensation for nonlawyer experts and depriving legal services providers of the resources and non-law skillsets necessary to drive innovation.⁷ Taken together, these restrictions not only impose an inefficient business model on law practice over the short-term, they also chill innovation over the longer-term.

In recent years, policymakers have started to debate what reforming these rules can achieve and what the tradeoffs might be. Reform advocates contend that the current system protects lawyers' interests in maintaining a professional monopoly at the expense of consumer access, choice, autonomy, and control.⁸ They argue that relaxing regulations to allow more access to capital and welcome more types of providers into the system will spur innovation in services, promote competition, and result in a wider array of providers offering more tailored assistance and at lower prices. Innovation unleashed by rule reforms, they contend, will widen access up and down the socio-economic ladder, from the indigent, through middle-income people and for small businesses.

In response, critics concede that reform could spark innovation—but they worry that the innovation most apt to emerge will serve only those with at least some ability to pay, yielding access gains only for the comparatively well-heeled while leaving marginalized groups and the indigent no better off.⁹ Worse, some express concern that profit-focused corporate owners will undercut lawyers' independence and loyalty to clients, thereby driving a “race to the bottom” in service quality and resulting in significant consumer harm.¹⁰

Until now, states considering reforms could rely on only a thin evidence base in weighing these arguments. Much existing evidence was confounded, drawn from a decade of reforms in England and Wales, with their very different legal systems and baseline of regulation. No longer: Reform efforts in Utah and Arizona, launched in late 2020 and early 2021, respectively, are now sufficiently mature that one can begin to draw useable conclusions from each.

Research Questions and Focus

This Report leverages new evidence from Utah and Arizona to tackle two common questions, both noted previously, that arise in regulatory reform debates: First, if rules are relaxed, what types of innovation in legal services are likely to result? Second, who will be served by those innovations?

We seek to answer these questions by presenting results from a comprehensive analysis of the application, authorization, and other public-facing materials from all 57 of the authorized entities in Utah and Arizona as of June 30, 2022. We bolster this analysis with in-depth interviews with 37 legal service providers, including 18 interviews with authorized entities in Utah and Arizona and, for comparative perspective, an equivalent number of authorized entities in England and Wales. The result is a first-of-its-kind, grounded, and data-driven analysis of what regulatory reforms might achieve in the U.S. legal context.

An important aim of our study is to leverage the different reform approaches that Utah and Arizona are pursuing in order to draw useful inferences about which types of reforms will generate which types of innovations. To gain needed analytic traction, we focus our analysis on a single type of reform known as “entity regulation”—that is, the licensing and regulation of entities providing legal services. This Report does not assess what is sometimes called “role regulation,” that is paraprofessional licensing reforms that create a limited licensure process to permit nonlawyer individuals to provide legal services within specific practice areas.¹¹ However, both Utah and Arizona have implemented paraprofessional reforms in parallel to their entity-based reforms, with possible implications for our findings that we take up in Part VI.¹²

While both Utah and Arizona are pursuing entity regulation as a core part of their reform efforts, the two states have adopted very different reform strategies. In particular, the two states’ reforms vary in their *target*—that is, *which* of the rules are relaxed. Utah’s approach allows entities to seek waivers of Rule 5.4, UPL, or both—an approach we call the “ABS+UPL” approach. (ABS is an acronym for “alternative business structures,” a term commonly used in regulatory reform debates to describe legal services entities with nonlawyer ownership.) Arizona, in contrast, relaxed only Rule 5.4—an approach we call the “ABS-only” approach. The states also vary in terms of their *lever*—that is, *how* those rules are relaxed. Utah created a sandbox, which is a space within which legal services providers can seek waivers of UPL, Rule 5.4, or both, subject to ongoing oversight by a regulator. The sandbox is currently authorized for seven years. Arizona made an *ex ante* change to its rules—and, in particular, its Rule 5.4 equivalent—and then created an application process for entities seeking ABS status. Our study uses this contrast in the two states’ approaches to draw inferences about what types of innovation are likely to present under different reform conditions—a key question as reformers chart their own state’s course.

Report Roadmap

The remainder of this Report proceeds in seven Parts. In Part I, we briefly outline the scope of the access to justice problem, rehearse the debate around specific rule reforms as a way to address it, describe the recent history and current status of regulatory reform, and present some of the main empirical questions raised in ongoing debate. Part II reviews existing evidence from England and Wales, the largest legal market to have undergone entity-focused reform, but also explains why that evidence is confounded by important differences between U.S. and U.K. legal markets. Part III outlines the methodology we used in conducting our primary research. Part IV presents a novel taxonomy of the kinds of innovation enabled by liberalized regulation

using closer in case studies of authorized entities. Part V presents a quantitative analysis of the 57 entities authorized in Utah and Arizona as of June 2022, identifying similarities and differences among the authorized entities in the two jurisdictions that may reflect differing regulatory choices. Part VI addresses key caveats and limits of our study. Part VII presents our conclusions.

I. Access to Justice and Regulatory Reform

This Part motivates the empirical study that follows. Subpart A describes the civil justice gap and summarizes the arguments about its many causes, including current regulation of legal practice. Subpart B turns to regulatory reform and summarizes the debate around the two main rules—Rule 5.4’s bar on nonlawyer ownership and the prohibition on unauthorized practice of law (UPL)—at the core of current reform proposals. Subpart C tours current regulatory reform efforts in England and Wales, Australia, Utah, and Arizona and draws out some of the main contrasts among them. Finally, Subpart D presents key research questions about the innovation effects of different reform approaches.

A. The Civil Justice Gap

The justice gap in the U.S. is significant and sustained.¹³ The civil justice system fails to serve most of the legal needs of the poor and many of the legal needs of middle-income Americans.¹⁴ State court dockets—a large subset of that system—are just as arresting: In three-quarters of all civil cases in state courts, at least one side is unrepresented by an attorney.¹⁵ In short, Americans facing legal problems often do not use lawyers and often navigate legal problems without any legal help at all.¹⁶ These citizens muddle through issues with potentially significant life impacts, on one’s marriage, family, physical safety, housing, finances, employment, and access to government support.¹⁷ And they experience harmful impacts in their lives beyond the scope of the legal problem itself, including negative emotions, mental health problems, and financial consequences.¹⁸ The Covid-19 pandemic has exacerbated this profound crisis.¹⁹

Besides illuminating the scale and scope of the justice gap, studies that map and measure the civil justice gap provide two additional insights relevant to regulatory reform. First, the barriers facing Americans with legal needs are complex and multifaceted. Barriers include not just the high price of legal help, but also the fact that many Americans cannot or do not identify their problems as legal in the first place and, even when they do, cannot determine an appropriate course of action.²⁰ Second, the justice gap is not synonymous with indigence or poverty. Rather, studies repeatedly show that the gap extends up the economic ladder, impacting middle-income Americans, and small businesses.²¹

The causes of this justice gap are complex and interrelated. Culprits include inadequate funding for state civil justice systems, declining public investment in civil legal aid, the complexity and inaccessibility of court processes and procedures, a shrinking legal market serving Americans’

everyday legal needs, a widening wealth gap, a fraying social welfare system, and a growing housing crisis.²²

But mounting evidence suggests that something else is also to blame: the rules that have long governed the delivery of legal services, particularly Rule 5.4's bar on nonlawyer ownership and the prohibition on UPL.²³ Under Rule 5.4 and its state-level equivalents, only lawyers may own or manage legal practices, and lawyers and law firms may not tap forms of capital apart from their own profits or ordinary loans secured by those profits.²⁴ Nor can lawyers or law firms offer equity interests to other types of professionals, whether technologists or business specialists, in order to drive innovation. Similarly, UPL rules establish that only lawyers can practice law (with limited exceptions), sharply limiting the development of alternative forms of assistance, whether through nonlawyer providers or technology.²⁵ These laws operate as economic restrictions on the legal services market, limiting not only *who* or *what* may provide services, but also *how* those services may be financed and structured.²⁶ The central premise of regulatory reform is that the existing rules governing delivery of legal services create high and often insurmountable barriers around the supply of legal services, raising prices, stymieing innovation, and yielding a dysfunctional market that cannot optimally deliver legal services to those who need them.

B. Designing Regulatory Reform: Key Rule Choices

Any jurisdiction considering regulatory reform faces several core design choices.²⁷ At the outset, states must decide whether to pursue *entity regulation* via the authorization and regulation of entities or organizations, *role regulation*, such as paraprofessional licensure programs that authorize individual nonlawyer providers to practice law in defined legal areas, or some of both.²⁸ As noted previously, this Report focuses on entity regulation.

Even for states that pursue entity regulation, the hard choices do not stop there. Foremost among those choices is the *target* of reform and, in particular, which among the existing rules to relax: Rule 5.4, UPL, or both?²⁹ This choice raises vital questions about which rules have contributed most to the justice gap and whether rule reforms will spur innovation, lower prices, and increase access to qualified legal help or, instead, expose the public to unqualified or low-quality providers, further entrench existing inequalities, and compromise professional independence and judgment.³⁰ This sub-part summarizes the debate around each. In Part VI, we ask how other key design choices facing states that accept entity-based reforms might also shape innovation.

1. NONLAWYER OWNERSHIP AND INVESTMENT

Rule 5.4 forbids lawyers from sharing fees with nonlawyers and forming a partnership with a nonlawyer if any of the activities of the partnership constitute the practice of law. Reform advocates argue that the prohibition on nonlawyer investment and management prevents law firms from keeping pace with modern innovations in business, including the corporate form, and that more flexibility would benefit consumers.³¹ Professor Gillian Hadfield explains:

Although there are market imperfections that raise the price of law above competitive levels, the problem of access is primarily a problem of cost—meaning the total cost of identifying, securing and implementing legal help that raises the well-being of an ordinary person as he or she navigates the dense legal environment in which we all live. Under the existing business model—in which legal services for ordinary individuals are provided by solo and small firm practitioners operating in traditional law-office settings—these costs are simply too high.³²

Reducing the cost of law in a meaningful way and thus increasing access to legal services, Hadfield argues, requires changing “the form in which legal services are produced and delivered to the market.”³³ The traditional model is difficult to scale, lacks financial flexibility, and misses the fact that ordinary people’s legal needs might be broken down into component parts that need not be provided as a single, complete representation.³⁴ Non-traditional models—loosely defined as almost anything that is not the traditional lawyer-owned and managed legal practice partnership or professional corporation—could promote both accessibility and affordability by allowing for specialization and the unbundling of services into separate parts.³⁵ Providers with innovative structures may focus on different components of legal services—such as diagnosing needs, acquiring knowledge, or producing documents—at scale.³⁶

Advocates also argue that Rule 5.4’s ban on revenue-sharing and nonlawyer partnership negatively impacts the profession by isolating it from the funding and expertise necessary for innovation.³⁷ As Professor Deborah Rhode put it: “Prohibition of lay investment cuts legal organizations off from the sources of funds that fuel innovation elsewhere in the economy: angel investors, venture capital, private equity, and public capital markets.”³⁸ Law firms are left to rely on capital from their equity partners, who are increasingly likely to move between firms and lack a long-term commitment to any individual firm’s growth.³⁹ As a result, law firms have remained firmly in the twentieth century, even as numerous non-law industries, from finance to healthcare to consumer retail, have used innovative funding models to undergo a “digital transformation.”⁴⁰ Removing restrictions and allowing law firms to tap investment from private investors and even

the public marketplace could help spur innovation by helping firms spread risk among more shareholders, integrate legal and non-legal services, and pursue larger-scale capital projects.⁴¹

Critics of allowing nonlawyer ownership and investment counter that loosening legal services regulations will lead to conflicts of interest, excessive commercial influence over a firm's general management, and the degradation of the overall quality of legal services.⁴² In particular, critics express skepticism that opening the market will be able to remedy existing disparities in access, arguing that the benefits of novel ownership and management structures have been oversold as they relate to access to justice for poor and middle-income people.⁴³ Market-based innovation will, by definition, serve only those individuals who already have at least some ability to pay and have the capacity to see their problems as legal in the first place.⁴⁴ On this view, loosening rules around ownership will merely entrench and perhaps even exacerbate a “two-tiered” justice system, with cheaper and better services for middle-income consumers but little or no help for low-income individuals.⁴⁵ They advocate for more targeted reforms sitting outside the “competition paradigm” as the wiser course.

2. UNAUTHORIZED PRACTICE OF LAW

In addition to—or instead of—reforms that expand nonlawyer ownership and management, some experts advocate rethinking the *delivery* of services by amending the rules governing UPL. Though the precise formulation varies by state, the definition of “the practice of law” tends to be broad and vague, and it arguably encompasses swaths of activity that could be performed adequately by nonlawyer individuals or entities.⁴⁶

Proponents of less restrictive UPL rules argue that current standards prevent otherwise qualified providers from offering services that would benefit consumers.⁴⁷ As early as 1976, Deborah Rhode and Ralph Cavanagh wrote about UPL enforcement against a legal aid office's do-it-yourself (DIY) divorce guide, noting that, by preventing poor pro se litigants from obtaining legal information for themselves, UPL laws consigned individuals to pay exorbitant fees for relatively basic services.⁴⁸ In the decades since, reform advocates have continued to argue that UPL restrictions and the “lawyer's monopoly” create unnecessary barriers for poor people trying to access justice.⁴⁹ They also point to growing evidence that consumers *want* legal services provided by nonlawyers and that nonlawyers “can be competent and effective across a range of case types.”⁵⁰ Finally, UPL reform advocates note that nonlawyer individuals and entities are *already* playing a role in the provision of legal services, particularly in administrative adjudications and in the legal technology space.⁵¹ Nonlawyers have long been allowed to represent others, sometimes for compensation, in a variety of administrative tribunals, federal and state.⁵² And compa-

nies like LegalZoom and Rocket Lawyer and nonprofits like Upsolve provide unregulated legal document completion services to millions of people, but, because of UPL restrictions, are limited to offering generalized legal information and basic scrivener help.⁵³ UPL reforms, the argument goes, will permit better use of technology and nonlawyers to increase access to justice.⁵⁴

Critics of UPL reform tend to advance one of two arguments. First, critics argue that allowing nonlawyers to provide legal services will result in poor quality of services.⁵⁵ Second, critics once more advance an equality argument: UPL reform will, as with nonlawyer ownership, entrench a tiered system of legal services, where the rich have access to lawyers—the service providers with the most training and power—and the poor do not. On this view, regulatory reform is a failure of imagination and an abandonment of the goal of creating a justice system that ensures a “basic level of legal resources to which everyone is entitled.”⁵⁶ In a world where lawyers hoard legal resources and paraprofessionals and other qualified people can offer only limited and lesser services, low-income consumers may still be unable to access the justice of the rich.⁵⁷

C. The Current State of Reform

Intensifying concerns about a widening justice gap and a lack of competition within legal markets are leading many jurisdictions to initiate changes to their regulatory framework. The objectives and mechanisms of reforms differ across jurisdictions, but each effort is united by the goal of opening up the legal sector to new types of providers and new approaches to delivering services.

The most prominent early efforts to liberalize legal markets came on foreign shores. New South Wales, Australia’s most populous state, allowed limited multi-disciplinary practices as early as 1994. In 2001, the state permitted Incorporated Legal Practices (ILPs) in which lawyers could share revenue and practice alongside nonlawyers.⁵⁸ In 2015, New South Wales and Victoria implemented the Legal Profession Uniform Law which harmonized the regulatory framework across both jurisdictions while retaining local performance of regulation.⁵⁹ The two states together contain approximately three-quarters of Australia’s lawyers.⁶⁰ Australia’s reform approach imposes management objectives on authorized entities, specifying ten “objectives of sound legal practice,” including “competent work practices” and “effective, timely, and courteous communication.”⁶¹

In 2007, regulatory liberalization entered the mainstream when England and Wales, among the most influential legal markets in the world, embraced entity regulation.⁶² Following a comprehensive review of competition in the legal services market, Parliament enacted the Legal

Services Act, permitting nonlawyer ownership and investment in legal practices through the creation and regulation of ABS entities.⁶³ Reform was driven primarily by the goal of increasing competition in the legal services market.⁶⁴ Under the LSA, regulators oversee both ABS entities and individual authorized providers (e.g., solicitors).⁶⁵

Reforms in Australia and England and Wales have, in turn, helped catalyze a range of reform efforts in the United States. An initial set of reform efforts can be thought of as a species of UPL reform: the licensing of alternative legal roles (e.g., paraprofessionals, document preparers, or legal navigators) for a limited range of legal activities across certain areas of law (e.g., family law or consumer debt law).⁶⁶ The most significant development in this area was Washington's 2012 launch of a qualification and licensing scheme for independent legal paraprofessionals. The Washington Supreme Court closed the program 8 years later, in 2020, citing costs and low take-up.⁶⁷ Washington's unsuccessful effort has not deterred other states—among them Utah, Arizona, California, Minnesota, and Oregon—to consider similar reforms.⁶⁸ As noted previously, this Report does not directly address paraprofessional reforms, despite their significant promise and a rich debate about how best to structure and implement them.⁶⁹

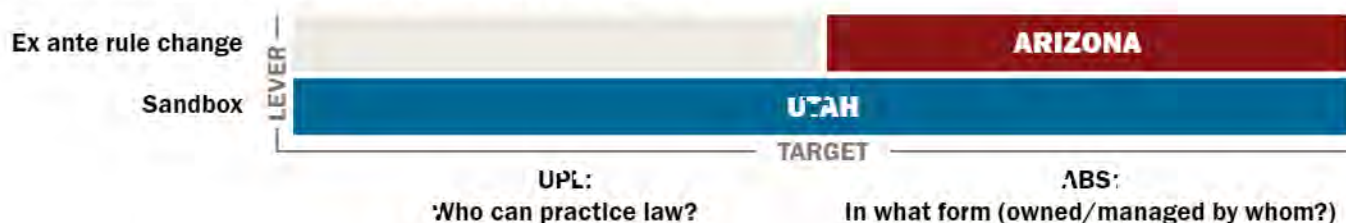
More recently, U.S. jurisdictions have begun to consider entity-focused reforms. These reforms permit nonlawyer investment and ownership and /or nonlawyer provision of legal services through liberalization of Rule 5.4, UPL, or both. Utah and Arizona are both implementing entity regulation, but they have made different choices as to which rules are targeted.

Figure 1 captures two of the key design differences along dimensions using a 2x2 matrix. In August 2020, the Utah Supreme Court began permitting nonlawyer ownership and investment and nonlawyer practice within regulated entities.⁷⁰ In other words, the *target* of Utah's reforms was both Rule 5.4 and UPL—an approach we referred to previously as ABS+UPL. In addition, Utah chose to implement these rule reforms through a *lever* called a regulatory sandbox within which entities can propose innovations that require waivers of Rule 5.4, UPL, or both. In return, authorized entrants to the sandbox agree to various requirements, including ongoing disclosures and data reporting to facilitate ongoing oversight by a new regulatory body, the Utah Office of Legal Services Innovation, created and supervised by the Utah Supreme Court.⁷¹

Arizona adopted a different approach. In August 2020, Arizona repealed its Rule 5.4 equivalent outright and created a licensing regime for ABSs.⁷² In October, the adopted Section 7209 to the Arizona Code of Judicial Administration to regulate ABSs, and in January 2021 the Arizona Supreme Court began authorizing ABS entities to practice law.⁷³ As reflected in Figure 1, the target of Arizona's reforms was Rule 5.4—an approach we refer to hereafter as

“ABS-only.” As for the lever, Arizona implemented its reform through an outright change in the rule, rather than a sandbox mechanism. To that extent, Arizona’s entity-based reforms are more analogous to the reforms undertaken in England and Wales.

FIGURE 1: Approaches to Reform in Utah and Arizona



Other U.S. states are also exploring entity-based reforms. California has been studying possible reforms since 2018 through a series of working groups formed by the state bar.⁷⁴ Michigan, North Carolina, and Washington are considering entity-based reforms through working groups, commissions, and committees organized either by the state supreme court or the state bar.⁷⁵ Florida’s working group produced a limited recommendation which was rejected by the bar’s Board of Governors in 2021.⁷⁶

D. Key Questions

Facing a heated scholarly debate, increasing pressure to act, and a menu of design choices, policymakers considering regulatory reforms have repeatedly articulated two central questions:

1. What types of innovation in legal services delivery models will different reform approaches generate? In particular, what kinds of businesses and providers will emerge to offer legal services in a liberalized market? What can we expect to see in terms of innovation? Do we see differences between reforms targeting business and capital structure (Rule 5.4), reforms targeting the service model (UPL), and reforms targeting both?

2. Who will be served by the new market entrants? In particular, will these reforms promote access to legal services? Who will new market entrants serve, and at what rungs of the socio-economic ladder? Again, do we see any differences that relate to the choice of regulatory target?

Seeking answers to these questions, the remainder of this Report reviews existing evidence from England and Wales (Part II). Part III reviews our research design. Part IV uses case studies of new legal services providers in liberalizing jurisdictions to construct a novel taxonomy of innovation types. Part V presents a quantitative analysis of emerging innovations in Utah and Arizona.

II. Existing Evidence on the Impact of Regulatory Reform: England and Wales

To this point, most evidence on the effects of liberalization of legal services regulation has come from England and Wales.⁷⁷ However, U.K. legal markets differ in fundamental ways from U.S. legal markets, calling into question their applicability to rule reform efforts among U.S. states. This Part briefly summarizes the rule reforms pursued in England and Wales, reviews key findings from evaluations of that process, and then explains why these findings may not fully generalize to the U.S. context.

A. Rule Reform in England and Wales

As Part I briefly noted, in 2007, following an influential report advocating reform of legal services regulation to drive market competition, Parliament passed the Legal Services Act (“LSA”).⁷⁸ A major thrust of the LSA was to implement the regulation of legal service entities, dubbed ABSs, in which nonlawyers could participate as owners, investors, and managers and in which legal services could be furnished alongside nonlegal services.⁷⁹ The LSA imposes multiple requirements on ABSs, including: Authorized entities must have a legal compliance officer (“Head of Legal Practice”) and a financial compliance officer (“Head of Finance and Administration”), each independently approved by the regulator,⁸⁰ and nonlawyers with more than a 10 percent ownership share or who exerts significant influence over the ABS require special approval.⁸¹ In addition, both the ABS and all regulated providers (e.g., solicitors) who work within it must comply with all applicable conduct rules and unregulated participants in the entity must not interfere with that compliance.⁸² The first ABS was licensed in 2012. Today, there are more than 1,600 ABSs, approximately 10 percent of the regulated market.⁸³

B. Key Findings from the U.K.

A growing literature evaluates the impact of these reforms. From this literature, four findings stand out.

- **The majority of ABSs serve individual consumers and/or small businesses**—or what has become known as the “PeopleLaw” sector, in contrast to BigLaw’s corporate focus.⁸⁴ In 2021, the majority of ABSs were in probate, wills, and real estate conveyancing, areas that are overwhelmingly individual consumers.⁸⁵ The reforms have allowed existing consumer-facing firms to grow and have brought entirely new providers with consumer expertise into the market.⁸⁶

- **Reforms do not appear to have had a negative economic impact on the traditional U.K. legal market, but nor have they substantially increased competition as hoped.** The post-reform U.K. legal market remains strong and continues to grow.⁸⁷ Contrary to predictions that new authorized entities would crowd out traditional law firms or displace legal providers, most ABSs are existing law firms that have converted to a new ownership form.⁸⁸ Solos and small firms (up to 4 partners) remain 85 percent of all solicitors' firms in the U.K.⁸⁹ But alongside this reality is a more dispiriting finding: A 2020 study found that the reforms have had “a limited impact on the intensity of competition between providers and on sector outcomes,” with little evidence of a change in price dispersion since the implementation of price and service transparency measures.⁹⁰ A reason might be that the market, with multiple provider types and regulators, is simply too complicated for many consumers to understand.⁹¹
- **Reforms do not appear to have negatively impacted the quality of legal services.** Critics of the LSA alleged that the reforms would create conflicts of interest and lead to excessive commercial influence over legal judgment and degradation in the quality of legal services.⁹² None of these predictions appears to have come to pass.⁹³ Consumer satisfaction with legal services is high (84 percent) across the regulated sector.⁹⁴ Data from both the Solicitors Regulation Authority (SRA), the largest legal regulator, and the Office of the Legal Ombudsman—the separate entity created to investigate and resolve consumer complaints—suggest little or no difference across ABSs and conventional law firms.⁹⁵
- **The reforms appear to be promoting innovation.** Regulators and external researchers have concluded that, in general, ABSs are more innovative than traditional law firms, particularly in their use of technology and in their development of new legal services.⁹⁶ That said, the evidence is ambiguous as to whether and how that innovation is increasing access and/or benefiting consumers. In a 2018 survey, providers broadly reported that, while technological innovation increased the quality of their services, only one-third said that technology had reduced their costs.⁹⁷ In contrast, a 2020 market study by the Legal Services Board (LSB) reported that ABSs were more likely to offer fixed-fee, technologically-enabled, and low-cost services.⁹⁸
- **The impact of the reforms on access to justice for low-income people is unclear.** As noted, regulatory reform in England and Wales was driven primarily by the government's desire to increase competition in a historically insulated sector. Although promoting access to justice is a stated LSA objective, in implementation access to justice for low-income people appears to have been addressed as a likely consequence of increased price competition rather than a focal point of reform efforts.⁹⁹ Perhaps as a result, there exists little rigorous research exploring the impact of the reforms on access to justice among indigent and low-income persons. As noted

above, most ABSs are operating in areas such as probate, wills, and real estate conveyancing that, while consequential for middle-income people, are not impactful for people of more limited means. More generally, while data and methodological challenges, as well as the major changes to government funded legal aid discussed below, prevent meaningful comparisons of legal need before and after the 2007 reforms, the simple fact is that significant unmet legal needs persist even after a decade of implementation. A 2020 legal needs survey found that, of the 17,500 adults who had faced a legal issue in the past four years, two-thirds received help, mostly from professional providers, but fully one-third did not receive any help at all, and this was particularly so for members of historically disadvantaged groups.¹⁰⁰

C. Limitations of the UK Evidence as Applied to U.S. Legal Markets

Though providing some of the best available evidence on the likely effect of entity-based regulatory reforms, applying findings from England and Wales to the U.S. context is confounded by two significant differences in the legal markets on the two sides of the Atlantic.

First, the reforms in England and Wales were implemented against a very different baseline of regulation, confounding the inferences that can be drawn about the likely effect of similar reforms in the U.S. The legal market of England and Wales has always been less monolithic and restricted than in the U.S., incorporating not only multiple types of legal professionals (for instance, barristers and solicitors), but also a robust unregulated legal services market, comprised of professionals who have long been allowed to perform tasks that, in the U.S., must be provided by lawyers under UPL rules (e.g., providing legal advice or writing wills and trusts). Some estimate this large unregulated sector at 130,000 providers, meaning there are at least as many unregulated individuals operating in the legal market as there are solicitors.¹⁰¹ Because the England and Wales reforms went forward against a baseline of a large and diverse unregulated market of providers, it is hard to draw inferences about the likely innovation effect of similar reforms in the U.S., with its broad UPL restrictions.¹⁰²

The other complicating variable when attempting to apply evidence from the England and Wales reforms to the U.S. context is that the U.K. reforms proceeded alongside a major pull-back in government funding for legal aid. Almost simultaneous with the 2012 implementation of the LSA reforms, the government slashed funding to legal aid in civil cases and the number of solicitor firms providing civil legal aid. Government funding for legal aid fell 46 percent between 2010-11 and 2015-16,¹⁰³ sharply reducing the number of non-profit civil legal aid providers, including those serving clients in some of the most vulnerable areas.¹⁰⁴ While it is impossible to say with certainty what impact, positive or negative, the cuts had, this major change plainly clouds the inferences that can be drawn about the likely effect of reforms in the U.S. context.¹⁰⁵

III. Research Design and Methods

The above discussion makes clear that the Wales and England experience provides *some* evidence about the effects of rule reforms, but that any predictions based on that overseas evidence comes with significant qualifiers. Fortunately, new evidence is emerging from reform efforts in the U.S.—and that evidence, we suggest, is of greater utility.

In order to better understand what types of entities are emerging in newly liberalized legal markets in the U.S., a research team at the Rhode Center on the Legal Profession collected two types of data. First, the team conducted semi-structured interviews with 37 entities that have obtained authorization in liberalizing jurisdictions: 18 entities from the U.S., including 13 Utah entities and five Arizona entities, and 19 entities from England and Wales.¹⁰⁶ The resulting case studies of legal services providers inform Part IV’s taxonomy of emerging innovations.

Second, the research team cataloged and reviewed all application, authorization, and other publicly available materials on all entities authorized in Utah and Arizona as of June 30, 2022.¹⁰⁷ We coded these materials across a common set of features and metrics, including which innovation model from Part IV’s taxonomy an entity falls into, the entity’s capital and ownership structure, its percentage of nonlawyer ownership or investment, its area(s) of legal service, its target market(s), including whether the entity serves indigent populations, its articulated or required consumer protection mechanisms, and its articulated data protection policies. As of June 30, 2022, at the time the review was completed, a total of 57 entities had obtained authorization in the two states, including 19 in Arizona and 39 in Utah (with one entity authorized in both jurisdictions).¹⁰⁸

Finally, we obtained data and information about complaints directed at authorized entities in both Utah and Arizona. Utah’s Innovation Office, the regulator that presides over the sandbox, publishes complaint data on a monthly basis. In Arizona, we requested and received complaint statistics from the Arizona Supreme Court.

IV. Findings (I): A Taxonomy of Innovation Enabled by Regulatory Liberalization

This Part presents a taxonomy of innovations that are emerging in liberalizing jurisdictions. Put another way, our analysis shows what types of innovations are *possible* when rules are relaxed. It does so using case studies of legal services providers drawn from Utah, Arizona, and England and Wales.

Looking across authorized entities in these jurisdictions reveals a range of innovation approaches. As depicted in Figure 2, we identify and illustrate five stylized innovation types: (a) traditional law firms making changes to their capital or business structure or service model; (b) “law companies” practicing law; (c) “non-law companies” as new entrants to the legal sector; (d) intermediary platforms; and (e) entities using nonlawyers and technology to practice law.

FIGURE 2: A Taxonomy of Innovation in Liberalizing Jurisdictions

1	2	3	4	
<p>TRADITIONAL LAW FIRMS making changes Give non-lawyers equity ownership or take non-lawyer investment to expand</p>	<p>LAW COMPANIES practicing law Provide legal services with non-lawyer ownership <i>(e.g., LegalZoom, Hello Divorce)</i></p>	<p>NON-LAW COMPANIES expanding into law New entrants: holistic “one-stop-shops” <i>(e.g., law+accounting)</i> and offshoot services <i>(e.g., travel services → visas)</i></p>	<p>INTERMEDIARY PLATFORMS Marketplaces <i>(connect consumers with lawyers)</i></p>	
<p>5</p> <p>ENTITIES USING NON-LAWYERS AND TECH TO PRACTICE LAW New ways to provide legal services; may also have non-lawyer investors or owners</p>				

These five categories capture innovation along two main dimensions: first, an authorized entity’s capital and business structure; and second, its service delivery model. The first four categories in the taxonomy distinguish authorized entities along the first dimension; they are primarily identified based on an entity’s ownership structure. The fifth category in the taxonomy distinguishes entities along the second dimension; it captures entities that are using an approach other than lawyers to deliver legal services. Note that, while the first four categories are mutually exclusive of one another, the fifth is not. Entities that fall into the fifth category may also fall into one of the other four.

CATEGORY 1: Traditional law firms

The first category captures traditional law firms that are taking advantage of the new regulatory

environment by altering their capital or business structure. This often takes the form of investment to expand and grow market presence or services or to hire, retain, and recognize nonlawyer employees. Some of the entities in this category are making modest changes to their ownership structure but otherwise changing little about the organization or service model. Other firms are proposing or making broader changes, particularly around the deployment of technology.

SUBCATEGORY: Law firms bringing nonlawyers into equity ownership

Rule 5.4's ban on nonlawyer ownership prevents law firms from partnering with nonlawyer contributors or incentivizing or rewarding nonlawyer employees through equity participation. A pair of authorized entities, both entrants in the Utah sandbox, exemplify some of the ways traditional law firms are leveraging rule reforms to tap new forms of expertise by bringing nonlawyers into equity ownership.

- **Davis & Sanchez** is a traditional law firm specializing in workers' compensation claims. The sole owner partner entered the Utah Sandbox because he was ready to retire and wanted to sell the firm to his nonlawyer son-in-law who had managed the firm's business for years. There are no plans to change anything else about the structure or practice of the firm.¹⁰⁹
- **Rocky Mountain Justice**, a plaintiff-side law firm in Utah, merged with a small radio marketing company in order to enhance its marketing capacity. Legal services are provided by the lawyers; nonlawyer partners assist with advertising and marketing.¹¹⁰

In both England and the U.S., firms are using the reforms to elevate nonlawyers to equity partnership in recognition of their contributions to the firm. For instance:

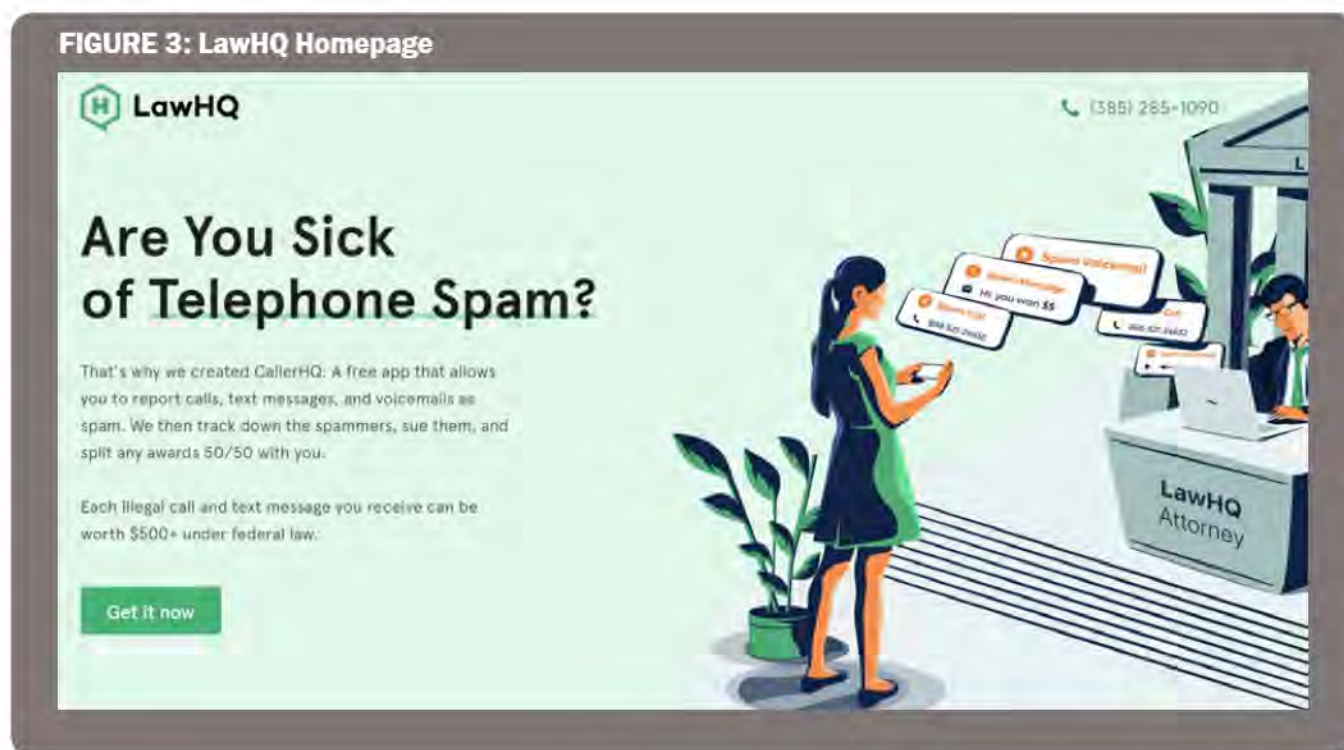
- **Blue Bee Bankruptcy**, a solo bankruptcy practice, was one of the first Utah sandbox entrants. The firm owner wished to give his longtime paralegal a ten percent equity interest in the firm in recognition of her contribution and as a retention incentive.¹¹¹
- **Anthony Gold Solicitors** is a traditionally organized British firm which became an ABS to offer equity partnership to nonlawyers, including a certified accountant and a trust administrator, who are providing services to the firm, not to the clients.¹¹² The firm wanted to give its nonlawyers stake in the business just as the lawyers have.¹¹³

SUBCATEGORY: Law firms taking investment to drive expansion of services

The conventional ban on nonlawyer ownership blocks law firm access to capital markets (including venture capital and private equity financing). Outside the legal sector, these mechanisms

have allowed companies to tap capital to fund research and development, drive innovation, and disperse risk.¹¹⁴ With rule reforms, law firms are seizing opportunities to access these capital mechanisms to fund growth, even if the firms do not change much else about their actual provision of legal services. Two examples, one from Utah and one from Arizona, illustrate:

- **LawHQ** is a plaintiff-side firm that has entered the Utah sandbox in order to raise capital to develop an app to both plaintiffs and then collect evidence for litigation against telephone spammers.¹¹⁵ Through the proprietary app, consumers can identify themselves as having been victimized by spammers, opt in to litigation (subject to vetting and conflicts checks), and use the app to identify which calls are spam.¹¹⁶



- **Elias Mendoza Hill Law Group** is a newly formed law firm and Arizona ABS focused on immigration. The firm is taking on outside capital to develop a technology platform to streamline legal services and increase efficiency but is otherwise retaining a traditional law firm structure.¹¹⁷ In particular, the firm is developing software to perform initial client screening for eligibility for certain immigration programs (*e.g.*, Deferred Action for Childhood Arrival status).

Authorized entities in Utah and Arizona, such as LawHQ and Elias Mendoza, are smaller-scale versions of efforts by conventional law firms in England and Wales to use rule reforms to access capital and attract needed expertise. For example:

- **Stowe Family Law**, the U.K.’s largest family law firm, has a network of 10 offices across the U.K., including its flagship office in central London. Stowe was founded in 1982, but in 2017, it became an ABS and was acquired by Livingbridge, a mid-market private equity firm, for more than \$10 million.¹¹⁸ “Private equity brought some new members to our board, which allowed us to grow at a faster rate,” said Julian Hawkhead, a senior partner at Stowe. “The ability to be an ABS gives you access to a more skilled ownership and management team.”¹¹⁹ Stowe has since doubled its number of offices and gained 150 clients per month.¹²⁰ Access to capital also allowed Stowe to gain a larger market share through economies of scale (i.e., greater use of technology to economize on lawyers’ time).

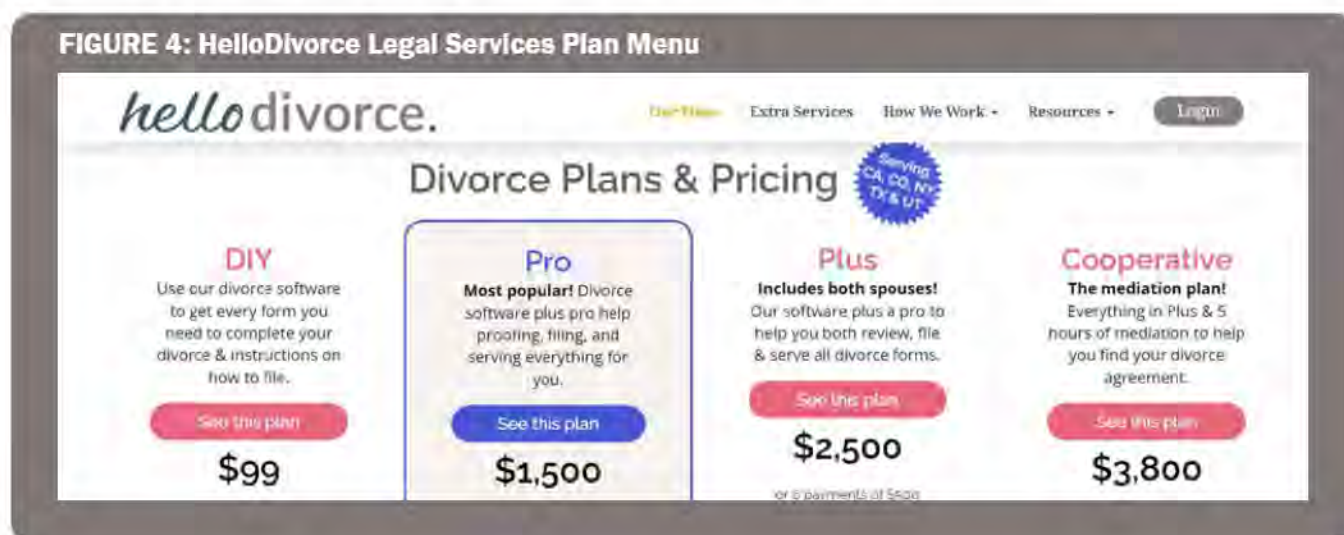
CATEGORY 2: Law Companies Practicing Law

A second innovation category in liberalizing jurisdictions is “law companies” practicing law. Law companies are entities that provide legal services as their primary business but have previously been excluded from the sanctioned legal market because they are not owned solely by lawyers and/or are structured as a for-profit corporate entity.

The law company space has expanded significantly in recent years, with growth in both consumer-facing legal technology companies, such as Rocket Lawyer and LegalZoom, and corporate-facing ones, sometimes called “alternative legal service providers” in the legal trade press, such as Elevate and United Lex. Even before rule reforms, these companies had developed product and service models that avoided UPL restrictions by providing general legal information, document assembly and other scrivener services, and legal process management. With rule reforms, law companies of both the consumer- and corporate-facing variety are seeking to become authorized entities primarily to hire lawyers as employees and provide legal services directly in ways that would otherwise run afoul of UPL rules. In Utah, some law companies are also building out nonlawyer or technology-based tiers of service. Three law companies offer a portrait of the resulting innovation:

- **LegalZoom**, a publicly traded legal tech company that serves millions of consumers each year with basic legal information and form completion, gained ABS status in Arizona in 2021 and, before that, in England in 2015.¹²¹ With ABS status in both places, LegalZoom can hire lawyers directly to provide legal services.¹²² What distinguishes LegalZoom’s product from that of a traditional law firm is that consumers can choose the portions of the work they wish to complete themselves via the software platform and the portions for which they would like professional legal assistance.

- **Elevate Services**, an ABS in Arizona (as Elevate Next US, LLC) and England and Wales, is a corporate-facing law company that has historically provided a mix of services to businesses that do not necessarily constitute the practice of law under conventional UPL understandings: corporate entity formation, e-discovery, contract management, internal investigations, responses to subpoenas and law enforcement requests, and compliance counseling.¹²³ With rule reforms, Elevate can hire lawyers and provide end-to-end service to customers, including the practice of law. Steve Harmon, Chief Legal Officer of Elevate, explained that the company's primary value proposition is the integration of legal expertise with technology, process optimization, and data analytics.
- **Hello Divorce** is a California-based legal tech company that specializes in the simplification of dissolution of marriage. It is owned by a California divorce lawyer who wanted to reach more clients and realized they didn't all need her bespoke services. She created a software platform offering a tiered set of flat-fee packages, ranging from a DIY tier with easy-to-use forms and access to automated guidance and legal information to assistance and advice from human professionals at higher tiers. She sought and received financing from a variety of investors. In most states, including California, if consumers want to access higher service tiers and lawyer services, they must be referred out to the tech company's sister law firm. Hello Divorce, the tech company, cannot charge a flat fee for access to both the technology platform and lawyer assistance. Levine Family Law Group, the law firm, cannot raise external capital to fund the development of a tech platform and cannot use equity-based incentives for technical experts in order to compete with the non-law tech market. In the Utah sandbox, the entire business can be housed under one roof, giving consumers one-stop access to a mix of DIY tools and lawyers when and how they want them. According to its application materials, single-entity status increases efficiency and allows for more frictionless service for consumers.¹²⁴



ENTITIES IN TRANSITION

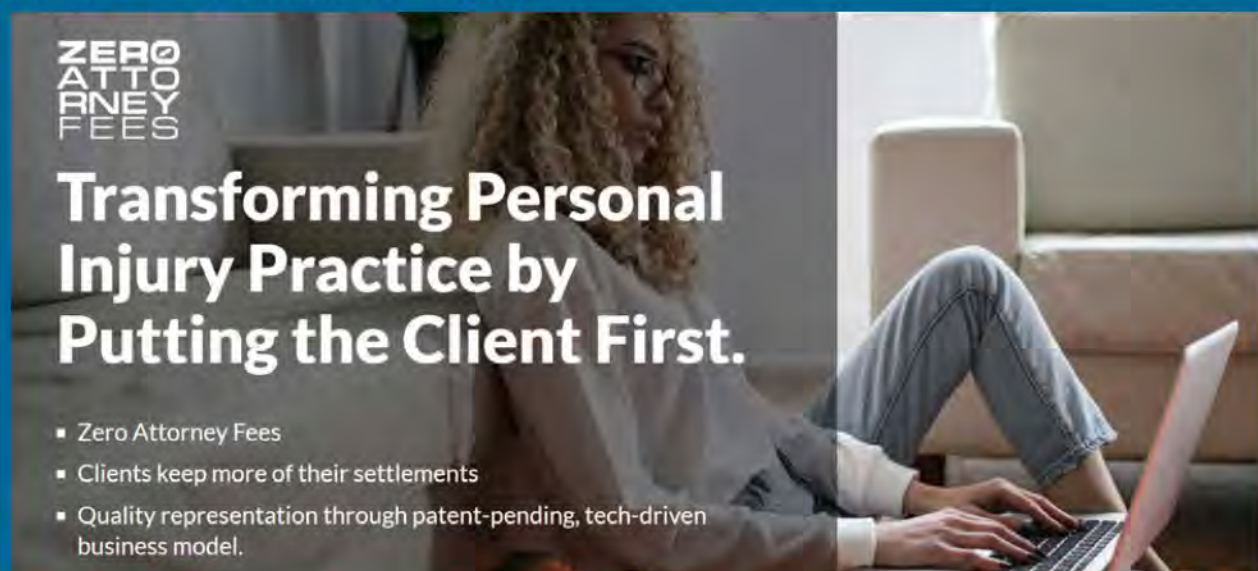
Nuttall, Brown → ZAF Legal

Law firm → Law company

Nuttall, Brown & Coutts d/b/a “ZAF” Legal is among the oldest personal injury firms in Utah and might have been thought an unlikely entrant to Utah’s sandbox. In fact, the firm’s leadership was initially opposed to rule reforms out of concern that

reforms would undermine their traditional model of providing bespoke, one-on-one legal services. After much discussion and debate, however, the firm unanimously voted to embrace the Utah reforms after examining data from the Insurance Research Council indicating that more than half of potential auto accident plaintiffs never get representation. In an effort to meet this latent demand, the firm has launched a new brand called ZAF (Zero Attorney Fees), built around a software tool, developed with investment from a venture capital firm, that is designed to serve personal injury plaintiffs.¹²⁵ Once implemented, the platform will help accident victims navigate the complicated insurance claims process, gauge what is fair settlement value in their particular case, and get as much or as little lawyer help as they want. As with HelloDivorce, the firm envisions tiers of service going forward. The software-based, DIY tier of service will be completely free—hence the “zero” in the ZAF trade name. Higher tiers of service will be made available for a fee. In addition, the ZAF platform will support a subscription service entitling subscribers to legal representation for a monthly fee, with the full recovery going to the injured person rather than a contingency fee.¹²⁶ Recognizing that this arrangement could present conflicts in certain cases—for instance, an accident involving an uninsured motorist or an accident with drivers from the same insurance company—the Utah sandbox conditioned approval on ZAF making clear disclosures at the point of sale. ZAF has also said it will refer cases presenting a conflict to another firm, covering any expenses. Tyler Brown, ZAF’s CEO, says: “I believe we can demonstrate that personal injury legal services need innovation and creativity at least as badly as other areas of law.”¹²⁷

FIGURE 5: ZAF (Zero Attorney Fees) Legal



**ZERO
ATTO
RNEY
FEES**

Transforming Personal Injury Practice by Putting the Client First.

- Zero Attorney Fees
- Clients keep more of their settlements
- Quality representation through patent-pending, tech-driven business model.

CATEGORY 3: Non-Law Companies as New Entrants to the Legal Sector

A third innovation category reflects companies or partnerships from the non-legal sector that are leveraging rule reforms to enter the legal market by employing or partnering with lawyers and offering legal services. There are two sub-categories here: (i) one-stop-shops for professional services; and (ii) non-law companies moving into legal.

SUBCATEGORY: One-stop-shops for professional services

One-stop-shops are partnerships between lawyers and other professionals that provide holistic or bundled services to consumers. To this point, the authorized entities in Utah and Arizona that fall into this category are most frequently, but not exclusively, small professional partnerships serving individual consumers or small businesses. Many of them are found in the areas of end-of-life planning or tax and accounting. For instance:

- **Arete Financial** is an Arizona ABS owned 50-50 between a lawyer and a tax and accounting specialist.¹²⁸ The joint venture uses an operating agreement to define the two partners' roles and responsibilities. Arete proposes to provide the full range of financial services for individuals and small- to mid-sized businesses. These services will initially include tax preparation and accounting services and also legal services in the area of trusts and estates, probate, and corporate transactions. Currently, Arete's sole lawyer handles all legal work along with a certified paralegal and support staff. Nonlawyers apply only their respective expertise—whether tax, accounting, or financial planning—and do not engage in legal work. In addition to capital contributions by both the co-founders, the entity is financed by Small Business Administration loans.

The Big Four accounting firms are key examples of one-stop-shop professional service firms moving into the legal market. Each of the firms has acquired an ABS license in England and Wales, but, though seemingly well-positioned to utilize rule reforms in the U.S. legal markets, none have sought authorization in either Utah or Arizona.

- **KPMG** became the first Big 4 accounting firm to become a licensed ABS in England in October 2014. Since then, the firm has focused on offering legal services to existing clients. Howard Shurkett, the deputy compliance officer, says the firm is prioritizing “organic growth” over aggressively moving into the traditional legal services market. This multidisciplinary approach means focusing on areas most useful to the firm's existing clients, such as tax, restructuring, and transactional work.¹²⁹ Bundling legal services with existing accounting and consulting services allows KPMG to more efficiently manage work streams and projects. It also allows KPMG to

be more solution-oriented, as the firm can more easily tell how legal services fit into the client’s overall business portfolio. While KPMG does not see itself as a “disruptor” in the legal market, it does have plans to continue expanding its legal services within other limits imposed by law.¹³⁰ For instance, separate rules in the U.S. and U.K. beyond those contemplated by regulatory reforms prohibit providing legal services to audit clients, and the firm has a complex system for checking conflicts and ensuring auditors remain independent. When legal services are provided, safeguards are reportedly in place to ensure confidentiality and other legal requirements.

SUBCATEGORY: Non-law companies moving into legal

The other sub-category of non-law companies covers entities whose primary business sits outside the legal sector but have begun to offer legal services. A pair of authorized entities operating in the Utah sandbox illustrate:

- **GovAssist Legal** is the legal subsidiary of a travel services company that entered the Utah sandbox in order to provide legal advice and assistance, using Utah-licensed lawyers, regarding U.S. visa applications.¹³¹ The company seeks to bring comprehensive immigration support to small- and medium-sized businesses and lower- to middle-income individuals and families.

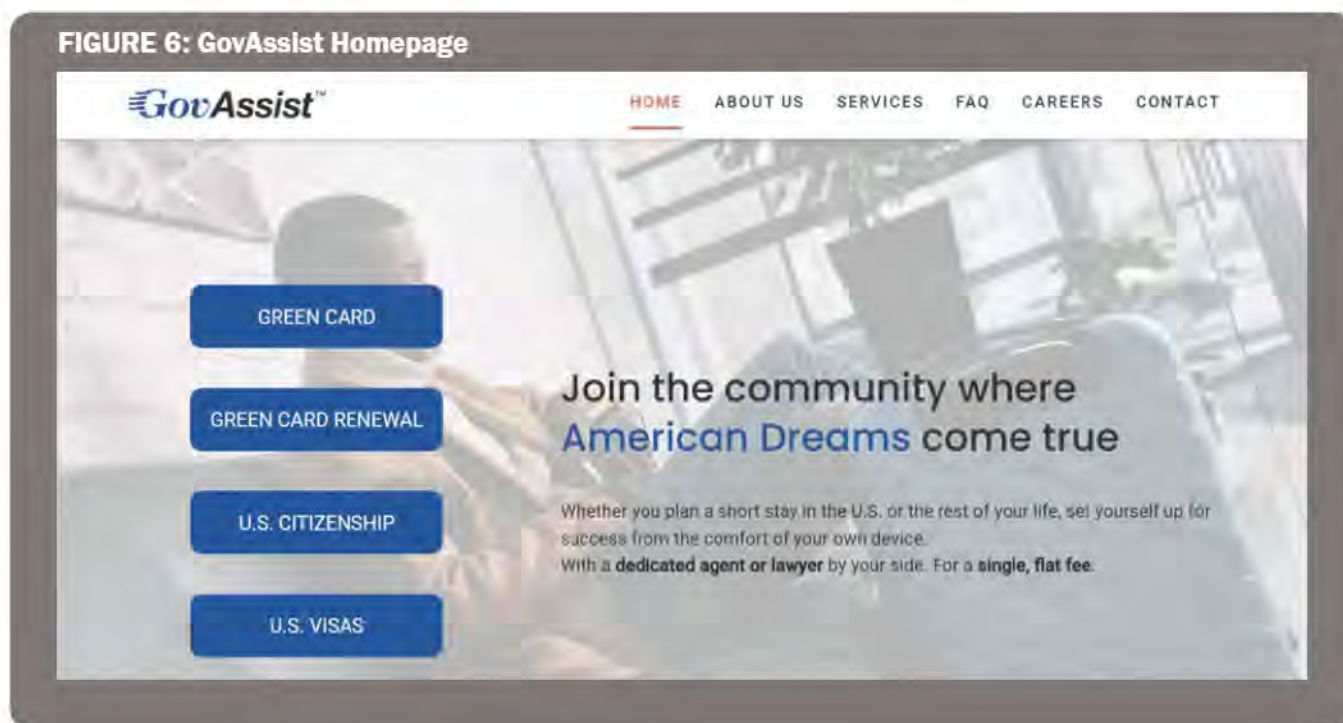
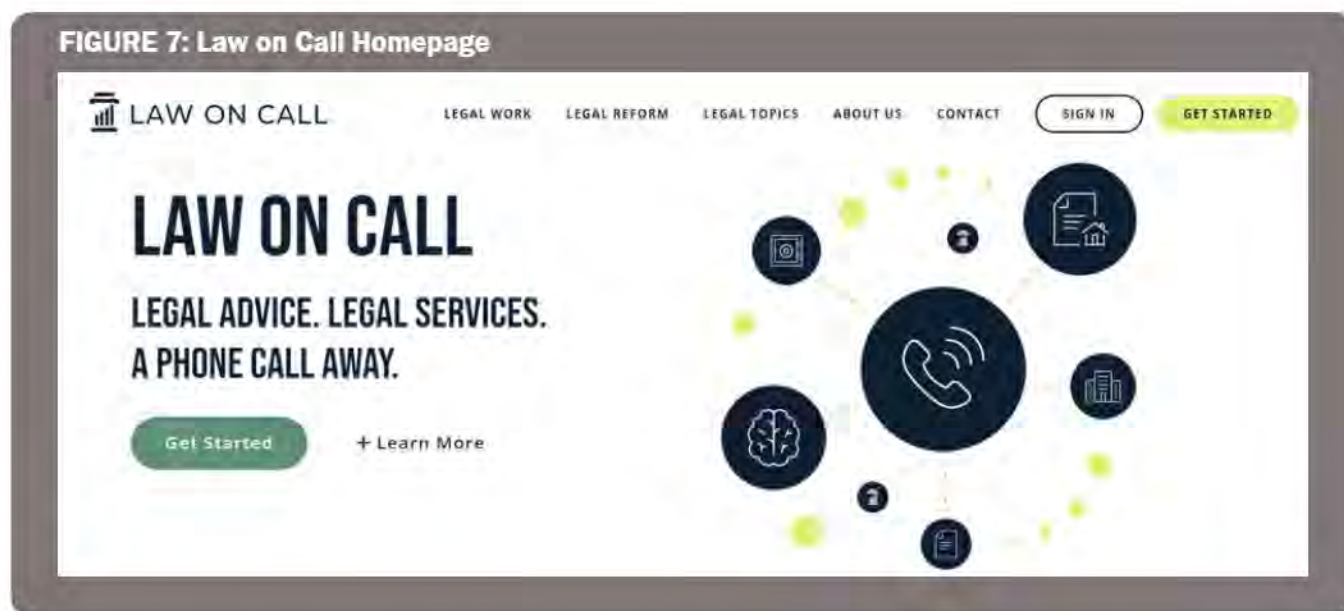


FIGURE 6: GovAssist Homepage

- **Law on Call** is the legal subsidiary of an established registered agent company authorized by the Utah sandbox to provide legal services to small businesses.¹³² Its target market is mom-and-pop businesses, small LLCs, small professional practices, and independent contractors. Law on Call offers its small business clients access to a team of licensed lawyers through a \$9 subscription fee. Consumers who want more in-depth legal services, in areas such as trademarks and contracts, can purchase additional low-cost services à la carte. Law on Call is also developing a low-cost tier of nonlawyer service providers.¹³³



Non-law companies entering the legal sector are an especially robust presence among ABS entities in England and Wales. Examples include:

- **Co-Op Legal Services**, which moved quickly to become a licensed ABS after the 2007 Legal Service Act, is one of the largest consumer-facing law firms in England and Wales, specializing in bereavement law. It is owned by the Co-Op Group who also owns the U.K.'s top funeral services provider, its fifth biggest food retailer, and a major general insurer.¹³⁴ Since attaining ABS status in 2012, CLS has offered a wide range of legal services relating to family law, conveyancing, personal injury, medical negligence, and employment.¹³⁵ In 2018, the firm was named the national will-writing firm of the year.¹³⁶ Co-Op Legal Services reportedly suffered flagging revenues in the middle 2010s, but it showed increased growth during the first half of 2022.¹³⁷ “We have invested far more in digital advice, including technology that allows the customer to assess and understand what legal advice is best for their situation,” said Caoilinn Hurley, managing director of life planning and legal at Co-Op Legal Services.¹³⁸

FIGURE 8: Co-Op Legal Services Homepage



- **Pathfinder Legal Services** is a law firm owned by four local governments in England.¹³⁹ Formed in 2015 to share the cost of in-house legal needs following budget cuts, Pathfinder offers small-scale legal services to more than 100 public and nonprofit entities. Pathfinder targets municipal- and even neighborhood-level services, including many areas familiar to lawyers who work within municipalities and counties: general litigation, special education, childcare (such as adoption and foster care), property planning, and commercial governance. Pathfinder also serves some larger development projects.¹⁴⁰

ENTITIES IN TRANSITION

MJ Hudson

Law firm → Law company → Non-Law company

MJ HUDSON, an English ABS, started as a traditional law firm serving private equity clients but has since aggressively diversified beyond legal services. The company now provides a

range of business services, including asset management, data analytics, and marketing, which have steadily taken precedence over legal work. MJ Hudson now views itself as a “toolkit” for managers and investors at its private equity clients. MJ Hudson might be most accurately described as an entity in transition, beginning as a traditional law firm, morphing into a law company, and now emerging as a non-law company with a small legal vertical. Once MJ Hudson became an ABS in 2014, it transformed itself, using its connections in private equity to acquire other service providers in the private equity space. In December 2019, MJ Hudson went public on the London stock exchange, raising nearly \$40 million in an IPO. Since then, it has continued to expand, bringing a half-dozen new businesses under the umbrella. “Law is just one tool in the toolkit,” said Guy Grayson, General Counsel.¹⁴¹

CATEGORY 4: Intermediary Platforms

Entities in the fourth category of innovation—intermediary platforms—serve two primary functions. First, they serve as a marketplace connecting consumers and lawyers. Second, they provide a legal practice support platform, allowing lawyers to access a suite of technological services, including secure communication, case management, and billing portals. Although intermediary platforms have ballooned in recent years in both the corporate- and consumer-facing sectors, they often face challenges from the organized bar for violating the fee-sharing ban.¹⁴² An authorized entity from the Utah sandbox is representative:

- **Off the Record** is an intermediary platform that connects consumers with traffic citations with lawyers. The platform also serves to facilitate the lawyer-client relationship and provides lawyers technological practice support. Off the Record entered the Utah Sandbox to share fees directly with lawyers and to seek a waiver of Rule 1.15, the rule requiring lawyers to hold client’s property, including fees paid up front, in a separate trust account.¹⁴³ With the waiver, Off the Record is able to offer a payment portal in which the client can deposit a fee, although the fee is not released to the lawyer until the client determines that the lawyer has performed satisfactorily.

FIGURE 9: Off the Record Home Page

The screenshot shows the Off the Record home page. At the top, the logo 'Off the Record' is on the left. To its right are three star ratings: 4.5 from 687 reviews on Facebook, 4.9 from 1273 reviews on REVERIEWS, and 9.0 from 315 reviews on Highya. A 'Get Started' button is on the far right. The main headline reads 'Fighting your ticket has never been this easy'. Below this is a sub-headline: 'You are legally entitled to contest your traffic tickets, but city and municipal governments make the process inconvenient and cumbersome. Off The Record lets you do it in under a minute.' The page features three steps, each with a smartphone icon and a description:

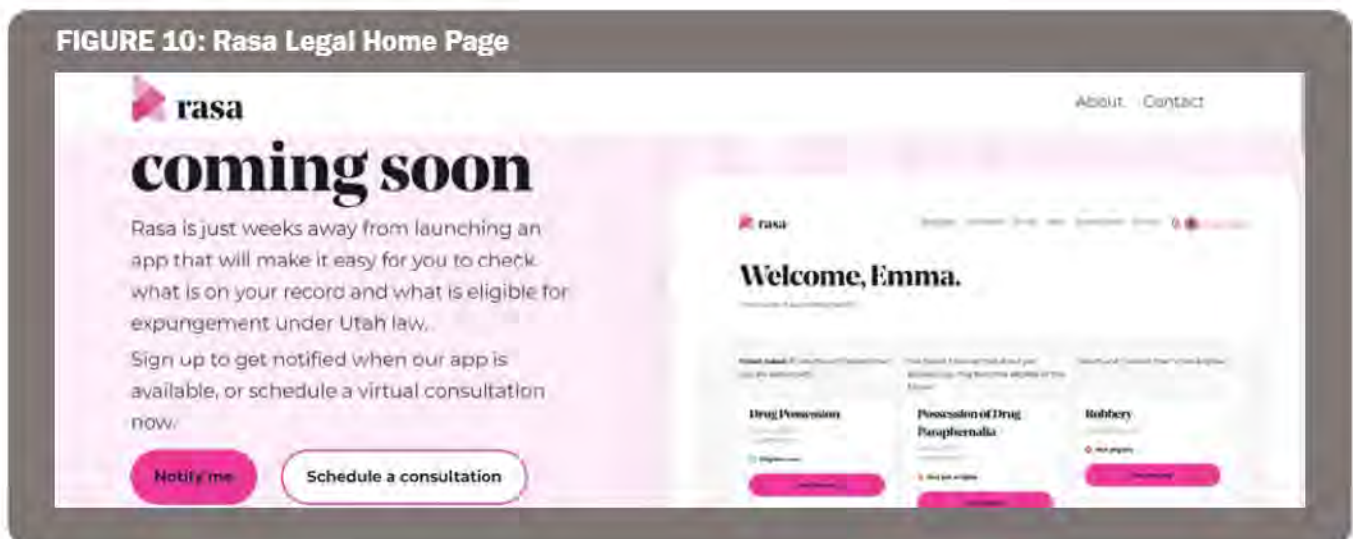
- Snap a photo**: First, provide a photo of your ticket. This will give us most of the info we need to start your case.
- Tell us about your ticket**: We'll ask you a few questions in order to match you with the most appropriate lawyer for your case.
- Get an attorney**: An experienced lawyer will handle your ticket. You'll pay one flat fee and be covered by our money back guarantee.

CATEGORY 5: Entities using nonlawyers and technology to practice law

The final category of innovation diverges from the other four in its focus on entities that are developing new methods to furnish legal services in ways that would otherwise run afoul of UPL rules. As noted previously, while the first four innovation categories are mutually exclusive, this fifth category of innovation is not: Entities falling into the fifth category may also fall into one of the other four. Moreover, note that, in the U.S. at least, this fifth type of innovation is only possible within the Utah sandbox, with its “ABS+UPL” approach, not in Arizona under its “ABS-only” approach.¹⁴⁴ This fifth category also contains the only nonprofits and public benefit corporations utilizing rule reforms, and the only entities that are primarily serving low-income consumers. We return to this observation in Part V, below. Four authorized entities, all entrants to the Utah sandbox, highlight some of the possibilities:

- **Rasa Legal** is a B-corporation using both AI-enabled software and nonlawyer providers to help Utahns determine whether they are eligible to expunge their criminal records and then execute the process.¹⁴⁵ Consumers can use the software, which draws on data from both the state court system and the Utah Bureau of Criminal Identification, to make an initial determination of eligibility and then receive aid from nonlawyers in completing and filing required forms. These nonlawyer providers—who are subject to training and qualification and ongoing oversight by a Utah lawyer serving as Rasa’s legal director—are also authorized to provide legal advice to consumers and negotiate with prosecutors as needed. The cost of an expungement through Rasa is generally around \$500—significantly cheaper than the \$2000 to \$3000 reportedly charged by a traditional lawyer. Noella Sudbury, Rasa’s founder and CEO, stated: “The Utah Sandbox has enabled me to build a company that can serve people when and how they need it. We—the tech, the staff, and the lawyers—help people clear their records for a low price and get back to building lives and careers and contributing to society.”¹⁴⁶

FIGURE 10: Rasa Legal Home Page



- **Timpanogos Legal Center (TLC)**, is a legal clinic affiliated with Brigham Young School of Law. TLC is overseeing lay advocates authorized to offer legal advice and assistance to survivors of domestic violence seeking protective orders and/or stalking injunctions.¹⁴⁷ Susan Griffith, the Executive Director of Timpanogos explained that the program taps existing domestic violence advocates from across the state: “The advocates were frustrated because they were already accompanying victims to court. In a rural area, for example, there might be one judge. The advocates knew exactly what was going to happen but they could not do anything because of the practice rules. They could not give legal advice and the victims, primarily because of their trauma, could not pick up on more subtle and nuanced suggestions.”¹⁴⁸ Now that the victim advocates are able to offer legal advice and help victims complete their forms, Griffith believes it is having a positive impact. She notes, “The first cohort has been handling cases since the beginning of June [2021]. They have good numbers, very few dismissals of applications [for protective orders or stalking injunctions].”¹⁴⁹



- **Utah Legal Advocates** is an established family law solo practice in Utah which sought authorization to train law students and paralegal staff in the provision of limited legal services such as simple legal advice and form completion assistance for family law matters such as simple divorce and guardianship.¹⁵⁰ Under the model, consumers can choose to pay a lower price for services from these nonlawyer providers but, according to the authorization materials, the work of those providers will be regularly reviewed for quality by the qualified lawyer.

Such is the state of innovation across liberalizing jurisdictions: a mix of structural changes to ownership and capital sources and new service delivery models. The next Part asks how much of this innovation is emerging and where.

V. Findings (II): A Quantitative Study of Legal Services Innovation in Utah and Arizona

Part IV used case studies of authorized entities in Utah, Arizona, and England and Wales to construct a taxonomy of the types of innovation made possible by rule reforms. But a taxonomy does not capture an important issue of direct relevance to policymakers: the incidence of innovation. *How much* of each type of innovation is likely to result from rule reforms in U.S. legal markets? And how might innovation *vary* in response to different reform approaches?

Utah and Arizona, as noted previously, have pursued contrasting reform strategies. Though both are pursuing entity-based regulatory reforms, the two states differ in the specific rules targeted. Utah's reforms target both Rule 5.4 and UPL, an approach we previously dubbed ABS+UPL; Arizona has adopted an ABS-only approach.¹⁵¹ In addition, Utah adopted a sandbox approach as its reform lever; Arizona, by contrast, made an *ex ante* change to its nonlawyer ownership rules. A key question as states consider reforms is whether and how these differences matter.

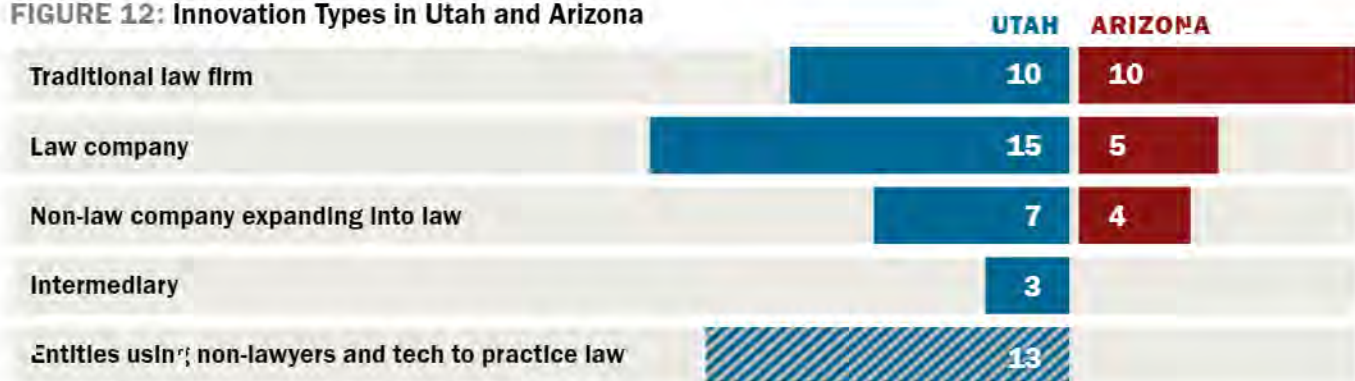
This Part seeks a clearer understanding of the types and amounts of innovation that result from different approaches to regulatory reform. It seeks answers by way of a quantitative analysis of the application, authorization, and other public-facing materials for all 57 authorized entities in the two states—39 in Utah and 19 Arizona, with one entity authorized in both—as of June 30, 2022. The results presented here mark the beginning of an ongoing effort to review, code, and track authorized entities in liberalized U.S. jurisdictions. Updates incorporating newly authorized providers in Utah and Arizona, as well as entities in new jurisdictions adopting rule reforms, will appear in an interactive online tool.

While it may be too soon to draw ironclad inferences about the effects of different reform approaches—in Part VI, below, we address the limitations of this analysis—a quantitative portrait of the entities authorized in Utah and Arizona to this point strongly suggests that reform choices matter. While both states' reforms are spurring significant innovation, the contrasting reform approaches in Utah and Arizona appear to be generating very different types of innovation in terms of *how* legal services are delivered and *who* is served. In particular, because of Arizona's narrower, ABS-only approach, only Utah's reforms are yielding innovation in the use of nonlawyers and technology to deliver legal services. And, perhaps relatedly, only Utah is seeing innovation in the nonprofit and community-based sector and in the development of new delivery models that serve low- and middle-income populations (but see discussion of Arizona's role-based reforms in Part VI below).

FINDING #1: Rule reform in both states is spurring significant innovation in the ownership structure of legal services providers, and lawyers are playing a central role in that innovation.

Applying Part IV’s five-category taxonomy, Figure 12 offers an initial snapshot of the kinds of legal innovation that are emerging in Utah and Arizona.

FIGURE 12: Innovation Types in Utah and Arizona



Across both jurisdictions, 35 percent (20) of the 57 entities are organized and managed as **traditional law firms**. Falling within this category (and all three profiled in Part IV) are: Davis and Sanchez, which entered the Utah sandbox so its partner could sell the practice to a nonlawyer family member; Blue Bee Bankruptcy, a solo bankruptcy practitioner who entered the Utah sandbox to give a paralegal a 10 percent equity interest; and Elias Mendoza Hill Law Group, an immigration firm that sought ABS status in Arizona in order to take outside capital to develop tech services.¹⁵² Looking across the two reform states, Arizona’s ABS-only approach has yielded a larger proportion innovation by traditional law firms: In Arizona, 53 percent (10) of authorized entities are traditional law firms; in Utah, only 26 percent (10) are.

Another thirty-five percent (20) of authorized entities across both jurisdictions are **law companies practicing law**—described previously as entities with nonlawyer ownership or structured as a for-profit corporate entity but primarily offering law-related services. In Utah, 38 percent (15) of authorized entities are law companies, including Rocket Lawyer and Hello Divorce, among others. In Arizona, 26 percent (5) of authorized entities are law companies; they include several large and established companies, such as LegalZoom, Axiom, and Elevate. A smaller authorized law company in Arizona is Singular Law Group, a partnership between a lawyer and nonlawyer that sought authorization to provide low-cost, subscription-based legal services, flat-fee transactional legal services, and mediation services using an online platform.¹⁵³

Importantly, most of the law companies that have sought authorization in Utah and Arizona have done so in order to incorporate lawyers into the various tiers of services they

provide. Estate Guru and Jordanelle Block, both founded by nonlawyers, sought authorization to use software platforms to offer DIY tools for estate planning or real estate transactions, but both also give clients an option to speak to lawyers or trained nonlawyers if the client wants personalized assistance.¹⁵⁴ LawGeex, a well-established legal technology company specializes in contracts management, is authorized to employ lawyers to offer services in addition to those provided through its technology.¹⁵⁵ Crucially, the ability to employ lawyers to practice enables LawGeex to serve more small businesses and startups, because it is no longer limited to being a vendor to an in-house legal department. LawGeex can now serve small businesses with no in-house counsel on staff.¹⁵⁶ DSD Solutions is an entity seeking to stand up small “legal clinics” staffed primarily by nonlawyers using guided software tools to provide legal assistance in traditionally underserved areas. A centralized lawyer team would be on call as needed and able to assist remotely (via computer or telephone), as well as “ride circuit” to regularly visit the clinical locations to address more complex legal needs.¹⁵⁷

Relatedly, several of the Utah law companies, including LawGeex, Estate Guru, and Jordanelle Block, have sought authorization to develop new service delivery models built around software. In Utah, even traditional law firms, such as PI-specialist Nuttall Brown, are straddling the law firm and law company categories by developing delivery models built upon a tiered service approach that deploys a mix of lawyers, nonlawyers, and software at each level of service, from fully automated DIY services at the lowest tier to full lawyer representation at the highest. We provide more details on authorized entities providing legal services via nonlawyers and technology in connection with our analysis of entities falling into the fifth innovation category, **entities using nonlawyers and technology to practice law**, below.

Only eighteen percent (10) of entities across both jurisdictions are **non-law companies as new entrants to the legal sector**. As noted previously, these entities are companies whose primary business sits outside the legal sector but have sought authorization to offer “one-stop-shop” multidisciplinary professional services or begin to build a legal vertical. Eighteen percent (7) of Utah’s total authorized entities are non-law company new entrants and include several already-existing consumer-facing companies that have begun to develop a legal vertical. GovAssist, a travel company offering immigration-related legal services through a law firm subsidiary, and Law on Call, a registered-agent company offering subscription-fee legal services to small businesses—both profiled in Part IV—fall into this category. Trajector Legal is the legal subsidiary of a large disability benefits company, employing lawyers to help veterans access their government benefits.¹⁵⁸ In Arizona, twenty-one percent (4) of authorized entities fall into the non-law companies category, all of them of the “one-stop-shop” variety. Firms such as Radix Professional Services, KWP Estate Planning, and Trajan Estate (the one entity authorized in both

Utah and Arizona), are all partnerships between lawyers, financial planners, and usually accountants to offer a full range of financial, tax, and legal services.¹⁵⁹

Only three total entities, all in the Utah sandbox, fall into the fourth innovation category: **Intermediary platforms** that serve as marketplaces connecting lawyers and consumers and/or provide practice support services to lawyers. Two of the intermediary platforms in the Utah sandbox—Off the Record, profiled in Part IV, and Xira Connect—also have waivers of Rule 1.15 allowing lawyers to use the company to hold and process payments from consumers.¹⁶⁰ While intermediary platforms could be authorized as ABSs in Arizona, ABS status is not necessary to take on ABS regulation because they can already share fees with lawyers directly outside of that framework.¹⁶¹

FINDING #2: Fully one-third of Utah authorized entities, but no Arizona entities, are using nonlawyers and/or technology to practice law within the meaning of UPL rules.

The fifth and final innovation category, entities using nonlawyers and technology to practice law, is open only to entities in the Utah sandbox, with its ABS+UPL approach. As reflected in Figure [X], thirty-three percent (13) of Utah entities fall into this category. Seventy-seven percent (10) of those are using nonlawyer service providers, typically as part of a lower-cost service tier. Forty-six percent (6) are developing technology that practice law via automated advice or guidance. Three entities, Rasa, Estate Guru, and Jordanelle Block, are developing both nonlawyer and technology practice services.

As discussed previously, many of the entities in this category are developing tiered service models that deploy nonlawyers, software, or both, from fully automated DIY services at the lowest price point, to nonlawyer assistance at a middle price point, to full lawyer representation at the highest price point. Consumers can thus “right source” their legal solution for their particular legal need, with some legal needs readily addressed through software platforms but others warranting human assistance. As examples, Estate Guru and Jordanelle Block are both developing software platforms that provide a mix of guided document completion and legal advice for end-of-life planning and real estate transactions.¹⁶² The software-based delivery models are being trained via the lawyer-provided services and the consumer interactions currently facilitated through the platform. Similarly, ILAW, the subsidiary of a personal injury firm, is developing an AI-driven limited legal advice chatbot which is offered for free; other services are available according to a fee schedule.¹⁶³ Utah Legal Advocates, a traditional law firm described above, has adopted a similar model using only trained nonlawyers in its mostly family law practice.¹⁶⁴

The status of some of the software-based delivery models described in the application

and authorization materials on which this Report relies remains unclear. As Part III noted, those materials may capture innovations that are still under development and not yet deployed. And many technical challenges remain for fully automated software tools. Still, Utah entities such as HelloDivorce, LawGeex, Jordanelle Block, and 1LAW show the beginnings of what is possible in jurisdictions that include UPL as part of their reform approach.

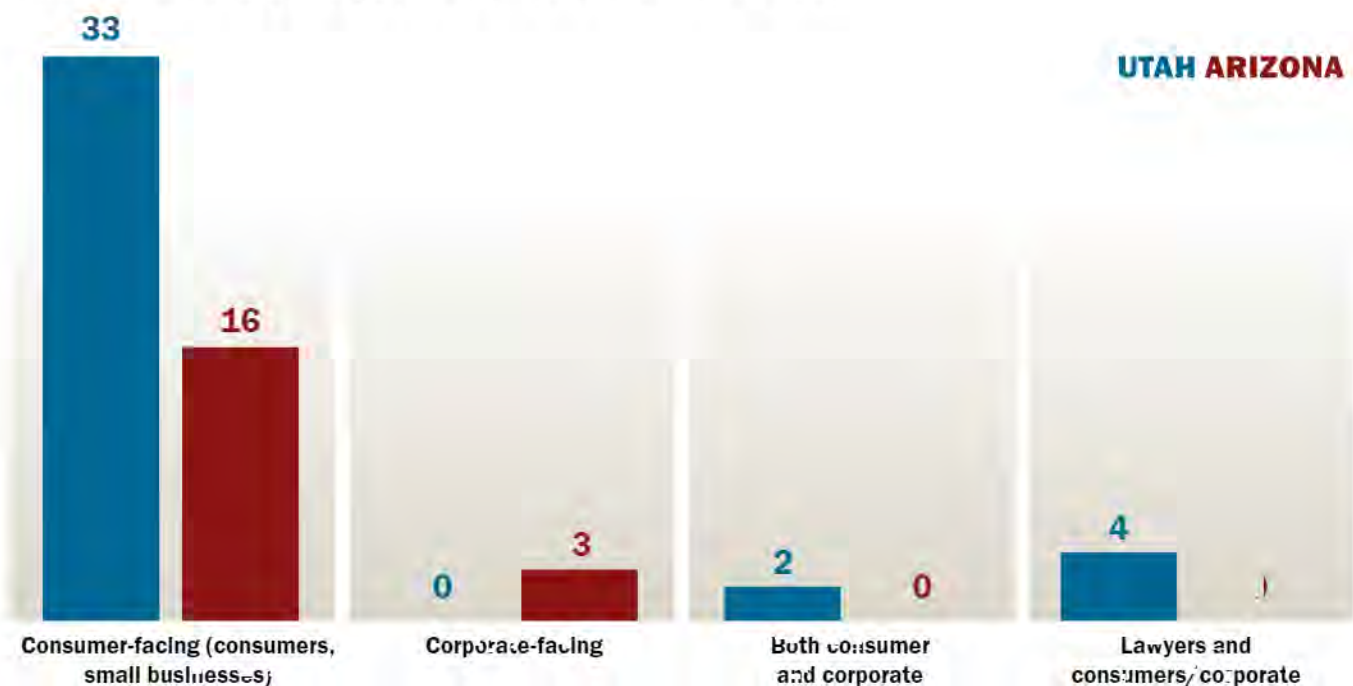
FINDING #3: The Utah Sandbox contains the only nonprofits and the only entities that sought authorization to primarily serve low-income people.

The Utah sandbox features the only authorized entities across the two reform states that are non-profits and whose service delivery models, using trained nonlawyers, are designed to primarily serve low-income people. Indeed, nonprofit organizations and B corporations together make up 10 percent (4) of entities in the Utah Sandbox and include Rasa and Timpanogos, as profiled in Part IV. The other two nonprofits are Holy Cross Ministries and AAA Fair Credit.¹⁶⁵ Each is a non-legal community organization working in partnership with Innovation for Justice (i4J), an interdisciplinary legal innovation lab jointly housed at the University of Utah and the University of Arizona.¹⁶⁶ Both authorized entities are developing a service model that trains and deploys Medical Debt Legal Advocates (MDLAs) to assist clients to resolve medical debt by providing free legal advice, assistance in completing documents, and negotiation.

FINDING #4: Most authorized entities in Arizona and Utah are serving consumers and small businesses.

As reflected in Figure 13, a large majority of legal service entities in Arizona and Utah—84 percent, or 48 entities—report providing services to consumers and/or small businesses. This percentage is similar across the two states. This finding appears to track the experience in England and Wales. Based on this evidence, rule reforms appear more likely to spur innovations that serve clients within the PeopleLaw sector, not the BigLaw sector.

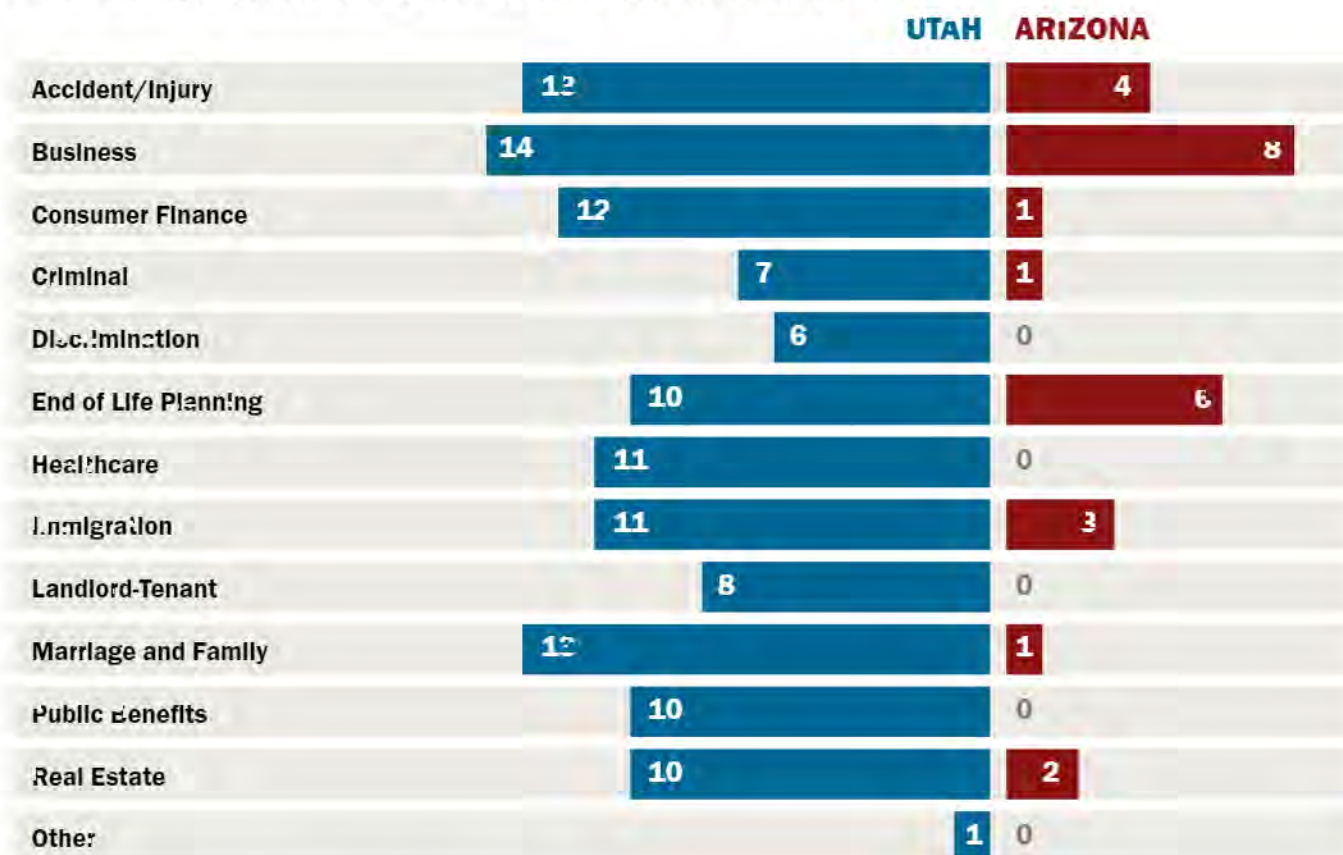
FIGURE 13: UT and AZ: Corporate- and Consumer-Facing Entities



FINDING #5: Authorized entities across both jurisdictions are offering services in a wide range of legal subject areas, but Utah’s reforms are yielding a greater diversity than Arizona’s.

As Figure 14 demonstrates, Utah sandbox entities and Arizona ABSs have sought authorization to offer services across a wide variety of substantive legal areas.¹⁶⁷

FIGURE 14: Comparison of legal service areas between Arizona and Utah

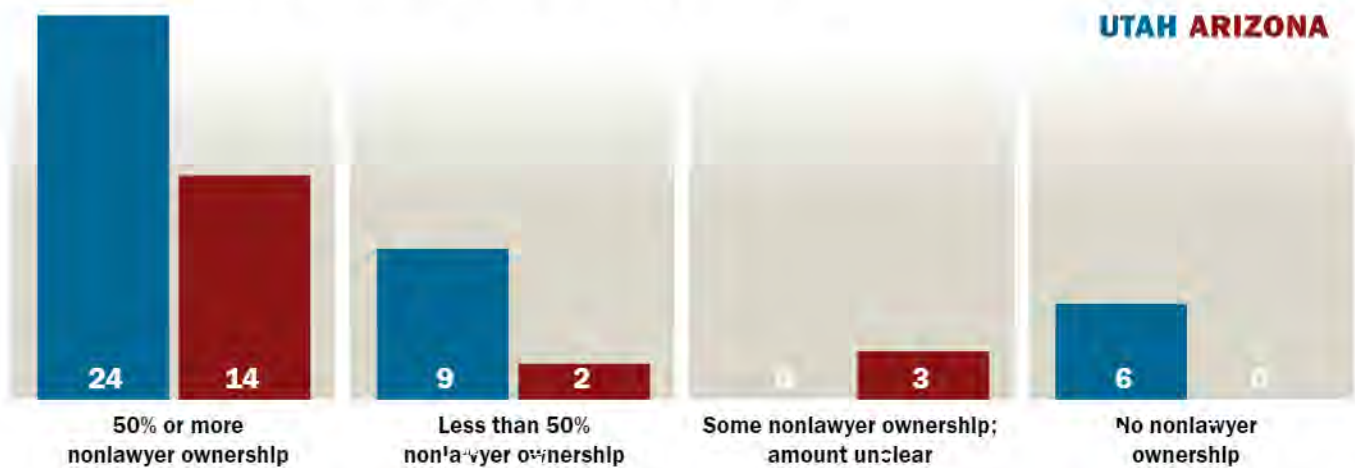


Thirty-eight percent (22) of authorized entities report offering legal services related to business needs, whether small or large businesses. Thirty percent (17) report offering accident/injury services, a category which includes personal injury, workers’ compensation, sexual abuse claims, and mass torts. End of life planning (26 percent (15), consumer financial issues (23 percent (13)), immigration (25 percent (14)), and marriage and family (25 percent (14)) are also significant service areas, followed by healthcare (19 percent (11)) and real estate (8 percent (12)). Note, however, that Utah sandbox entities exhibit significantly more dispersion across the full range of subject-matter areas.

FINDING #6: A large majority of entities across both jurisdictions sought authorization to take on nonlawyer ownership or investment, although their reasons for doing so vary.

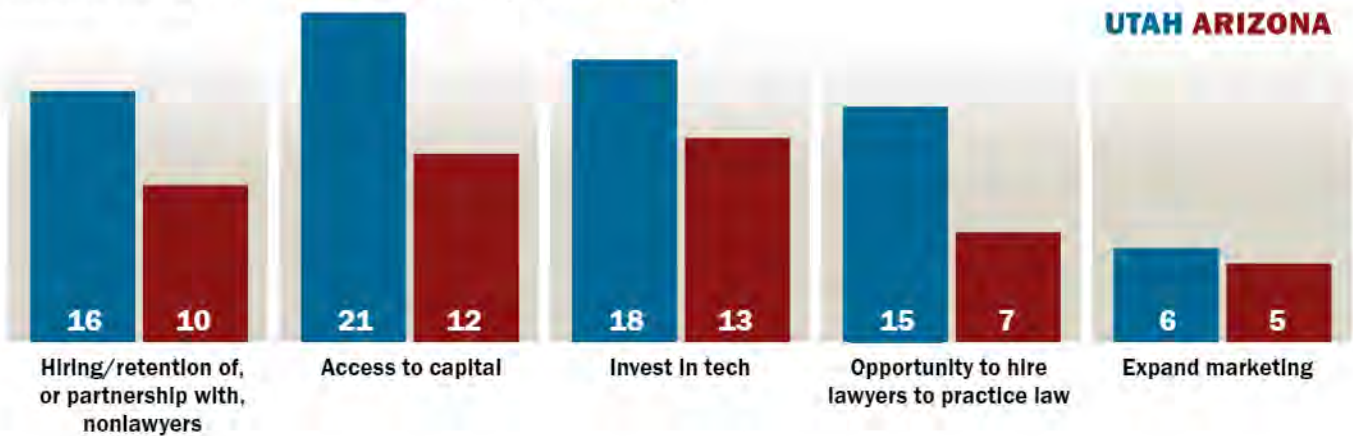
Figure 15 shows that most authorized entities across both jurisdictions—in total, 89 percent, or 51 out of 57—have taken on nonlawyer ownership, investment, or partnership of some kind.¹⁶⁸

FIGURE 15: Nonlawyer ownership, investment, and partnership



By definition, these 51 entities include all of the Arizona entities, because nonlawyer ownership and investment is the only innovation opportunity under the state’s ABS regime. Looking across the two reform states reveals a mix of ownership levels. Of the entities that sought authorization for nonlawyer ownership/investment, 73 percent (37) of entities that sought authorization for nonlawyer ownership/investment report 50 percent or more nonlawyer ownership, and 22 percent (11) report less than 50 percent nonlawyer ownership. For the remaining 6 percent (3), the percentage of nonlawyer ownership is unclear. Focusing on Utah only, 85 percent (33) of authorized entities report nonlawyer ownership or investment, with 73 percent (24) of those reporting 50 percent or more nonlawyer ownership/investment and 27 percent (9) reporting less than 50 percent. All told, 15 percent (6) of authorized Utah sandbox entities did not seek authorization to take on nonlawyer investment or ownership—and have instead sought authorization solely on the UPL side of the regime.

FIGURE 16: Stated reasons for nonlawyer ownership

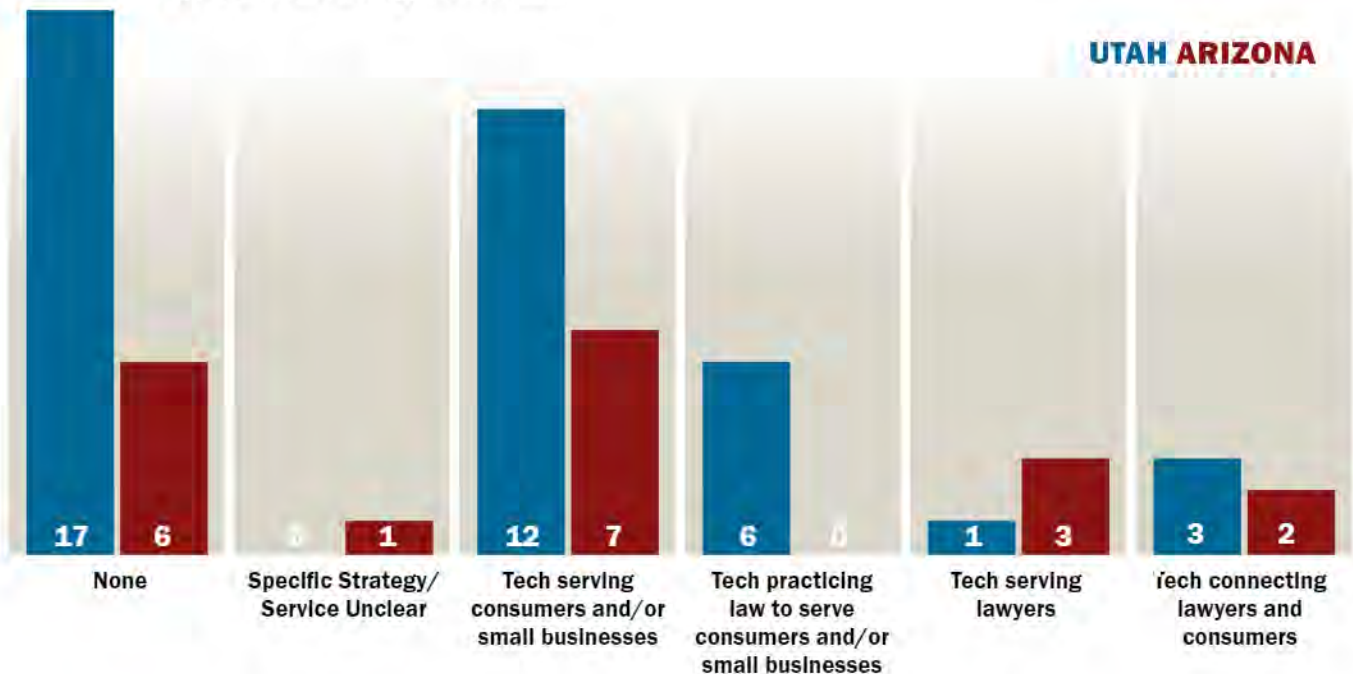


As reflected in Figure 16, entities in Utah and Arizona describe a range of reasons for seeking authorization to take on nonlawyer ownership and investment, including accessing additional capital, investing in technology or marketing, and hiring, retaining, or partnering with nonlawyers. Forty-three percent (22) identify employing lawyers as a primary reason.

FINDING #7: A majority of entities are developing some kind of technological innovation.

As Figure 17 shows, most authorized entities report use of technological innovation of some sort beyond a simple website. In total, sixty-one percent (35) of entities across the two reform states identified some kind of technological innovation as part of their ABS or sandbox authorization.¹⁶⁹

FIGURE 17: Types of technology innovation



More specifically, 54 percent (19) of the authorized entities across both jurisdictions that identified a tech innovation described a tool that is primarily public-facing and *not* practicing law within the conventional meaning of UPL. Primary examples include case management platforms accessible to consumers and platforms providing general legal information or DIY document assembly tools such as those offered by LegalZoom and Rocket Lawyer. Fourteen percent (5) of entities with a technological innovation seek to connect lawyers and consumers; this category includes, but is not limited to, those falling into the taxonomy's fourth category as **Intermediary platforms**. Some entities may not primarily see themselves as an intermediary platform but are using software to build out intermediary functions. Eleven percent (4) of authorized entities identify a technological innovation primarily serving lawyers (*e.g.*, case management or billing tools). Seventeen percent (6) of technological innovations are software practicing law, a use that, as noted above in Finding #2, is only permitted in the Utah sandbox.

FINDING #8: A majority of entities across both jurisdictions feature other, non-tech innovations.

Authorized entities in both jurisdictions also feature other, non-technology innovations. These are primarily pricing innovations: Across the two reform states, 49 percent (28) of authorized entities identify subscription and flat-fee pricing as part of their service model. Law on Call, profiled in Part IV, reported a subscription-based model targeting small businesses. Mountain West Legal Protective, in the Utah sandbox, reported a legal insurance model focused initially on problems arising from the purchase of a home. Consumers can purchase the coverage as they would purchase a home warranty and would be covered for legal needs, including fraud in the seller's disclosures or related to the purchase contract.¹⁷⁰

FINDING #9: There are few reported complaints against service providers in Arizona or Utah.

A ninth and final finding moves away from this Part's analysis of application, authorization, and other public-facing materials and focuses instead on complaint information and data, as generated by the Arizona Supreme Court as overseer of the state's ABS scheme, and by Utah's Innovation Office, tasked by the Utah Supreme Court with overseeing the state's sandbox.

Both sources of complaint information show little overall complaint activity. According to the Arizona Supreme Court, there have been no reported complaints against ABS entities in Arizona,¹⁷¹ Utah, which systematically collects data on complaints as part of the reporting requirements imposed on authorized entities who enter the sandbox, a total of eleven complaints

reported as of the end of June 2022, approximately one for every 2,123 services delivered. Of those eleven, six were categorized by the regulator as relating to a potential harm caused by the provision of legal services, or one for every 3,892 services. The remaining five concerned other types of complaints—for instance, concerns about a provider’s tone or manner. The Innovation Office determined that each complaint was resolved satisfactorily by the entity.¹⁷²

No fully reliable data exist on complaints against lawyers that might provide a point of comparison with these complaint statistics from Utah and Arizona. A commonly cited source, the ABA’s 2018 Survey on Lawyer Discipline (S.O.L.D.), offers a plausible estimate: approximately one complaint for every 15 lawyers.¹⁷³ However, drawing comparisons using these data is still complicated by the fact that the Utah statistics report complaints per service delivered, while the S.O.L.D. statistics on lawyers report complaints per individual provider.¹⁷⁴ Needed is a way to convert per-provider numbers to per-service numbers or vice versa, a conversion that can be achieved in two steps.¹⁷⁵ First, one can derive a rough estimate of 215 services per lawyer per year from statistics on service delivery reported by the Legal Services Corporation (“LSC”).¹⁷⁶ Second, applying this number to the S.O.L.D. data implies approximately 1 complaint for every 2,150 lawyer-provided services. That complaint rate is not dissimilar from, and perhaps even higher than, the complaint rates reported by Utah and Arizona.

Further analysis along these lines as the Utah and Arizona reform efforts mature further should be performed. For now, available data suggest that the more dire predictions by reform opponents in both states, that reform would lead to widespread consumer harm have not come to pass.

VI. Study Caveats and Limits

This study offers a first-of-its-kind accounting of emerging legal innovations in Utah and Arizona. However, it is limited in at least four ways.

First, it is still early days for this brave new world of regulatory reform. The Utah and Arizona courts each authorized their reforms two years ago, in August 2020. The Utah sandbox admitted its first entities in September 2020. Arizona authorized its first ABS in January 2021. Our analysis, based in a comprehensive review of the application and authorization materials of authorized entities as well as in-depth interviews with a subset of those entities, captures takeaways from the early stages of these experiments, but may not reflect the long-run equilibrium. Research into innovation tells us that the timeline for truly disruptive innovation is much longer than two years.¹⁷⁷ Some of the innovations described in application and authorization materials are aspirational or remain under development.

Second, empirical findings from Utah and Arizona may not generalize to other states with differently situated legal markets. As already noted, regulatory reforms are under consideration in a wide range of states, from California to Michigan to North Carolina. Differences in wealth, industry, and demographics mean that these states' legal markets may differ, perhaps substantially, in their core attributes. Market size, revenue flows, and the amount and mix of practice types can make some types of innovation more attractive as business opportunities. As a concrete example, KPMG—a non-law company that is well-positioned to begin to offer legal services in liberal U.S. legal markets, as evidenced by its ABS status in England and Wales—might not see Utah and Arizona as sufficiently large legal markets to make a move into legal but might see California as an attractive opportunity. That said, it is also possible that, while legal markets might differ substantially across U.S. states in their upper and, in particular, corporate and business law precincts, states may be far more similar than different in their individual and small business markets, where access to justice concerns are most acute. Indeed, legal needs surveys and docket research from numerous jurisdictions tell a remarkably consistent story in terms of unmet legal need among ordinary Americans across a wide range of areas, from consumer debt and evictions to family law and estate planning.¹⁷⁸

Third, important parts of our analysis are both made possible, but also complicated, by the distinct reform approaches undertaken in Utah and Arizona. On the one hand, and as repeatedly noted above, Utah's reforms are more expansive as a matter of their target: Entrants to the Utah sandbox can seek waivers of Rule 5.4, UPL, or both rules. In contrast, authorized entities in Arizona can gain only a relaxation of Rule 5.4's prohibition on nonlawyer ownership. Utah's more expansive approach in terms of the rules targeted should, in theory, spur greater

innovation, and Arizona's narrower reform result in less. Consistent with those expectations, Part V showed that only Utah's reforms are generating innovation in the use of nonlawyers and technology to deliver legal services, and only Utah features authorized entities that are non-profits or that primarily serve low-income populations.

On the other hand, Arizona's reform approach might be thought more innovation-promoting than Utah's as a matter of its lever. Utah's sandbox was, from its inception, a time-limited pilot. Although the Utah Supreme Court has extended its authorization, it remains a finite reform by design.¹⁷⁹ In contrast, Arizona's relaxation of its Rule 5.4 equivalent is a permanent rule revision, unless and until changed by legislative or court action. In theory, Arizona's more permanent change should spur greater innovation than Utah's time-limited sandbox approach if entities seeking authorization see a material difference in the likely durability of the two reforms. An important implication is that the legal innovation that is emerging in Utah, which appears more multi-faceted and diverse than in Arizona, might be even *more* so if the sandbox reforms were framed as permanent regulatory changes.

Finally, our findings may be complicated by the two reform states' parallel pursuit of additional role-based reforms, including the implementation of paraprofessional reforms.¹⁸⁰ The presence of these reforms in Utah and Arizona at the same time that the states are pursuing entity-based regulatory reforms could, in theory, depress the number of entities serving low- and middle-income individuals. After all, paraprofessional reforms tend to target particular legal areas, such as landlord-tenant (evictions) or family law. Arizona, in particular, is exploring a variety of role-based reforms focused in these particular sectors, including a licensed legal advocate program for domestic violence survivors developed by i4J.¹⁸¹

VII. Conclusion

The access to justice problem in the U.S. is deep and costly, and a growing body of evidence suggests that the various rules that restrict the delivery of legal services are at least in part to blame. While a few countries, most notably England and Wales, have undertaken rule reforms, their legal systems differ in fundamental ways from the U.S. legal system, muddying the application of their experience to the U.S. context. Fortunately, reforms in Utah and Arizona are now far enough along that we can begin to draw more reliable inferences about the likely effects of rule reforms in U.S. legal markets. This Report has leveraged newly available evidence from both states in order to answer two questions that are critically important to state decisionmakers as they weigh reforms: What types of innovation in legal services will result from different reforms? And who will be served by those innovations?

The evidence gathered in this Report shows that rule reforms can spur significant innovation, both in the ownership structure of legal services providers and in the delivery models used to serve clients. Importantly, the innovation that is emerging in Utah and Arizona is hardly the sole province of nonlawyers or technologists. To the contrary, much of the legal innovation in evidence in both states involves lawyers, whether traditional law firms exploring new, tiered service delivery models, or companies building out legal verticals by hiring lawyers to practice within them. While ironclad predictions about the future remain unwise, the evidence thus far suggests that lawyers, far from being displaced by newly configured entities and new service delivery models, will instead face a host of new opportunities to extend their reach via a mix of conventional service delivery, nonlawyer assistance, and software that were not possible previously.

That said, and while the Utah and Arizona reforms are yielding substantial innovation, the evidence thus far suggests important differences in the results from the two states' contrasting reform approaches. Reforms permitting access to outside capital alone (ABS-only), while likely to result in increases in diversification and innovation within the market serving corporations, small businesses, and the middle class, may be less likely to yield providers that serve low income and indigent people. An ABS+UPL approach, in which regulated entities not only can access new sources of capital but can also develop service innovations that deploy nonlawyers and technology, is more likely to see nonprofit participation, more likely to spur creation of lower-cost service tiers, and more likely to impact the justice gap for low-income individuals, where access concerns are typically most acute. Other states considering regulatory reform should recognize that their regulatory choices will impact the outcomes of reform.

ENDNOTES

- 1 HAGUE INST. FOR INNOVATION OF LAW & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA, 2021: LEGAL PROBLEMS IN DAILY LIFE 22-69 (2021) [hereinafter IAALS 2021], available at: https://iaals.uu.edu/sites/default/files/documents/publications/justice_needs_and_satisfaction_us.pdf; AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 9 (1994), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.pdf. See *infra* note 14 for additional sources.
- 2 IAALS 2021, *supra* note 1, at 68-86.
- 3 NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 11 (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport2015.pdf.
- 4 Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 114-116 (Pascoe Pleasence et al. eds., 2007).
- 5 See Gillian K. Hadfield, *Legal Markets*, J. ECON. LIT. (forthcoming) [hereinafter "Legal Markets"] (arguing that "our existing legal markets are not performing well and that a central reason for their poor performance is almost exclusively reliance on self-regulation of the legal profession"). See *infra* note 23 for additional sources.
- 6 Lauren Sudeall, *The Overreach of Limits on "Legal Advice"*, 131 YALE L.J.F. 637, 640 (2022). See *infra* notes 43-47 and accompanying text.
- 7 See Gillian K. Hadfield and Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1193-94 (2016). See *infra* notes 33-34 and accompanying text.
- 8 *Id.*
- 9 Nuno Garoupa & Milan Markovic, *Deregulation and the Lawyers' Cartel*, U. PENN. J. INT'L L. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872974. See *infra* note 42-43 and accompanying text.
- 10 See Sam Skolnik, *ABA Sides Against Opening Law Firms to New Competition*, Bloomberg Law (Aug. 9, 2022, 11:37 AM; Updated: Aug. 9, 2022, 2:36 PM), <https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition>. See also STATE BAR CAL., TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS. ("ATILS"), FINAL REPORT AND RECOMMENDATIONS 30 (2020), <https://www.calbar.ca.gov/Portals/0/documents/publiccomment/ATILS-Final-Report.pdf> (describing public comments raising concerns about nonlawyer ownership's impact on lawyer independence and quality of legal services).
- 11 Washington State implemented such a program from 2012 to 2020. Several other states have since implemented paraprofessional licensing and numerous states are formally considering the idea. For more on the potential of paraprofessional licensing reform, see JASON SOLOMON & NOELLE SMITH, THE SURPRISING SUCCESS OF WASHINGTON STATE'S LIMITED LICENSE LEGAL TECHNICIAN PROGRAM (2021), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/04/LLLT-White-Paper-Final-5-4-21.pdf>.
- 12 See *Licensed Paralegal Practitioner*, UTAH CTS., <https://www.utcourts.gov/legal/lpp/> (last visited Aug. 18, 2022); *Legal Paraprofessionals (LP): Questions & Answers*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/lp> (last visited Aug. 18, 2022).
- 13 *WJP Rule of Law Index: United States*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/United%20States> (last visited July 26, 2022) (ranking the United States 126th out of 139 countries on whether people can access and afford civil justice). See also Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001); *Deborah L. Rhode, Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013 (2004).
- 14 LEGAL SERVS. CORP., 2022 JUSTICE GAP STUDY (2022), <https://justicegap.lsc.gov/resource/executive-summary/> (finding that low-income Americans do not get any or enough legal help for 92 percent of their substantial legal problems); IAALS 2021, *supra* note 1; REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014). A 1994 study by the ABA found that approximately half of American households surveyed "faced some situation that raised a legal issue," with 47% of low-income households and 52% of middle-income households reporting at least one legal need. Of those households facing legal issues, 41% of low-income households and 42% of middle-income households were forced to deal with their problems without legal assistance, and an additional 38% of low-income households and 26% of middle-income households took no action at all. Only 29% of low-income households turned to the civil justice system to attempt to resolve their issues, and only 39% of middle-income households did so. AM. BAR ASS'N, *supra* note 1, at 9. See also STATE BAR CAL., THE CALIFORNIA JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF CALIFORNIANS 21 (2019) (finding that "Even when experiencing problems that have a significant impact on them, most do not receive legal help: 27 percent of low-income Californians received some legal help, while 34 percent of middle-income individuals did.").

- 15 NAT'L CENTER FOR STATE COURTS, *supra* note 3. This is in sharp contrast to just a couple of decades prior. The 1992 Civil Justice Survey of State Courts found that attorneys represented both plaintiffs and defendants in 95% of the cases disposed in general jurisdiction courts. *Id.*
- 16 LEGAL SERVS. CORP., 2022 JUSTICE GAP STUDY, *supra* note 14 (finding that low-income Americans do not get any or enough legal help for their substantial legal problems); AM. BAR ASS'N, REPORT OF THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016) (noting only 15% of people facing civil justice issues "sought formal help," and only 16% "even considered consulting a lawyer"). See also Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016) (finding that people took just over a fifth, or 22%, of their civil justice situations to someone outside their immediate social network, and only some of those made it to lawyers: 8% involved contact with a lawyer and 8% had court involvement of some sort); Sandefur, *supra* note 4.
- 17 IAALS 2021, *supra* note 1, 68-86. See also Sandefur, *supra* note 16, at 444-445.
- 18 IAALS 2021, *supra* note 1, at 69.
- 19 LEGAL SERVICES CORP., 2022 JUSTICE GAP STUDY, *supra* note 14 (finding 33% of low-income Americans experienced at least one civil legal problem linked to the COVID-19 pandemic in the past year and that the types of civil legal problems related to COVID-19 were primarily income maintenance, education, and housing).
- 20 Sandefur, *supra* note 16, 448-449. See also LEGAL SERVS. CORP., 2022 JUSTICE GAP STUDY, *supra* note 14 (finding that among those surveyed as to why they did not seek legal assistance not being sure whether their problem is legal (20%) and not knowing where to look for help (22%) were more frequently cited than cost (14%)). See also Tyler Hubbard, Deno Himonas, Rebecca Sandefur, & James Sandman, *Getting to the Bottom of the Justice Gap*, 33 UTAH BAR J. 15 (2020) (noting that price is only one indicator of a dysfunctional market).
- 21 See *supra* note 14; LEGALSHIELD, THE LEGAL NEEDS OF SMALL BUSINESS: A RESEARCH STUDY CONDUCTED BY DECISION ANALYST (2013).
- 22 See generally Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URBAN L.J. 1229-40 (2014) (synthesizing causes of the justice gap). The Legal Services Corporation, the single largest funder of legal aid in American, received \$489 million from Congress for fiscal year 2022 after requesting more than \$1 billion. Funding for LSC has not increased significantly over 30 years. Brian Fitzpatrick & Mary Gay Scanlon, Opinion, *It's Time for Congress to Step up Funding for the Legal Services Corporation*, THE HILL (D.C.), Feb. 15, 2022, [https://thehill.com/blogs/congress-blog/politics/594244-](https://thehill.com/blogs/congress-blog/politics/594244-its-time-for-congress-to-step-up-funding-for-the-legal-services-corporation/)its-time-for-congress-to-step-up-funding-for-the-legal-services/. See also E.H. Geiger, *The Price of Progress: Estimating the Funding Needed to Close the Justice Gap*, 28 CARDOZO J. EQUAL RIGHTS & SOC. JUST. 33 (2021); WILLIAM D. HENDERSON, LEGAL MARKET LANDSCAPE REPORT 13 (2018) (noting the shrinking market for individual consumers and small businesses); Robert H. Frank, *How Rising Inequality Has Widened the Justice Gap*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/business/rising-inequality-widened-justice-gap.html>; Jennifer Ludden, *Eviction Filings Are Up Sharply as Pandemic Rental Aid Starts to Run Out*, NAT'L PUB. RADIO (May 4, 2022), <https://www.npr.org/2022/05/04/1095559147/eviction-filings-are-up-sharply-as-pandemic-rental-aid-starts-to-run-out>.
- 23 See generally Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49 (2015). For Rule 5.4 see: Legal Markets, *supra* note 5; Hadfield & Rhode, *supra* note 7. See also Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un) Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 48 (2014) [hereinafter *Cost of Law*] (citing scholars who have made this point); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 955-56 (2000) (Hadfield argues that the traditional regulatory structure, permitting lawyers only to offer services, has created a competition for scarce resources dominated by those with the most money—corporations and wealthy individuals. This scarcity drives up the cost of legal services because price is based on the value that the wealthiest consumers place on the services rather than the actual value of the services.). For UPL see: Sudeall, *supra* note 6; Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014) (finding that "restricting the practice of law to those who have completed a juris doctor has constrained the market options so that many consumers have no access to legal services at all"). See also Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 26 Stan. J. C.R. & C.L. 283 (2020).
- 24 See MODEL RULES OF PRO. CONDUCT r. 5.4 (2020).
- 25 Sudeall, *supra* note 6, at 640. The practice of law is, in general, defined broadly and includes a wide range of activities, including the provision of legal advice (itself defined broadly), preparation of legal documents, negotiation on behalf of another in a legal matter, etc. *Id.*
- 26 Hadfield, *Legal Markets*, *supra* note 5, at 12-14; Hadfield & Rhode, *supra* note 7; Hadfield, *Cost of Law*, *supra* note 23, at 46.
- 27 See THOMAS CLARKE & LUCY RICCA, A FRAMEWORK FOR DESIGNING AND IMPLEMENTING REGULATORY REFORM (July 2022), <https://law.stanford.edu/publications/designing-and-implementing-legal-regulation/>.

- 28 *Id.* Note that entity-based regulation can exist alongside role regulation—for instance, licensed doctors working within regulated hospitals, or licensed paraprofessionals working within a regulated law company. But entity-level regulation also enables provision of services by unregulated roles, including nonlawyers or software, *within* the regulated entity.
- 29 *Id.* There are other design choices as well. As already noted, a second key design choice is the reform lever: whether to change the rules outright or, instead, create a regulatory sandbox—a space within which entities can seek waivers of rules, subject to ongoing oversight by regulators. Still other choices must be made if a state creates a new regulatory body to preside over the authorization process or perform ongoing oversight. They include: how much to scrutinize authorized entities beyond their admission to the system, where to locate and how to structure a body that presides over admission to the system and/or exercises regulatory oversight, whether the unit of regulation is to be individuals, entities, or both, whether entities are to be subject to other existing rules of professional responsibility that govern lawyers (e.g., duties of confidentiality), and what standard of care applies to claims of harm.
- 30 Compare Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297 (2019). HENDERSON, *supra* note 22; Benjamin H. Barton, *The Lawyers' Monopoly: What Goes and What Stays?*, 82 FORDHAM L. REV. 3067 (2014) (concluding that the organized bar's refusal to rethink regulation will ultimately lead to deregulation of most services to the consumers' benefit); MODEL RULES OF PRO. CONDUCT r. 5.4 cmt. (AM. BAR ASS'N 2019) ("The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.")
- 31 See Jayne Reardon, *How Reregulation Could Benefit Lawyers*, IAALS (Dec. 5, 2019), <https://iaals.du.edu/blog/how-reregulation-could-benefit-lawyers>; JASON SOLOMON, DEBORAH RHODE & ANNIE WANLESS, STAN. CTR. LEGAL PRO., *HOW REFORMING RULE 5.4 WOULD BENEFIT LAWYERS AND CONSUMERS, PROMOTE INNOVATION, AND INCREASE ACCESS TO JUSTICE* 4 (2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf.
- 32 Cost of Law, *supra* note 23 at 44 (citations omitted).
- 33 *Id.*
- 34 *Id.* at 53.
- 35 *Id.* at 52 (quoting RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL STUDIES* (2008)).
- 36 See generally Gillian Hadfield, *Legal Barriers to Innovation*, 31 REGUL. 14 (2008). But see Nick Robinson, *When Lawyers Don't Get All the Profits: Nonlawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 47 (2016) (arguing that economies of scale increase possible conflicts of interest); SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE* 5 (2002).
- 37 Hadfield & Rhode, *supra* note 7; SOLOMON, RHODE & WANLESS, *supra* note 31, at 3.
- 38 DEBORAH RHODE, *THE TROUBLE WITH LAWYERS* 100 (2015).
- 39 SOLOMON, RHODE & WANLESS, *supra* note 31, at 4.
- 40 *Id.* (citing Mark Cohen, *Law is Lagging Digital Transformation – Why it Matters*, FORBES (Dec. 20, 2018, 5:40 AM EST), <https://www.forbes.com/sites/markcohen1/2018/12/20/law-is-lagging-digital-transformation-why-it-matters/?sh=3eb4e2cc515c>).
- 41 *Id.*
- 42 See generally Robinson, *supra* note 36. See also DEP'T CONST. AFFS., *THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST* 44-48 (2005), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272192/6679.pdf. Particular concerns are raised around private equity participation in the legal industry, drawing support from analyses of industries in which private equity has had an outside influence. See, e.g., EILEEN APPELBAUM & ROSEMARY BLATT, *PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET*, RUSSELL SAGE FOUND. (2014) ("When private equity firms take over companies, moral hazard problems often ensue because the general partners in these firms, in a position to make greater use of other people's money than their own, engage in high risk behaviors."). See also Heather Perlberg, *How Private Equity Is Ruining American Health Care*, BLOOMBERG (May 20, 2020, 2:00 am PDT), <https://www.bloomberg.com/news/features/2020-05-20/private-equity-is-ruining-health-care-covid-is-making-it-worse>; Bryce Covert, *The Demise of Toys 'R' Us Is a Warning*, THE ATLANTIC (July/Aug. 2018), <https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/>
- 43 See Robinson, *supra* note 36; Garoupa & Markovic, *supra* note 9.
- 44 Garoupa & Markovic, *supra* note 9.
- 45 *Id.* (concluding that "Deregulation alone is insufficient and may in fact exacerbate existing market failures.")
- 46 MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. (AM. BAR ASS'N 2019) ("[L]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."); Sudeall, *supra* note 6 (arguing for a narrower and more explicit definition of the practice of law).
- 47 Sudeall, *supra* note 6. See also David McGowan, *Two Ironies of UPL Laws*, 20 CHAPMAN L. REV. 225 (2017).

- 48 Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 123-29 (1976).
- 49 Deborah L. Rhode and Lucy Buford Ricca, *Protecting the Profession or the Public?: Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2013).
- 50 Sandefur, *supra* note 23, at 286. See also Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the U.S.A.*, 67 HASTINGS L.J. 1467, 1469 (2016).
- 51 Perlman, *supra* note 23, at 87; Sandefur, *supra* note 23, at 288-290; Sandefur & Clarke, *supra* note 50, at 1471. Cf. Jessica K. Steinberg et al., *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315 (2021).
- 52 Multiple federal agencies permit nonlawyer representation, and the Federal Code grants them that authority. 5 U.S.C. § 555(b) (2018). For example, the Department of Justice (immigration), the Veterans Administration, and the Social Security Administration all permit nonlawyers, though each agency has its own framework for qualifying the nonlawyers appearing before it. See 8 C.F.R. § 1292.1 (immigration); 38 C.F.R. §§ 14.626-7 (veterans); 20 C.F.R. § 14.1705 (Social Security).
- 53 Brief for The NAACP & The NAACP New York State Conf. as Amici Curiae Supporting Plaintiffs, *Upsolve v. New York* (2022) (No. 1:22-cv-00627-PAC), at 5-13, https://uploads-ssl.webflow.com/60d147561d53665ec78fff2c/62212d49422bf2759b404d7a_Upsolve%20%26%20Rev.%20Udo-Okon%20v.%20NY-%20Amicus%20Briefs%20Filed%20in%20SDNY%2C%20March%202022%20.pdf.
- 54 Perlman, *supra* note 23, at 87.
- 55 STATE BAR CAL., *supra* note 10, at 30.
- 56 FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* 9 (2019).
- 57 *Id.*
- 58 Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices - A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 673 (2004), <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1607&context=psilr>.
- 59 Legal Profession Uniform Law 2014 (NSW), pt 1.1 s 3 (Austl.), <https://legislation.nsw.gov.au/view/html/inforce/current/act-2014-16a#sec.3>.
- 60 *How Many Lawyers Are There in Australia?*, L. COUNCIL AUSTL., <https://www.lawcouncil.asn.au/resources/faqs/how-many-lawyers-are-there-in-australia> (last visited Aug. 18, 2022).
- 61 Mark & Cowdroy, *supra* note 58, at 690.
- 62 Other jurisdictions permit nonlawyer participation in legal practice entities in some form, including New Zealand and Singapore, which permit nonlawyer ownership of law firms; and several European countries where nonlawyer minority ownership is allowed up to a certain point, including Scotland (up to 49% nonlawyer ownership), Italy (33%), Spain (25%), and Denmark (10%). See generally Memorandum from the Am. Bar Ass'n Comm. on the Future of Legal Servs. to the Am. Bar Ass'ns et al. (Apr. 8, 2016), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/issues-paper-regarding-alternative-business-structures040816.pdf>.
- 63 See generally Legal Services Act 2007, c. 29 (UK), <http://www.legislation.gov.uk/ukpga/2007/29/contents>.
- 64 DAVID CLEMENTI, *REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES* (2004), http://www.avocatsparis.org/Presence_Internationale/droit_homme/PDF/Rapport_Clementi.pdf.
- 65 See generally Legal Services Act 2007, *supra* note 63.
- 66 SOLOMON & SMITH, *supra* note 11; THOMAS CLARKE & REBECCA L. SANDEFUR, *ROLES BEYOND LAWYERS: EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM* (2017), <https://www.americanbarfoundation.org/research/summary/29>.
- 67 Lyle Moran, *How the Washington Supreme Court's LLLT Program Met Its Demise*, ABA J. (July 9, 2020, 1:46 PM CDT), <https://www.abajournal.com/web/article/how-washingtons-limited-license-legal-technician-program-met-its-demise>.
- 68 See *supra* note 12. See also State Bar Cal., Cal. Paraprofessional Prog. Working Group, <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/California-Paraprofessional-Program-Working-Group> (last visited Aug. 19, 2022); Sara Merken, *Minnesota Greenlights Plan to Open Some Legal Work to Nonlawyers*, Reuters (Sept. 30, 2020, 2:55 PM), <https://www.reuters.com/article/minnesota-paraprofessionals/minnesota-greenlights-plan-to-open-some-legal-work-to-non-lawyers-idUSL1N2GR2PM>; Karen Sloan, *Nonlawyer Licensing Movement Gains Steam With Oregon Approval*, Reuters (Jul. 10, 2022, 9:56 AM PDT), <https://www.reuters.com/legal/legalindustry/non-lawyer-licensing-movement-gains-steam-with-oregon-approval-2022-07-20/>.
- 69 SOLOMON & SMITH, *supra* note 11.
- 70 See Utah Sup. Ct. Standing Ord. No. 15 (Aug. 14, 2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/07/Signed-Utah-Supreme-Court-Standing-Order-No.-15-Amended-June-3-2021.pdf>; UTAH WORK GRP. ON REGUL. REFORM, *NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION* (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>; Lyle Moran, *Rocket Lawyer Is among the First*

- Applicants Approved to Join Utah's Regulatory Sandbox Program*, ABA J. (Sept. 8, 2020, 4:38 PM CDT), <https://www.abajournal.com/web/article/rocket-lawyer-given-approval-to-join-utahs-regulatory-sandbox-program>. Multiple Canadian provinces have also launched legal regulatory sandboxes with varying scopes: Alberta (<https://www.lawsociety.ab.ca/about-us/key-initiatives/innovationsandbox/>), British Columbia (<https://www.lawsociety.bc.ca/our-initiatives/innovation-sandbox/>), Ontario (<https://lso.ca/about-lso/access-to-innovation>)
- 71 *What We Do*, OFF. LEGAL SERVS. INNOVATION, <https://utahinnovationoffice.org/about/what-we-do/> (last visited July 26, 2022).
- 72 Order Amending the Ariz. Rules of the Sup. Ct. and the Ariz. Rules of Evid. (Aug. 27, 2020) [hereinafter Arizona Order 15], <https://www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034LPABS.pdf>; ARIZ. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REP. AND RECOMMENDATIONS (Oct. 19, 2020). See also Lyle Moran, *Arizona Approves Nonlawyer Ownership, Nonlawyer Licenses in Access-to-Justice Reforms*, ABA J. (Aug. 28, 2020, 2:20 PM CDT), <https://www.abajournal.com/web/article/arizona-approves-alternative-business-structures-as-part-of-access-to-justice-reforms>.
- 73 Arizona Order 15, *supra* note 72.
- 74 STATE BAR CAL., CLOSING THE JUSTICE GAP WORKING GROUP, <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Closing-the-Justice-Gap-Working-Group> (last visited Aug. 19, 2022); *Task Force on Access Through Innovation of Legal Servs.*, STATE BAR CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Task-Force-on-Access-Through-Innovation-of-Legal-Services> (last visited Aug. 19, 2022).
- 75 *Justice for All*, MICH. CTS., <https://www.courts.michigan.gov/administration/special-initiatives/justice-for-all-commission/> (last visited Aug. 18, 2022); *North Carolina Equal Access to Justice Commission*, N.C. JUD. BRANCH, <https://www.nccourts.gov/commissions/north-carolina-equal-access-to-justice-commission> (last visited Aug. 18, 2022); WASH. CTS. PRAC. L. BD., BLUEPRINT FOR A LEGAL REGULATORY SANDBOX IN WASHINGTON STATE (2021), [https://www.wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/2021-06-21-blueprint-\(v7\)-sent-to-court.pdf](https://www.wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/2021-06-21-blueprint-(v7)-sent-to-court.pdf).
- 76 Dan Packel, *Florida Bar Board of Governors Says No to Fee Sharing, Nonlawyer Ownership*, AM. LAW. (Nov. 11, 2021), <https://www.law.com/americanlawyer/2021/11/11/florida-bar-board-of-governors-says-no-to-fee-sharing-nonlawyer-ownership/>.
- 77 England and Wales represent the largest and most studied liberalized legal market. Although often referred to as the United Kingdom in discussions around legal regulatory reform, only England and Wales were subject to the 2007 reforms. Scotland and Northern Ireland are separately regulated.
- 78 See generally Legal Services Act 2007, *supra* note 63.
- 79 *Id.* at §§ 71, 72, 89, pt. 5. In 2019, the Solicitors Regulation Authority, the largest legal regulator which has oversight over solicitors—the legal profession most similar to American lawyers, and entities employing them—implemented further reforms allowing individual solicitors to work for unregulated businesses. These reforms permit any company to hire individual solicitors to open an office in their store without having to register as an ABS. Though it is too early to discern the impact of this further reform, it will enable professional legal services to be provided alongside a wide range of other consumer services. Rocket Lawyer has taken this approach to its U.K. business rather than becoming an ABS. John Hyde, *SRA Says Solicitors Embracing Change as 400 Go Freelance*, L. SOC'Y GAZETTE (Dec. 16, 2021), <https://www.lawgazette.co.uk/news/sra-says-solicitors-embracing-change-as-400-go-freelance/5110960.article>.
- 80 Legal Services Act 2007, *supra* note 63, §§ 90 and 91.
- 81 *Id.* at § 89, sch. 13.
- 82 *Id.* at § 90.
- 83 *Market Structure Dashboard*, LEGAL SERVS. BD., <https://legalservicesboard.org.uk/market-structure-dashboard> (last visited July 26, 2022).
- 84 MARI SAKO & RICHARD PARNHAM, TECHNOLOGY AND INNOVATION IN LEGAL SERVICES: FINAL REPORT FOR THE SOLICITORS REGULATION AUTHORITY 7 (2021), <https://www.sra.org.uk/globalassets/documents/sra/research/full-report-technology-and-innovation-in-legal-services.pdf?version=4a1bfe> (referring to HENDERSON, *supra* note 22). See also BOS. CONSULTING GRP., THE EFFECTS OF DEREGULATING LEGAL SERVICES IN ENGLAND AND WALES 18 (2021), https://www.advokatforeningen.no/contentassets/1a52122e70894491a283a74441152fd8/the-effects-of-deregulating-legal-services-in-england-and-wales_vf.pdf.
- 85 SAKO & PARNHAM, *supra* note 84. ABSs are also concentrated in the litigation and dispute resolution sector, with an outsize presence in the personal injury arena. *Id.* See also CTR. FOR STRATEGY AND EVALUATION SERVS., IMPACT EVALUATION OF SRA'S REGULATORY REFORM PROGRAMME: A FINAL REPORT FOR THE SOLICITORS REGULATION AUTHORITY 5 (2018), <https://www.sra.org.uk/globalassets/documents/sra/research/abs-evaluation.pdf?version=4a1ac2>.
- 86 The ABS opportunity has also impacted the corporate legal sector, with each of the Big Four accounting firms have attained an ABS license, as well as multiple large law firms. BOS. CONSULTING GRP., *supra* note 84. At least six ABSs are publicly traded. CHRISTOPHER DECKER, REFORM

AND “MODERNISATION” OF LEGAL SERVICES IN ENGLAND AND WALES: MOTIVATIONS, IMPACTS, AND INSIGHTS FOR THE OECD PMR INDICATORS 13 (2021), <https://www.oecd.org/competition/reform/Reform-and-modernisation-of-20-legal-services-in-England-and-Wales.pdf>.

- 87 Between 2009 and 2019, the total number of entities in the U.K. legal services market rose by 15 percent. *Market Structure Dashboard*, *supra* note 83. Legal employment has followed a similar trend, with authorized legal providers increasing by some 27% over roughly the same period. *Id.*
- 88 CTR. FOR STRATEGY AND EVALUATION SERVS., *supra* note 85.
- 89 STEPHEN MAYSON, REFORMING LEGAL SERVICES: REGULATION BEYOND THE ECHO CHAMBERS 27 (2020) [hereinafter “MAYSON REPORT”], https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_final_report_final_0.pdf.
- 90 LEGAL SERVS. BD., THE STATE OF THE LEGAL SERVICES MARKET 2020 NARRATIVE VOL. 15 (2020), https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Narrative-Volume_Final.pdf. See also MAYSON REPORT, *supra* note 89, at 37; COMPETITION AND MKT. AUTH., LEGAL SERVICES MARKET STUDY: FINAL REPORT 4 (2016), <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>.
- 91 MAYSON REPORT, *supra* note 89, at 33, 89.
- 92 DEP’T CONST. AFFS., *supra* note 42, at 44-48.
- 93 LEGAL SERVS. BD., *supra* note 90 (“[P]roblems that critics of the Legal Services Act had foreseen, such as lower standards and loss of the sector’s international standing, have not materialized.”).
- 94 LEGAL SERVICES BD., THE STATE OF THE LEGAL SERVICES MARKET 2020 EVIDENCE COMPENDIUM 64 (2020), <https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Evidence-Compendium-FINAL.pdf#64>. In particular, satisfaction with the quality of advice rose from 76% in 2012 to 82% in 2020. *Id.* A 2020 study found that people using unregulated providers were mostly likely to be dissatisfied with the service they received. YOU GOV ET AL., LEGAL NEEDS OF INDIVIDUALS IN ENGLAND AND WALES 66 (2020), <https://www.lawsociety.org.uk/topics/research/legal-needs-of-individuals-in-england-and-wales-report>.
- 95 Zoom Interview with Jason Chapman, Legal Ombudsman, Legal Ombudsman Off. (U.K.) (Apr. 11, 2022) (on file with authors) (stating that ABS complaints are “virtually indistinguishable” from complaints about traditional providers). Specifically, the Solicitors Regulatory Authority found in a 2018 report that 32 percent of all reported allegations against ABS firms fell into its highest severity level (“amber” or “red”) compared to 39 percent for all firms. Those figures increased to 57 percent for small ABSs compared to 49 percent of all small law firms regulated by the SRA. CTR. FOR STRATEGY AND EVALUATION SERVS, *supra* note 85, at 23 (concluding that available data on misconduct “does not suggest that ABSs pose greater risks to consumers”). The SRA triages complaints by the severity and urgency of the alleged misconduct. Complaints can receive one of three “traffic light” grades: green (least urgent), amber (more urgent), and red (most urgent). *Id.* See also DECKER, *supra* note 86. *But see* BOS. CONSULTING GRP, *supra* note 84, at 18 (concluding that it is unclear whether the reforms have resulted in increased quality of services).
- 96 STEPHEN ROPER ET AL., ENTERPRISE RSCH. CTR. & WARWICK BUS. SCH., INNOVATION IN LEGAL SERVICES: A REPORT FOR THE SOLICITORS REGULATION AUTHORITY AND THE LEGAL SERVICES BOARD 22 (2015), <https://www.sra.org.uk/globalassets/documents/sra/research/innovation-report.pdf?version=4a1aba>; SAKO & PARNHAM, *supra* note 84. Sako and Parham use the following definition of innovation: “significantly improving existing services or introducing new services, or making improvements to the delivery or marketing of [] services.” *Id.* at 14. They report the results of an online survey finding that ABS respondents are more than twice as likely to have introduced new services (31%) than non-ABSs (13%) in the prior 12 months and that ABSs (53%) are more likely to have introduced new technology than non-ABSs (33%). See also LEGAL SERVS. BD., TECHNOLOGY AND INNOVATION IN LEGAL SERVICES—MAIN REPORT 5 (2018), <https://legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf> (finding that ABSs are three times as likely to use technology as traditional firms, with over a quarter of providers reporting that they had introduced new or improved services in the previous three years). Studies find other features of ABSs that are indicative of innovation: greater employment of nonlawyers relative to lawyers, a larger proportion of job postings for nonlawyer technology skills, and higher pay for technologists. SAKO & PARNHAM, *supra* note 84, at 8.
- 97 LEGAL SERVS. BD., *supra* note 96, 43.
- 98 LEGAL SERVS. BD., *supra* note 94, at 58.
- 99 LEGAL SERVS. BD., EVALUATION: CHANGES IN THE LEGAL SERVS. MARKET 2006/07 – 2014/15—MAIN REPORT 14; 65 (2016), <https://legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Main-report11.pdf>. Critics have argued that this theory oversells the potential access impacts of changes to the business or capital organizational form of legal entities. Robinson, *supra* note 36; Garoupa & Markovic, *supra* note 9.

- 100 See, e.g., YOUgov ET AL., *supra* note 94, at 6. The YouGov study collected information from a nationally representative sample of 28,663 people and identified how people addressed both contentious legal issues and non-contentious legal issues. Contentious legal work relates to legal matters that take place between two or more parties, such as a court hearing or a tribunal hearing to resolve a dispute; Non-contentious legal work relates to transactions occurring between one or more parties, such as the sale or purchase of a house. *Id.* at 5. The study found that over 64% of those surveyed had experienced a legal issue in the past four years; 53% experienced a contentious legal issue; and 27% experienced a non-contentious legal issue. *Id.* at 8. When faced with a legal issue (contentious or non-contentious), 66% of people received some form of help. Eighty-three percent of those receiving help received professional help; 17% relied on a family member or friend. *Id.* at 33. “Professional help” is defined as “Help from a person or organization in a professional capacity.” *Id.* at 39. Twenty-one percent of those facing a legal issue did not try to get any help. Thirteen percent tried to get help—either informally or from a professional—and were unsuccessful. *Id.* at 34. Of those facing a contentious legal issue, approximately half were determined to have a *legal need*: needed professional support to deal with the legal issue. The study found that 31% of those facing a contentious legal issue actually had an unmet legal need. *Id.* at 89. Legal needs studies in England and Wales across the years (e.g. 2012, 2015, 2020) each used a different methodology, undermining comparisons across time.
- 101 SOLIC. REGUL. AUTH., RESEARCH AND ANALYSIS: THE CHANGING LEGAL SERVICES MARKET 9 (2016), <https://www.sra.org.uk/globalassets/risk/resources/changing-legal-services-market.pdf>.
- 102 A final change that complicates the inferences that can be drawn may also warrant mention here: The unregulated sector’s reach likely expanded in 2019 when a further set of reforms permitted solicitors to work within unregulated entities. See *supra* note 79.
- 103 LEGAL SERVS. BD., *supra* note 90, at 15.
- 104 Dominic Gilbert, *Legal Aid Advice Network “Decimated” by Funding Cuts*, BBC NEWS (Dec. 10, 2018), <https://www.bbc.com/news/uk-46357169>.
- 105 On the one hand, cut-backs might have opened up market opportunities for for-profit providers, including retailers and insurance companies, while at the same time inducing the non-profit providers who remained to innovate by doing more with less. On the other hand, reduced funding may have stymied innovation by shrinking the pool of entities who could pilot new approaches.
- 106 The selection process for interviews with entities in England and Wales was relatively ad hoc; entities were identified through reviewing both the ABS registry of the Solicitors Regulation Authority and through reviews of media coverage of the reforms. We sought variety in business models but ultimately were opportunistic in which entities were interviewed. In the American jurisdictions, our primary focus was on interviews with entities in the Utah Sandbox which had actually launched their Sandbox services. This focus was driven by the fact that the Utah regulatory structure is less prescriptive and has a more expansive scope than that in Arizona making it slightly more challenging to determine how entities may be structuring their legal service delivery from the authorization materials alone.
- 107 The publicly available materials differ across jurisdictions; Arizona releases ABS applications redacted to remove personal information and Utah publishes the recommendation and court order authorizing the Sandbox entities.
- 108 One entity, Trajan Estate, is authorized in both jurisdictions.
- 109 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: DAVIS & SANCHEZ, (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Davis-and-Sanchez.pdf>. Zoom Interview with Halston Davis, Attorney, Davis & Sanchez (Feb. 14, 2022) (on file with authors).
- 110 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: ROCKY MOUNTAIN JUSTICE, (2021), <https://utahinnovationoffice.org/wp-content/uploads/2022/02/Auth-Packet-Rocky-Mountain-Legal.pdf>.
- 111 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: BLUE BEE BANKRUPTCY, (2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Blue-Bee.pdf>.
- 112 The firm’s practice is a mix of personal injury and medical negligence, public sector housing for both landlords and tenants, and wills, trusts, and family law.
- 113 Zoom Interview with David Marshall, Managing Partner, Anthony Gold Solics. (Apr. 19, 2022) (on file with authors).
- 114 As noted above (*supra* note 42), the potential benefits of venture capital and private equity come with significant potential downsides which merit serious consideration on management and mitigation of risk by policymakers.
- 115 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: LAWHQ, LLC 2 (2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-LawHQ.pdf>.

- 116 LAWHQ, <https://lawhq.com/> (last visited July 26, 2022).
- 117 Elias Mendoza Hill Law Group, Arizona ABS Application (Feb. 18, 2021) (on file with authors). Zoom Interview with Elias Mendoza, Founder, Elias Mendoza Hill L. Grp. (Mar. 2, 2022) (on file with authors).
- 118 Nathan Williams, "Livingbridge Acquires Stowe Family Law," PRIV. EQUITY INT'L (Feb. 23, 2017), <https://www.privateequityinternational.com/livingbridge-acquires-stowe-family-law/>.
- 119 Zoom Interview with Julian Hawkhead, Senior Partner, Stowe Fam. L. (Apr. 8, 2022) (on file with authors).
- 120 Williams, *supra* note 118.
- 121 LZ Legal Services, LLC, Arizona ABS Application (May 17, 2021) (on file with authors). Zoom interview with James Peters, Designated Principal, LegalZoom (Feb. 2, 2022) (on file with authors).
- 122 Rocket Lawyer has a similar model and is authorized in the Utah Sandbox. It also offers unregulated legal services in England and Wales through solicitor employees. Zoom Interview with Heba Gamal, Vice President for Bus. Dev., & Adnan Mahmood, Head of Legal Advice – U.K., Rocket Law. (Jan. 27, 2022) (on file with authors).
- 123 ElevateNext US, Arizona ABS Application (Aug. 10, 2021), (on file with authors). Zoom Interview with Liam Brown, Chief Exec. Officer, & Steve Harmon, Chief Legal Officer, Elevate Servs. (Feb. 18, 2022) (on file with authors).
- 124 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: HELLO DIVORCE (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Hello-Divorce.pdf>.
- 125 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: NUTALL, BROWN & COUTTS (2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Nuttall-Brown.pdf>.
- 126 *Id.*
- 127 Zoom Interview with Tyler Brown, CEO Nuttall Brown & Coutts d/b/a/ ZAF Legal (Feb. 2, 2022) (on file with authors).
- 128 Arete Financial, Arizona ABS Application (Feb. 22, 2021) (on file with authors). Zoom Interview with Edwin Ashton, Principal, Arete Financial (Feb. 24, 2022) (on file with authors).
- 129 Zoom Interview with Howard Shurkett, Deputy Compliance Officer, KPMG (U.K.) (Mar. 10, 2022) (on file with authors).
- 130 *Id.*
- 131 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: GOVASSIST (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/12/Auth-Packet-GovAssist.pdf>.
- 132 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: LAW ON CALL (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/05/Auth-Packet-Law-on-Call.pdf>; Zoom Interview with Daniel Wilde, Head of Legal Servs., L. on Call (Feb. 3, 2022) (on file with authors).
- 133 Interview with Daniel Wilde, *supra* note 132.
- 134 *Our Co-Op*, CO-OP, <https://www.co-operative.coop/about-us/our-co-op> (last visited July 26, 2022).
- 135 CO-OP, <https://www.co-oplegalservices.co.uk/> (last visited July 26, 2022).
- 136 *Winners*, BRITISH WILLS & PROB. AWARDS, <https://www.britishwillsandprobateawards.co.uk/winners-2018/> (last visited July 26, 2022).
- 137 Neil Rose, Revenue up as Co-op Legal Services Expands Reach, LEGALFUTURES (Sept. 17, 2021), <https://www.legalfutures.co.uk/latest-news/revenue-up-as-co-op-legal-services-expands-reach>.
- 138 Zoom Interview with Caoilinn Hurley, Managing Dir., Life Planning and Legal, Co-Op Legal Services (Apr. 26, 2022) (on file with authors).
- 139 *About Us*, PATHFINDER LEGAL SERVS., <https://www.pathfinderlegal.co.uk/about-us/> (last visited July 26, 2022).
- 140 Zoom Interview with Debbie Carter-Hughes, Exec. Director, Pathfinder Legal Services (May 6, 2022) (on file with authors).
- 141 Zoom Interview with Guy Grayson, General Counsel, MJ Hudson (Feb. 10, 2022) (on file with authors).
- 142 See, e.g., Mary Ann Azevedo, *UpCounsel Avoids Shutdown after Last-Minute Acquisition by Enduring Ventures*, Crunchbase News (Apr. 2, 2020), <https://news.crunchbase.com/venture/upcounsel-avoids-shutdown-after-last-minute-acquisition-by-enduring-ventures/>. See also Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955 (2018).
- 143 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: OFF THE RECORD (AMENDED) (2022), <https://utahinnovationoffice.org/wp-content/uploads/2022/05/Amended-Auth-Packet-Off-the-Record.pdf>.

- 144 England and Wales also have examples of nonlawyer and technology-based legal practice services but they are in the unregulated market. MacKenzie Friends, for example, are nonlawyers who help others, sometimes for free and sometimes for a fee, in court appearances. They are not regulated or controlled by the state—anyone can act as a MacKenzie Friend—but they are limited what they can say or do in court because they do not have “rights of audience” – one of the reserved legal activities that can only be performed by a regulated person. See *McKenzie Friends*, LEGAL CHOICES, <https://www.legalchoices.org.uk/types-of-lawyers/other-lawyers/mckenzie-friends> (last visited July 26, 2022).
- 145 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: SUDBURY CONSULTING (2021), <https://utahinnovationoffice.org/wp-content/uploads/2022/03/Amended-Auth-Packet-Sudbury-Consulting.pdf>.
- 146 Email from Noella Sudbury, Founder and CEO, Rasa Legal (Aug. 16, 2022) (on file with authors).
- 147 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: TIMPANOGOS LEGAL CENTER’S CERTIFIED LEGAL ADVOCATE PROGRAM (2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-TLC-Certified-Advocates.pdf>.
- 148 Zoom Interview with Susan Griffith, Exec. Director, Timpanogos Legal Center (Feb. 16, 2022) (on file with authors).
- 149 *Id.*
- 150 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: UTAH LEGAL ADVOCATES (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/09/Auth-Packet-Utah-Legal-Advocates.pdf>.
- 151 As noted previously, both states are *also* pursuing a species of UPL reform through a limited licensure program that allows paraprofessional individuals to provide legal services. As noted, this Report does not address this latter reform.
- 152 Zoom Interview with Elias Mendoza, *supra* note 117.
- 153 Zoom Interview with Allen Rodriguez & Mary Juetten, Singular L. Grp. (Feb. 13, 2022) (on file with authors).
- 154 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: ESTATE GURU (2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Estate-Guru.pdf>; OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: JORDANELLE BLOCK (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Jordanelle-Block.pdf>.
- 155 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: LAWGEEX (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-LegaLogic.pdf>
- 156 *Id.*
- 157 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: DSD SOLUTIONS (2020), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-DSD.pdf>.
- 158 Interview with Evan Seamone, Legal Manager and General Counsel, Trajector Legal (Apr. 29, 2022) (on file with authors). OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: TRAJECTOR LEGAL (FORMERLY LEGAL CLAIMS BENEFITS) (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Legal-Claims-Benefits.pdf>.
- 159 Radix Prof I Servs., Arizona ABS Application (May 7, 2021) (on file with authors); Keystone Wealth Partners, Arizona ABS Application (Mar. 2, 2021) (on file with authors); Trajan Estate, Arizona ABS Application (Dec. 30, 2020) (on file with authors).
- 160 See e.g., OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: XIRA CONNECT (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Xira.pdf>.
- 161 See Arizona State Court Website, Alternative Business Structures (ABS): Questions and Answers, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs> (last visited Aug. 9, 2022).
- 162 See *supra* note 155.
- 163 Interview with Jason Velez, Founder and CEO, 1Law Legal Services (Jun. 4, 2022) (on file with authors).
- 164 See *supra* note 151.
- 165 OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: HOLY CROSS MINISTRIES (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/05/Auth-Packet-Holy-Cross.pdf>; OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: AAA FAIR CREDIT FOUNDATION / PEOPLE’S LEGAL AID, <https://utahinnovationoffice.org/wp-content/uploads/2021/05/Auth-Packet-AAA.pdf>.
- 166 INNOVATION FOR JUSTICE, PROJECT BRIEF: ADVANCING LEGAL EMPOWERMENT FOR UTAHNS EXPERIENCING MEDICAL DEBT (2020), <https://static1.squarespace.com/static/60dcbec3c8e7ab3e5de9acbe/t/62d1b87458ac192336a449ff/1657911412325/MDLA+Project+Brief.pdf>.
- 167 Utah requires entities to identify which legal service areas they will be offering services in and the entity authorization is limited by those areas. Arizona does not

explicitly request an itemization of legal service area but entities generally supply their area of focus in their description of their ABS. This likely means that some of the legal service areas in which no ABS entity appears to be offering services may actually have ABS-provided services but we are unable to clearly determine that it is happening.

- 168** Utah asks entities to identify whether they have or are seeking nonlawyer ownership and specifically asks whether it is less than 50 percent or 50 percent or higher. Arizona does not ask this and does not ask what percentage of an entity is owned by lawyers or by nonlawyers. Arizona does ask entities to identify those people (human or corporate) who will own 10 percent or more of an entity, but it does not explicitly ask those people be identified by whether they are an Arizona lawyer or not. Arizona does require submission of Articles of Incorporation and, often, any operating agreements or shareholder agreements which can help with determining percentage of ownership. These numbers, however, may be updated in the future with better information.
- 169** A technological innovation was only coded as such if it was clearly something more than a website.
- 170** OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., SANDBOX AUTHORIZATION PACKET: MOUNTAIN WEST LEGAL PROTECTIVE (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-MWLP.pdf>.
- 171** Email from Suzanne Porter, Legal Serv. Innovations Off., Ariz. Sup. Ct. (Jun. 14, 2022) (on file with authors).
- 172** OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., INNOVATION OFFICE ACTIVITY REPORT: EXECUTIVE SUMMARY—JUNE 2022, at 6 (2022), <https://utahinnovationoffice.org/wp-content/uploads/2022/07/IO-Monthly-Public-Report-June-2022.pdf>.
- 173** STANDING COMMITTEE ON PROFESSIONAL REGULATION OF THE AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, 2018 SURVEY ON LAWYER DISCIPLINE 5 (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf.
- 174** A per-service approach make sense for entity-based delivery of legal services, which often combines multiple provider types within a single authorized entity. Services—in the Utah sandbox framework—are loosely defined as portions of legal representation (e.g. question answered, limited assistance – legal advice, limited assistance – document completion, limited assistance – supported negotiation or transaction, etc. See OFF. OF LEGAL SERVS. INNOVATION, UTAH SUP. CT., DATA SUBMISSION TEMPLATE 1.30.2021 LOW AND LOWMODERATE REVISED, TAB 2 (2021), <https://docs.google.com/spreadsheets/d/1ZJMB0bdQcVhe3g8PBOVVo2BzPBzZ04ml/edit#gid=856398876>
- 175** Credit for the following estimation approach goes to Dr. James Teufel, Head of Data for the Utah Office of Legal Services Innovation.
- 176** 2018 data from LSC show 6,909 lawyers (categorized as advocacy staff). A total of 743,113 cases were closed in 2018 by LSC, 75% of which were limited service cases with a maximum of 2 services per case. LEGAL SERVICES CORP., BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS, 32, 37, 71 (2020), <https://lsc-live.app.box.com/s/amlce75n3jdgjw6omzjewm61eghavzt/file/872174451862>. Assuming an average of 2 services per lawyer per case, we conclude approximately 215 services per lawyer per year.
- 177** See e.g. Jeremy Schoen, et al., The Innovation Cycle: A New Model and Case Study for the Invention to Innovation Process, *Engineering Management Journal*, 17:3, 3-10, DOI: 10.1080/10429247.2005.11415292.
- 178** See *supra* note 1 for references.
- 179** UTAH SUP. CT. STANDING ORD. NO. 15, *supra* note 70.
- 180** See *supra* note 12 (describing the two states' parallel professional reforms).
- 181** INNOVATION FOR JUSTICE, REPORT TO THE ARIZ. SUP. CT TASK FORCE ON DELIVERY OF LEGAL SERVICES: DESIGNING A NEW TIER OF CIVIL LEGAL PROFESSIONAL FOR SURVIVORS OF DOMESTIC VIOLENCE (Spring 2019), <https://arizona.app.box.com/s/qkywph1ykhxr2p0cebbviviwph1q84dpw>.
- 182** AM. BAR ASS'N, PROFILE OF THE LEGAL PROFESSION 2021, at 113 (2021), www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf.



SECONDS TO IMPACT?: REGULATORY REFORM, NEW KINDS OF LEGAL SERVICES, AND INCREASED ACCESS TO JUSTICE

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I

INTRODUCTION

A range of reforms to the way legal services may legitimately be produced and funded is underway around the United States. California, Arizona, and Utah have all moved to relax the rules about who can profit from the sale of legal services, which have historically restricted this to licensed lawyers.¹ Utah has, in addition, moved to release restrictions on who and what may provide legal services directly to the public, permitting service models that violate long-standing unauthorized practice of law provisions that have kept nonlawyer humans and software applications from providing legal advice and representation.²

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1 Maddie Hosack, *Arizona Carries Regulatory Reform Momentum Forward with Historic Vote*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Sept. 22, 2020), <https://iaals.du.edu/blog/arizona-carries-regulatory-reform-momentum-forward-historic-vote> [<https://perma.cc/X8XM-4FRG>]; Zachariah DeMeola, *Utah Supreme Court Makes History with Vote to Establish Regulatory Sandbox*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 17, 2020), <https://iaals.du.edu/blog/utah-supreme-court-makes-history-vote-establish-regulatory-sandbox> [<https://perma.cc/AC3K-B5DV>]; Sam Skolnik, *California Bar Trustees Move Toward New Regulatory 'Sandbox'*, BLOOMBERG L. (May 14, 2020, 5:50 PM), <https://news.bloomberglaw.com/us-law-week/california-bar-trustees-move-toward-new-regulatory-sandbox> [<https://perma.cc/Y44D-CQEX>].

2 DeMeola, *supra* note 1; Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public: Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2587 (2013).

A key motivation for these changes is access to justice. For example, it was with “[t]he overarching goal of . . . improv[ing] access to justice”³ that Utah opted to create a “regulatory sandbox,” a controlled and monitored experimental regulatory space that relaxes rules about nonlawyer profit from legal services and unauthorized practice of law.

The ultimate measure of the success of this and other projects will be whether or not access to justice is, in fact, improved. Increased access would be a function of factors on both sides of the market. On the supply side, the newly permitted services would need to be discoverable, effective, and sustainable, and provide their services in fair and accurate ways. On the demand side, consumers would need to be interested in and able to actually use the new services, as no amount of affordable excellence has impact if it lies idle.

This paper explores a single question: assuming that innovation results in the offering of effective, competent services to consumers, how long will it take until those services actually change the landscape of access to justice?

Because Utah is the furthest along in reforms, we take it as a case study. We consider three structural factors that will shape the timing of reform’s impact. First, many observers believe considerable latent demand exists for legal services because many people currently experience justice problems for which they receive no assistance. How big is this to-date unrealized market for legal services? Second, what is the scale of newly permitted activity, and how fast might it grow? Third, even the most effective services have no impact if they are not used. How long will it take providers to adopt and consumers to start using newly permitted models of service production and delivery?

For present purposes, we focus on a very simple measure of access to justice: whether people and organizations with civil justice problems get some kind of legal assistance in handling them. Our analysis is meant to illustrate the factors to consider rather than precisely forecast a future. The assumptions we rely upon are many, but not implausible. The imprecision is unavoidable because of the unfortunate fact that there are little reliable data on civil justice in the United States.⁴ We illustrate three points: (1) Like Americans generally, Utahns experience a large number of justice problems for which they currently receive no legal service—in Utah, we estimate that this is on the order of over 2.4 million such problems each year.⁵ (2) To scale up to meet any substantial proportion of this need during the two-year initial window of Utah’s experiment, current provider activity would need to increase substantially, perhaps on the order of 240-fold from its current level.⁶ (3) It will likely be several years before these

3. Utah Supreme Court Standing Order No. 15 at 7 (effective Aug. 31, 2020), <http://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/REVISED-Utah-Supreme-Court-Standing-Order-No.-15.Redline.pdf> [<https://perma.cc/6CCF-YCTJ>].

4. AM. ACAD. OF ARTS AND SCI., MEASURING CIVIL JUSTICE FOR ALL IV (2021), <https://www.amacad.org/sites/default/files/publication/downloads/2021-Measuring-Civil-Justice-for-All.pdf> [<https://perma.cc/66LK-BVE4>].

5. See *infra* notes 8–21 and accompanying text.

6. See *infra* notes 24–32 and accompanying text.

reforms achieve noticeable impacts on access to justice.⁷

II

UNMET NEED FOR LEGAL SERVICES

Estimating the size of currently unmet need for legal services is a challenging task. Not every unserved justice problem is a legal need, as people can sometimes successfully handle such problems on their own.⁸ Debates about access to justice typically assume that high income households and large organizations are already capable of acquiring legal services when they need or want them. The “justice gap” is believed to be a problem for low-income people, the middle class, and small businesses. Surveys exist that document the distribution of justice problems across populations and whether people currently receive legal assistance for those problems. In the United States, most such surveys focus on low-income groups, though a few represent entire populations of a community or state.

In 2019, the Utah Bar Foundation commissioned a survey of Utah households at 200% of the poverty line or below. Drawing on American Community Survey data, the study estimates that just over 800,000 Utahns, or about 25% of the state’s population, live in such households.⁹ In the study, 57% of low-income households reported at least one justice problem in the previous twelve months.¹⁰ As is a typical finding in this type of research, households with multiple problems contribute a large share of total problems: the 22% of low-income households that experienced three or more problems encounter 65% of all justice problems experienced by low-income people in Utah.¹¹ Based on the study, we estimate that these households experienced over 1,000,000 justice problems in 2018.¹²

7. See *infra* notes 34–42 and accompanying text.

8. Rebecca L. Sandefur & James Teufel, *Assessing America’s Access to Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 755 (2021).

9. UTAH FOUNDATION, *THE JUSTICE GAP: ADDRESSING THE UNMET LEGAL NEEDS OF LOWER-INCOME UTAHNS 2–3* (Apr. 2020), https://www.utahbarfoundation.org/images/pdfs-doc/UBF_Justice_Gap_-_Full_Report.pdf [<https://perma.cc/P9A4-SFRJ>].

10. *Id.* at 21. Low-income Utahns report fewer justice problems than are discovered in most other surveys. For example, a recent World Justice Project survey of Americans at all income levels found that 66% reported at least one justice problem in the previous two years. WORLD JUST. PROJECT, *GLOBAL INSIGHTS ON ACCESS TO JUSTICE 108* (2019), <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> [<https://perma.cc/2F25-TX7Z>]. In contrast, the Legal Services Corporation 2017 study of the national population of people living at 125% of poverty or below found that 71% of respondents had at least one civil justice problem. LEGAL SERVS. CORP., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, <https://www.lsc.gov/justicegap2017> [<https://perma.cc/FV84-63VQ>].

11. Authors’ calculations from data presented in UTAH FOUNDATION, *supra* note 9, at 21.

12. Authors’ calculations from data presented in UTAH FOUNDATION, *supra* note 9, at 21 fig.18.

Number of justice problems	Percent of households reporting	Implied number of problems
0	43%	0
1	23%	184,158

Legal services providers that work with low-income populations gave assistance to 42,720 households during that same time period.¹³ If we assume that that help went to households with on average 1.5 problems, this implies that roughly 944,854 [=1,008,934-(42,720*1.5)] justice problems of the low-income population went unserved by legal aid providers.¹⁴

No similar data exist for the justice problem experiences of middle-income Utahns. In order to estimate how many justice problems this group experienced, we define people below the top 10% of the income distribution as “middle-income.” In Utah, 65% of the state’s population has incomes above 200% of poverty and below the top 10% of all incomes, or about 2,080,000 people.¹⁵ Average household size in Utah (3.1 people)¹⁶ is a bit larger than the national average (2.56 people),¹⁷ so this implies 670,968 middle-income households in the state of Utah.

Existing evidence suggests that middle-income households experience different types of justice problems from low-income households, but are not necessarily less likely to encounter such problems. For example, the American Bar Association’s 1994 national study of the legal needs of the public found that 47% of households below 125% of the federal poverty line were experiencing at least one justice problem, while 52% of middle-income households were.¹⁸ The average number of problems experienced by low-income households was 0.9, while the average number for middle-income households was 1.0.¹⁹ Using this average to estimate the number of middle-income justice problems in Utah produces an estimate of 670,968 justice problems experienced by this group. No evidence exists for how many of these problems received a legal service in Utah. In the 1994 national survey, 29% of the justice problems reported by low-income

2	12%	192,165
3	9%	216,185
4	5%	160,137
5	3%	120,103
6	2%	96,082
7	1%	56,048
8		64,055
9		72,062
Total	100%	1,008,934

13. See UTAH FOUNDATION, *supra* note 9, at 23 fig.22.

14. This assumes that the only source of service to the low-income population is organizations that provide service for free but other research suggests that low-income households also purchase legal services from the private practice bar. AM. BAR. ASS’N., CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, REPORT ON THE LEGAL NEEDS OF THE LOW- AND MODERATE-INCOME PUBLIC 29 (1994).

15. See UTAH FOUNDATION, *supra* note 9, at 1.

16. *Id.* at 2.

17. U.S. CENSUS BUREAU, CHANGES IN HOUSEHOLD SIZE, CURRENT POPULATION SURVEY, ANN. SOC. & ECON. SUPPLEMENTS fig. HH-6 (2021), <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/hh-6.pdf> [<https://perma.cc/EQP4-TYFU>].

18. See AM. BAR ASS’N., *supra* note 14, at 8.

19. *Id.* at 9.

people received some kind of legal service, either from a lawyer, a hearing body, or both. The comparable figure for middle-income households was 39%.²⁰ Thus, assuming that Utah's middle-income households are similar to those in the 1994 ABA study, we can estimate that 409,290 problems of middle-income people went unserved.

Even less information is available on the justice problems of small businesses. The range of problems experienced by such organizations in the United States is not known, but it probably centers around financial and employment issues and contract disputes, as well as taxes and real and intellectual property. In Utah, there are 277,140 small businesses, which account for 99.3% of all companies in the state.²¹ A 2015 survey of small enterprises (those with fewer than fifty employees) in the United Kingdom found these organizations experienced an average of thirteen justice problems.²² Notwithstanding the complications of measurement and definition, the general point is that justice issues are common for small business. Making the conservative assumption that Utah's small businesses encounter an average of five justice problems per year, that is 1,385,700 [=277,140*5] problems. We have no direct information on how many of these problems receive legal services of some type. The United Kingdom study cited above reported that 23.4% of small organizations' "most recent" problems involved assistance by an "independent advisor/representative/support service."²³ Of course not all of these services were legal services; for example, accountants offer tax advice, human resources professionals advise on personnel policies, and so forth. If Utah's small businesses are broadly similar, we would expect that small businesses experienced at least 1,061,446 [= (1-.234)*1,385,700] problems every year that receive no service.

Combining these three quantities, we can then estimate that low- and middle-income people and small businesses in Utah experience over 2.4 million civil justice problems every year that receive no legal services of any type. On the back of the envelope that we are scribbling on here, that is 79% of all civil justice problems experienced by these groups. While these numbers are quite stark, they are also consistent with other research.²⁴

20. *Id.* at 21.

21. U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, 2018 SMALL BUSINESS PROFILE: UTAH 1 (2018), <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-UT.pdf> [<https://perma.cc/N45Q-B3ES>].

22. ROBERT BLACKBURN, JOHN KITCHING & GEORGE SARIDAKIS, THE LEGAL NEEDS OF SMALL BUSINESS: AN ANALYSIS OF SMALL BUSINESSES' EXPERIENCE OF LEGAL PROBLEMS, CAPACITY AND ATTITUDES 21 (2015).

23. *See id.* at 50 tbl.5.1 (stating that the survey results indicated that 15.3% of small businesses sorted out their most recent problem with help from these service providers and 8.1% relied on these service providers to sort out the problem for their business).

24. PASCOE PLEASENCE, 'LEGAL NEED' AND LEGAL NEEDS SURVEYS: A BACKGROUND PAPER 9 (2016), https://namati.org/wp-content/uploads/2016/11/OSJI-Legal-Needs-Surveys-Background-Materials-1-An-Introduction-to-Legal-Needs-Surveys-1-v3.6-2016-06-22-web_Pascoe.pdf [<https://perma.cc/AEQ3-323K>]; Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS, Winter 2019, at 49–55.

In this exploration, our measure of access to justice is a very simple one: does a justice problem receive a legal service of any kind—advice, representation, advocacy? Since the most common level of service received at present appears to be *no service*, any assistance at all would be an important change and, as we will discuss below, would indicate a breakthrough of existing barriers. While the ultimate goal may well be the one stated by the Conference of Chief Justices, “100 percent meaningful access to justice,”²⁵ in practice such a goal would be achieved in stages—for example, a 20% reduction in unmet need, then a 50% reduction, and so forth.

II

NEWLY PERMITTED ACTIVITY

One way to facilitate access to justice is to expand the number of authorized legal service providers. Based on our case study of Utah, current provider activity would need to increase significantly to make a noticeable impact. However, increases in the number of entities offering legal services do not guarantee that such services will actually be used, as many people fail to even recognize that their problems call for legal assistance.²⁶

A. Current Scale of Activity

Utah’s legal services regulatory sandbox opened in August 2020 as a two-year pilot project.²⁷ At this writing, Utah has approved twenty-two providers to offer legal services.²⁸ All but one are small organizations, and the large organization operates through a small local staff. Current monthly case volumes for these entities are in the single or double digits: all sandbox entities combined had offered services to address fewer than 500 legal problems. If existing organizations scaled up to serve an average of 500 problems per month, that would generate a total of 11,000 services each month, or 132,000 services per year. If each service involves treating a single justice problem, scaling up to 132,000 services per year would mean serving about 5.5% of our estimate of the current volume of unserved justice problems in Utah. If each service involved an average of two problems, that would mean serving about 11% of the current volume unserved.

Achieving even these modest impacts would require an increase in the current scale of sandbox activity on the order of sixty-fold. If the goal is to make

25. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3: EXPANDING MEANINGFUL ACCESS TO JUSTICE FOR ALL 2 (2018), https://ccj.ncsc.org/__data/assets/pdf_file/0011/23510/01312018-expanding-meaningful-access-to-justice-for-all.pdf [<https://perma.cc/S7QH-45QU>].

26. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 14 (2014).

27. UTAH CTS., *Supreme Court Regulatory Reform—Revised—Effective August 31, 2020* (Sept. 1, 2020), <http://www.utcourts.gov/utc/rules-approved/2020/09/01/supreme-court-regulatory-reform-revised-effective-august-31-2020/> [<https://perma.cc/M2E5-JCUC>].

28. OFF. OF LEGAL SERVS. INNOVATION, *Approved Applications*, <https://sandbox.utcourts.gov/approved> [<https://perma.cc/C2DT-G9ZA>].

a noticeable impact on access to justice, such as to serve a third of currently unserved needs, scale would need to increase much more dramatically. Indeed, the entities in the sandbox would need to increase service output by between around 240-fold—if each service treats an average of two problems—and 480-fold—if each treats one problem. The necessary increase is likely actually even larger, as these calculations assume that the new services would recruit new clients who are not using traditional services, rather than draw current legal services users from existing providers. If the new services were cheaper or otherwise superior to traditional services, we would expect the latter—that is, that current clients of lawyers would move to the new providers. It is also possible that new services might emerge to address types of legal issues that are not explored in current research on civil legal needs.

While increases of this size are certainly possible over periods of decades, they are unlikely to manifest in a two-year pilot window.

B. Pace of Adoption

Just because services exist does not mean people will use them. A classic example from the legal context is a simple will. These are inexpensive—a few hundred dollars—and can greatly ease the financial and social transitions necessary after someone’s death. Lawyers and many document preparation services already exist to assist people in creating wills. Yet, most Americans do not have wills.²⁹

New services can reach consumers in two ways. One is through their adoption by existing service providers that consumers already work with. Several current entrants to Utah’s sandbox are traditional legal services providers seeking to scale their capacity and expand their market share by offering services through nonlawyer humans and software.³⁰ As a profession, lawyers are not among the most open to innovation, so the spread of these new models may be slow.³¹ Other sectors are similar. For example, research on the diffusion of innovation in health care finds that the translation of a new idea into an adopted clinical practice typically takes seventeen years.³²

29. Megan Doherty Bea & Emily S. Taylor Poppe, *Marginalized Legal Categories: Social Inequality, Family Structure, and the Laws of Intestacy*, 55 LAW & SOC’Y REV. 252, 254 (2021).

30. See OFF. OF LEGAL SERVS. INNOVATION, *supra* note 28 (listing approvals for companies in the sandbox).

31. Clio, a provider of practice management software, produces fascinating annual reports that demonstrate empirically how little progress has been made toward the adoption of productivity-enhancing technology and practices by the kinds of smaller law firms that provide most of the legal services consumed by people and small businesses. For example, Clio is the source for the notorious finding that lawyers put in an average of only 2.2 billable hours per day because they spend their time inefficiently performing tasks that other people and computer programs could be performing on their behalf. See CLIO, LEGAL TRENDS REPORT 5 (2016), <https://files.clio.com/marketo/ebooks/2016-Legal-Trends-Report.pdf> [<https://perma.cc/2A22-3LXN>].

32. See Zoë Slote Morris, Steven Wooding & Jonathan Grant, *The Answer is .7 Years, What is the Question: Understanding Time Lags in Translational Research*, 104 J. OF THE ROYAL SOC’Y OF MED. 510, 510 (2011) (“It is frequently stated that it takes an average of 17 years for research evidence to reach clinical practice.”).

The other way consumers can access new services is to discover them directly and recognize them as potentially useful for the concrete problems they confront. An interesting argument from contemporary research on consumer behavior is that consumption of new goods and services spreads faster today than in the past. For example, it took roughly seventy years for 90% of American households to have landline telephones, but less than two decades for 90% to have a cell phone.³³ While this example may be striking on its face, it is more nuanced: cell phones, internet use, and social media permit new kinds of behavior, but they are also all ways of engaging in behaviors—phone conversations, news consumption, connecting with friends and family—that were already well-established parts of ordinary life before the introduction of new modalities for doing the same things.

Consumption of legal services is different. Most Americans do not use legal services of any type for most of their civil justice problems. The most common reason Americans do not seek legal services for legal problems is that they do not understand their problems to have legal aspects and fail to recognize that legal help can potentially improve their situations.³⁴ Services like RocketLawyer and LegalZoom help people complete documents for the types of problems people are already most likely to recognize as legal³⁵—for example, formally legal actions like divorce and wills, leases, and other types of contracts. But consumers are less likely to see the legal dimensions of other types of issues, such as problems with employment, insurance, pensions and other benefits, and the like.³⁶ So the adoption of new types of legal services by the public must overcome the barrier of consumers recognizing that they might benefit from such services *at all*, regardless of whether services are traditional or innovative.

In addition to barriers of discovery, consumers can be confused about what new services are and can do. Two authors of this paper studied nonlawyer “Navigators” in debt and eviction courts and certified, limited scope independent paralegals working family cases. Consumers had difficulty discovering that these services existed and were unsure how they were different from lawyers. Confusion about what these new kinds of roles could and could not do extended even beyond the general public to court staff and traditional attorneys whose work brought them into contact with these new kinds of providers.³⁷

33. W. Michael Cox & Richard Alm, *You Are What You Spend*, N.Y. TIMES (Feb. 10, 2008), <https://www.nytimes.com/2008/02/10/opinion/10cox.html> [<https://perma.cc/Z3YU-ZS8R>].

34. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 443–44 (2015).

35. Pascoe Pleasence, Nigel Balmer & Stian Reimers, *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, 1 OñATI SOCIO-LEGAL SERIES, no. 6, 2011, at 10 fig.3.

36. *Id.*

37. See REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 44 (2016) (noting inadequate communication about the Navigators program left confusion among court staff and other legal providers); see also THOMAS M. CLARKE & REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 9 (2017) (noting those in

III

WHERE AND WHEN MIGHT WE SEE IMPACT?

Expanded access to justice in the form of greater access to legal services could have effects across a wide range of outcomes and sectors. Two groups of actors likely to experience the earliest impacts are courts and the public. Nonetheless, the ultimate extent of such impacts remains to be seen with time.

A. Where Would Access to Justice Impacts Appear?

State and municipal courts—where most of the legal issues experienced by people and small businesses that become court cases are heard—currently struggle to handle a high volume of unrepresented litigants. On top of being unrepresented, these litigants may have received no assistance at all in preparing documents, arguments, or evidence necessary to pursue their cases. If reforms permit new forms of representation, these could reduce the number of unrepresented litigants that courts must deal with. New forms of advice and other services could also better prepare people for representing themselves, reducing the burdens on court staff. In some case types, for example debt collection, many jurisdictions observe that a majority of the targets of such lawsuits default, failing to respond to claims of debt or appear at scheduled hearings.³⁸ New services permitted under regulatory reforms could enhance the capacity of people to participate in their own cases. Greater access to legal services could increase the caseloads of courts as more people become able to pursue formal legal resolutions to legal problems; however, it could also reduce caseloads as greater access to legal expertise leads to the prevention and resolution of justice problems before they become court cases.

Americans currently experience a high volume of civil justice problems—situations that have civil legal aspects, raise civil legal issues, and have consequences shaped by the civil law.³⁹ Most of these issues currently receive no assistance from a legal expert. Most of these issues are not filed with courts or other kinds of hearing bodies. Many people lose the protection of important rights and face hardships—for example, lost income, lost housing, damage to their health—because they do not get assistance with civil justice problems.⁴⁰ Access to effective assistance with these very common problems would be of

similar roles in Washington State encountered confusion among clients about what their proper role was).

38. Megan Leonhardt, *Debt collectors are leveraging the court system more than ever—and this may have significant consequences for Americans*, CNBC (May 12, 2020), <https://www.cnbc.com/2020/05/11/debt-collectors-are-leveraging-the-courts-more-than-ever-before.html> [<https://perma.cc/HYJ2-3PN5>].

39. Sandefur & Teufel, *supra* note 8, at 766 (suggesting tens of millions of Americans face civil justice problems regularly).

40. AM. ACAD. OF ARTS AND SCIS., *Why a Major Initiative for Access to Civil Justice is Needed Now*, in CIVIL JUSTICE FOR ALL 6, (2020), <https://www.amacad.org/publication/civil-justice-for-all> [<https://perma.cc/8PB9-8N4N>].

tremendous benefit to the public.

B. When Would Courts Notice?

It is difficult to know how big any changes in workload and case flow would need to be in order for courts to notice them. Courts would probably not notice if a few more people had access to legal services, but they might notice if part of their workflow began to change substantially—for example, if default rates began to drop. Utah’s 2019 “justice gap” study found that debt collection lawsuits were an eye-popping 62% of all civil court cases, in which respondents—those against whom claims of unpaid debt are alleged—had no representation in 98% of cases.⁴¹ Even in Utah’s small claims courts, respondents suffer default judgments at least 70% of the time.⁴² If 70% of respondents defaulted in the roughly 57,000 debt collection cases filed in Utah District Courts in 2020,⁴³ there would be 39,900 defaults. As such, courts might notice a 10% reduction in default rates since that is almost 4,000 extra people showing up in court to respond to debt claims. Courts would very likely notice a one-third reduction in default rates—over 13,000 extra people showing up to respond to debt claims. Recall that Utah’s sandbox entities are currently offering less than 150 services per month in total across many areas of law, of which debt is only one. Without a sea change in activity in the sandbox, it would take a long time for these services offered to affect a measure such as Utah’s debt collection default rate.

C. When Would We Expect the Public to Notice?

Most of the civil justice problems of the public do not become court cases, so changes in court activity would provide a very incomplete picture of increased access to legal services.⁴⁴ One straightforward way to learn about public consumption of legal services is to ask people directly, through surveys. Unfortunately, the United States’ longstanding failure to invest in civil justice data infrastructure makes this difficult. Unlike for other issues of public benefit and policy—such as high school dropout, college completion, unemployment, and access to health insurance—there is no regular series of surveys that would allow us to compare public experience with justice problems before and after the

41. UTAH FOUNDATION, *supra* note 9, at 4. This pattern is true nationally. See THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 14 fig.8 (2020), (showing that across seven different jurisdictions the vast majority of debt claims were litigated without counsel for consumers).

42. NAT’L CTR. FOR STATE CTS., IMPACT OF THE UTAH ONLINE DISPUTE RESOLUTION (ODR) PILOT PROGRAM: FINAL REPORT 10 fig.3 (2020), https://www.ncsc.org/__data/assets/pdf_file/0025/57823/NCSC-UT-final-2020.pdf [<https://perma.cc/P2V8-M8FQ>].

43. See UTAH DISTRICT COURTS: FY2020 CASE TYPE BY COURT: STATEWIDE TOTAL (2020), <https://www.utcourts.gov/stats/files/2020FY/district/0-Statewide.pdf> [<https://perma.cc/GG4A-XB4F>]. An additional unknown number of debt collection cases were filed in small claims courts.

44. Sandefur, *supra* note 34, at 448 (“The most recent U.S. national survey, from the early 1990s, found that 24% of situations were taken to attorneys, and 14% involved courts.”).

implementation of regulatory reform.⁴⁵

The most readily available information about public contact with new services will be from regulatory reform agencies themselves. For example, Utah's sandbox collects a range of information on a regular basis from participating entities, including the number of services offered by service area—for example, family, end of life planning, financial.⁴⁶ As our discussion above indicates, it will be some time before these new projects achieve a level of production that could have significant impact on currently unmet legal need.

In sum, the courts and the public will likely be the first to experience the effects of expanded access to justice. But it will take some time to determine whether unmet need for legal services has been materially reduced. The impact of these reforms on access to justice will take several years to manifest, and observers must be patient enough to allow the necessary time to pass before drawing conclusions about whether the promise of these efforts was borne out.

IV

CONCLUSION

Legal services regulatory reform offers new ways to create and deliver legal services that can potentially extend access to justice to people and groups long excluded from enjoying the protections of their own laws. As our discussion here shows, the volume of service provided in Utah's sandbox over the next few years is likely to be quite small relative to Utah's access to justice needs. It will take some time for observers to be able to understand the relationship between access to justice and regulatory change. The need for patience may be particularly acute in a small state with a small legal services market, but it is likely necessary for all currently contemplated reform projects.⁴⁷

Enthusiasm for these legal market liberalization reforms indicates hope and optimism not only for impacts on access to justice, but also for changes to activities like lawyer advertising and fee-sharing between lawyers and nonlawyers. But whatever the outcome of interest, current expectations also reflect what some call the “planning fallacy,” on the part of both the designers of the new regulatory schemes and the participants in them. People typically

45. See AM. ACAD. OF ARTS AND SCIS., *supra* note 4, at 2 (noting clear data on civil justice issues has yet to emerge).

46. Office of Legal Services Innovation, Innovation Office Manual, <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Innovation-Office-Manual.pdf> [<https://perma.cc/5TX7-2BL9>].

47. For context, a recent independent evaluation of the impacts of reforms to rules about nonlawyer ownership in the much larger market of England and Wales concluded that “the full impacts of the reforms will not be visible for some time.” CTR. FOR STRATEGY & EVALUATION SERVS., IMPACT EVALUATION OF SRA'S REG. REFORM PROGRAMME: A FINAL REPORT FOR THE SOLIC. REG. AUTHORITY 39 (2018), <https://www.sra.org.uk/globalassets/documents/sra/research/abs-evaluation.pdf?version=4a1ac2> [<https://perma.cc/6K4G-RNNY>].

dramatically underestimate the resources, like time, required to achieve change.⁴⁸ Market-based, government and philanthropic funding practices often encourage the planning fallacy by limiting support for innovative efforts to twelve to thirty-six months. A key to overcoming the planning fallacy is recognizing the unrealistic aspects of the original plan and creating a more realistic plan that more accurately recognizes resource needs and potential obstacles.⁴⁹ We offer this Article as a step toward that more realistic plan.

Although regulators cannot control all of the factors driving growth in innovative activities, they can meaningfully influence many. As regulators, the agencies that design and administer these reforms cannot direct the flow of applications and activity, but they can make sure the pipes run clean. They can implement standardized, predictable review processes that are timely and transparent. They can find ways to create the capacity to process a high volume of applications and monitor the performance of many entities. To meet substantial parts of latent demand, some or many of these new entities would need to offer services at larger scale and lower cost, which will require many more nonlawyer providers, whether human or software-based. Regulators can signal their openness to these truly innovative models by approving those that are consistent with principles of consumer protection.

Decades of trying to solve America's access to justice crisis with a patchwork of poorly funded legal aid, lawyer pro bono, and other philanthropy provide a clear track record of failure. While regulatory reform offers tremendous opportunities to open up access to justice, understanding the impacts of these changes will require patience.

48. Roger Buehler, Dale Griffin, & Johanna Peetz, *The Planning Fallacy: Cognitive, Motivational, and Social Origins*, in 43 *ADVANCES IN EXPERIMENTAL SOC. PSYCH.* 1, 1 (M. P. Zanna & J. M. Olson eds., 2010).

49. *Id.* at 45–46, 54.



LEGAL ADVICE FROM NONLAWYERS: CONSUMER DEMAND, PROVIDER QUALITY, AND PUBLIC HARMS

Rebecca L. Sandefur*

As new forms of legal services proliferate, jurisdictions around the country are reconsidering how they regulate the practice of law, including by permitting people and things that are not lawyers to provide legal advice and other kinds of legal services. This Article explores three kinds of empirical evidence that should inform considerations about nonlawyer legal advice providers, whether they are people or other sources of advice, like sophisticated computer programs. The analysis focuses on the personal client market, where users of services are human beings, rather than fictive persons like corporations or other kinds of organizations. Three questions guide the inquiry: (1) what is the consumer demand for legal advice? (2) what is the quality of the legal advice being offered by nonlawyers? (3) what harms result from the current restrictions on legal advice by nonlawyers? The body of research is clear: there is demand for legal advice and other services from nonlawyer providers, and such providers can produce services that are as good as or better than those of attorneys. If regulating the practice of law is to be guided by honest concerns for consumer protection, there is much more scope for nonlawyers to practice law safely and effectively than is permitted by the current rules.

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INTRODUCTION

The crisis in access to civil justice in the United States is well established. Recently, the World Justice Project compared access to justice in nations across the globe based on surveys of ordinary people's experiences with civil justice problems. This study highlighted the United States' poor performance. Americans experience an enormous number of civil justice problems, many affecting basic needs and core areas of life: fully two-thirds of surveyed American adults reported having a justice problem in the past two years.¹ Of those reporting justice problems, only one third received any help, despite the fact that their problems caused hardships such as illness, economic adversity, or damage to important relationships for 45% of those who had them.² Most of the time people navigate these problems and their sequelae without help, much less help from a lawyer.³

One small change in the typical regulation of the practice of law could put a meaningful dent in this massive and to-date intractable problem, allowing people and things that are not lawyers to give legal advice. Expanding sources of legal

1. WORLD JUSTICE PROJECT, GLOBAL INSIGHT ON ACCESS TO JUSTICE 108 (2019), <https://perma.cc/Z5SU-S9MF>.

2. *Id.* Consistent with most contemporary survey research into public experience with civil justice problems, the World Justice Project Survey focuses on justiciable events: events and circumstances that have civil legal aspects, raise civil legal issues and have consequences shaped by the civil law. Because most of these events are adverse, they are often referred to as "justiciable problems." See OECD/OPEN SOC'Y FOUND., LEGAL NEEDS SURVEYS AND ACCESS TO JUSTICE 11 (2019), <https://perma.cc/4DNY-5PWJ>.

3. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448-50 (2016).

advice is part of a broader approach to access to justice, which recognizes that achieving justice is not the same as receiving a specific type of service, such as the services of a lawyer. Rather, achieving justice means realizing substantively just solutions to situations and conflicts that are endemic to contemporary life.⁴

This Article explores three kinds of evidence that should inform assessments of the permissibility of nonlawyer advice providers.⁵ The analysis focuses on the personal client market, where users of services are actual human beings rather than fictive persons like corporations or other kinds of organizations. Three questions guide the inquiry: (1) what is the consumer demand for legal advice? (2) what is the quality of the legal advice being offered by nonlawyers? (3) what harms result from the current restrictions on legal advice by nonlawyers?

Others have ably assessed the constitutional validity of the current rules about the practice of law, traced their doctrinal and political history and the motivations for their creation, and explored better ways of regulating legal practice.⁶ This Article instead focuses on empirical evidence about demand for services from nonlawyers, the quality of those services, and the harms to the

4. Rebecca L. Sandefur, *Access to What?*, DAEDALUS, Winter 2019, at 49, 49-54.

5. Throughout this paper, I use the inelegant term “nonlawyer” to denote people and things—for example, computer programs, fixed-choice forms, books, do-it-yourself kits, human beings—that are not lawyers but provide legal services. The United States is unusual in the breadth of the legal profession’s monopoly: In most countries, lawyers’ monopoly focuses on rights of appearance, while in the United States it extends to the provision of legal advice. Hilary Sommerlad et al., *Paralegals and the Casualisation of Legal Labour Markets*, in *LAWYERS IN 21ST-CENTURY SOCIETIES* 29 (Richard L. Abel et al. eds.) (forthcoming). In a context like the United States where lawyers have a strong monopoly on much of the practice of law, it makes sense to distinguish between lawyers and everything else.

6. E.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 112-15, 229 (1989) (describing how efforts to defend the practice of law from other occupations began in 1870 and observing that “[a]lthough the profession justified these actions in the name of consumer protection, it offered no evidence that lawyers performed the restricted tasks better than others.”); Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 303 (2019) (arguing that the United States is moving toward evidence-based regulation of lawyers and legal services); Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011) (analyzing free speech protections for advice from attorneys); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012) (arguing that first amendment protections on free speech extend to legal information provided by attorneys); Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2615 (2014) (arguing that lawyers’ monopoly on the practice of law ended years ago and citing examples such as accountants, real estate agents, and nonlawyer advocates in federal tribunals); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 713 (1996) (offering an alternative regulatory framework to increase consumer choice, provide consumer protection, and offer services at lower cost); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2587-88 (2014) (providing the “first comprehensive overview of [UPL] enforcement practices” since the early 1980s and arguing that enforcement consistently focuses on the profession’s interests in market protectionism rather than consumer protection).

public of the current regulatory regime.

Findings from diverse studies and sources lead in the same general direction. The review of the evidence provides clear support for efforts to expand legal advice provision beyond the traditional source of licensed attorneys. First, consumers want legal advice, including from providers that are not lawyers.⁷ Second, nonlawyer providers can be competent and effective in a range of case types.⁸ And third, the current rules about nonlawyer practice restrict access to justice for millions of Americans, and have a chilling effect on grassroots efforts to organize to secure goods that benefit communities and society, such as fair wages, healthy and secure housing, and a clean environment.⁹

Regulators interested in consumer protection will find the evidence reviewed here informative as they consider what new activities to permit and how to regulate them.¹⁰ This evidence can also inform consumers, who will continue to face increasing choice of types of legal services providers over the next few years.¹¹

I. WHAT IS LEGAL ADVICE?

Defining legal advice is challenging enough to have inspired both constitutional arguments¹² and extensive guides attempting to explain to nonlawyers how to avoid giving it.¹³ What legal advice looks like in practice and how it differs from general information about the content of the law or legal processes is hotly debated.¹⁴ In the present Article, *legal advice* involves the

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See generally Chambliss, *supra* note 6.

11. See REBECCA L. SANDEFUR, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES (2019) (canvassing the wide range of consumer-facing legal technologies); Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 209-21 (2014) (describing developments in the areas of *pro se* assistance, pro bono by law students, and licensed paralegals who may practice law independent of lawyer supervision); Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553 (2015) (analyzing the service and business models of LegalZoom).

12. See, e.g., Knake, *supra* note 6.

13. See, e.g., M. ELLEN MURPHY & STEVE H. NICKELS, THE UNAUTHORIZED PRACTICE OF LAW FOR NONLAWYERS (2018) (attempting to define and explain the unauthorized practice of law to people who are not lawyers). This book is nearly 300 pages long.

14. See, e.g., John M. Greacen, *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 JUDICATURE 198 (2001) (arguing the distinction is not meaningful); Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 - ORDHAM L. REV. 2843 (2014) (discussing when legal information is protected speech under the First Amendment); Center for Public Legal Education Alberta, *Legal Information vs. Legal Advice: What's the Difference?* (2015), <https://perma.cc/MG9S-4835> (providing public-facing definitions of the two concepts).

application of knowledge about laws, legal principles, or legal processes to specific facts or circumstances; creating an analysis of the situation (a diagnosis of its legal aspects); and suggestions about courses of action (proposed treatments). With some exceptions, legal advice in the U.S. is an activity typically restricted to licensed lawyers engaged in a lawyer-client relationship with the recipient of that advice.¹⁵ Unauthorized providers, whether people, companies, or technology, can be subject to enforcement and penalties, including criminal sanctions in certain states.¹⁶ Providing legal information, on the other hand, is not an activity restricted to fully qualified attorneys.

Because the line between advice and information can blur, a range of resources exist that try to explain the difference to people at risk of engaging in the unauthorized provision of legal advice. For example, law students are not licensed to practice law, so the American Bar Association advises students approached about legal problems by family and friends to keep their conversations in the realm of legal information by “talk[ing] in general terms about the area of law, without honing in on the specifics of the individual’s problems.”¹⁷ Court clerks, at the front lines of the court system, receive many questions from the confused public. But clerks are not authorized to practice law in the context of their clerk duties, so the Judicial Council of California, in a handbook of practical advice, encourages clerks to

“explain and answer questions about how the court works and give general information about court rules, procedures, and practices;”

“provide court users with information from their case files, as well as court forms and instructions;” and

“provide court users with schedules and information about how to get a case scheduled,” as well as to “answer most questions about court deadlines and how to compute them;”

but not to

“tell a litigant whether a case should be brought to court or give an opinion about the probable outcome;”

“tell a litigant what words to use in court papers or what to say in court;”

or

“talk to a judge on behalf of a litigant.”¹⁸

In this Article, legal advice comprises acts of analysis and communication

15. Rhode & Ricca, *supra* note 6, at 2588-89.

16. *Id.* at 2588.

17. ABA Center for Professional Responsibility, *Some Advice . . . on What’s Legal Advice*, ABA FOR LAW STUDENTS (June 17, 2016), <https://perma.cc/ABD7-NXBV>.

18. JUDICIAL COUNCIL OF CAL., MAY I HELP YOU? LEGAL ADVICE VS. LEGAL INFORMATION: A RESOURCE GUIDE FOR COURT CLERKS 2-7 (2003), <https://perma.cc/7CK2-3M78>.

defined by their content rather than by who engages in them. In providing legal advice, someone or something applies an understanding of law to particular facts and shares the results of that application with a person placed to do something guided by the analysis. Legal advice can thus include diagnosing a problem of everyday life—for example, being three months behind on one or more bills, needing to enroll a grandchild in school—as having legal aspects; helping someone identify relevant law and apply it to the facts of their situation; or giving guidance, based on a diagnosis of legal aspects, about potential routes of action and costs and benefits of each.

Because the focus of this Article is on empirical evidence of demand, quality, and harm, the definition of legal advice offered here is functional, focused on *what is being provided*, rather than positional, focusing on how that provision occurs. This contrasts with the approach to legal advice pursued in formal unauthorized practice of law (UPL) enforcement, in which the relationship between the client and the provider is a core consideration, since restrictions often focus on the provision of “personalized assistance.”¹⁹

By the definition offered in this Article, some activity currently treated by regulators as legal information would be considered advice, because that activity diagnoses someone’s situation and offers a solution based on an understanding of the law. For example, the New York City Mayor’s Office to Protect Tenants sponsored a public education campaign about tenants’ rights. On signs around the city, people could read:

If your landlord says: “I need three months’ security deposit before you move in” . . . Tell them the law says: Security deposits can only be one month’s rent.²⁰

Here, the law (housing law) is being applied to specific facts (a landlord’s demand for a security deposit of a certain amount), resulting in suggestions about what to do (tell the landlord the law says he can’t make you pay the amount he demands, but rather only a different specific amount). The fact that the application and recommendation are produced by a public notice, rather than offered by a neighbor, explained by an organizer at tenants’ union meeting, or conveyed by an attorney to a paying client is not relevant for the purposes of the analysis in this paper, though these distinctions would be important for contemporary UPL enforcement.²¹

The next Part reviews empirical evidence about consumer demand for legal advice and other legal services from providers that are not traditional attorneys. I then turn to a review of evidence on the competence of nonlawyer providers and the quality of the services they provide, before concluding with discussion

19. Rhode & Ricca, *supra* note 6, at 2589.

20. Michael Gartland, *NYC Launches Renters’ Rights Awareness Campaign Months After Albany Passes Reforms*, N.Y. DAILY NEWS (Oct. 22, 2019), <https://perma.cc/65D5-TEXC>.

21. Rhode & Ricca, *supra* note 6, at 2588-89.

of the harms created by the current prohibitions on nonlawyer advice.

II. CONSUMER DEMAND

In the United States, the current menu of consumer choice among legal advice providers is highly restricted. Licensed attorneys may offer legal advice, as can a few other kinds of providers in limited circumstances.²² Because choice is so restricted, consumption patterns reveal limited information about what services people would prefer: people can only consume goods or services that are actually available, that they know are available, and that they can afford. Take fruit as an example. If bananas and apples are cheap and widely available and we see people purchasing some of one and a lot of the other, that tells us something about fruit preferences. But if bananas are incredibly expensive and apples are illegal, the fact that bananas are routine only for the wealthy and an occasional treat for the rest, while virtually nobody is eating apples, does not mean that everyone hates apples and would love to buy more bananas if only they could afford them. When something (e.g., legal advice) can usually be offered by only one type of provider (e.g., lawyers), people cannot reveal their preferences for other kinds of providers by using existing providers' services. The review of evidence about consumer demand for legal advice thus by necessity looks beyond preferences revealed by current U.S. consumer purchases to a range of other sources of information about what members of the public want when they face justice problems.

A. Evidence from the United States

1. Consumers already use nonlawyer providers

When American consumers have the choice of using an authorized nonlawyer provider, many do so. In the U.S., a number of both state and federal adjudicatory forums permit people who are not fully-qualified attorneys to provide representation. For example, people who are not licensed attorneys are permitted to represent clients in patent applications, real estate closings, unemployment compensation appeals, labor grievance arbitration, and in some state tax and immigration courts.²³ Nonlawyer advocates in those settings offer consumers not only advice about their legal situation and possible courses of action, but also assistance in preparing documents and representation in their disputes pursued in specific kinds of hearing forums.²⁴ Characteristic of all of these nonlawyer providers is the *limited* ambit of their practice: they are

22. *Id.* See also Levin, *supra* note 6, at 2615-16.

23. See Levin, *supra* note 6, at 2615.

24. *Id.*

permitted to perform their tasks only for specific kinds of legal issues that come before specific hearing forums.

When these nonlawyer advocates are available, Americans do, in fact, use their services. One study in Wisconsin found nonlawyers serving as 22% of all employee representatives in unemployment compensation appeals in 1991.²⁵ In state tax appeals, the same study found that 38% of representatives were nonlawyers between 1991 and 1994.²⁶ For social security disability appeals, nonlawyers represented about 15% of those appealing denial of benefits nationally between 1986 and 1994.²⁷ And in immigration, over 2000 federally accredited nonlawyer immigration representatives are currently employed by approved nonprofit organizations around the country that deploy these nonlawyers' services in dealing with legal matters faced by their clients.²⁸ Consistent with this revealed demand for legal services from nonlawyers, states like Washington and Utah have already created, and states like Arizona are creating or expanding, the powers of specialized nonlawyer providers of limited legal services.²⁹

Not all nonlawyer assistance that consumers currently use is authorized. A well-known and controversial example of unauthorized practice is the *notario*, a nonlawyer who provides a range of document preparation and translation services as well as assistance in navigating the U.S. immigration system.³⁰ In a survey of low-income immigrant households in five U.S. cities in the early 1990s, 13% of respondents had used the services of a *notario*,³¹ and “[n]early

25. Though unemployment insurance is a federal program, it is administered at the level of states. Kritzer reported representation status for 5480 cases heard in Wisconsin in 1991 for which the representation status of both sides was known. HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYER AND NONLAWYERS AT WORK 23, 51 (1998) (on file with author).

26. Kritzer collected data on 170 appeals heard by the Wisconsin State Tax Commission between July 1991 and June 1994. *Id.* at 82-83.

27. *Id.* at 113-14.

28. Nonlawyer “Accredited Representatives” can provide representation in immigration courts as employees of or volunteers with “Recognized Organizations,” which must be nonprofit and tax exempt. Exec. Office for Immigration Review, *Recognition & Accreditation (R&A) Program*, <https://perma.cc/PK3G-R2AZ>.

29. The growth of Washington’s Limited License Legal Technician program has been slow, with just over thirty technicians currently practicing in the entire state. *See Limited License Legal Technicians*, WASH. STATE BAR ASS’N, <https://perma.cc/4UV6-KD37>. Utah’s LPP program issued its first licenses in 2019. *See* Lyle Moran, *Utah’s Licensed Paralegal Practitioner Program Starts Small*, ABOVE THE LAW (Dec. 12, 2019), <https://perma.cc/ZJK6-M8CN>. Arizona is considering changing limitations on legal document preparation. Brenna Goth & Joel Skolnik, *Arizona Weighs Role of Non-lawyers in Boosting Access to Justice*, BLOOMBERG LAW (Aug. 15, 2019), <https://perma.cc/JS2D-8L8S>.

30. Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 VILL. L. REV. 165, 171, 172 n.33 (2019).

31. ROBERT L. BACH, INST. FOR RESEARCH ON MULTICULTURALISM AND INT’L LABOR, BECOMING AMERICAN, SEEKING JUSTICE: THE IMMIGRANTS’ LEGAL NEEDS STUDY 12-13 (1996) (on file with author). During 1993 and 1994, the study conducted a telephone survey

half (48%) of undocumented immigrants went to a *notario* for help.”³² Clearly, there is demand for *notarios*’ services.

2. Consumers want legal advice

When people have civil justice problems, they often look specifically for legal advice. One illustration of this comes from live chat queries on legal information websites, which provide rich data. Every state has a legal aid-affiliated website that provides at least some free legal information, and sometimes simple or interactive legal forms for taking common actions like filing for divorce, amending a parenting plan, or answering a petition for nonpayment of rent.³³ A live chat function on many of these websites allows visitors to pose questions to actual human beings who staff the chats.³⁴ Although some staff on these websites are lawyers, others include nonlawyers like AmeriCorps members, paralegals, or law students.³⁵

A recent study examined what people sought when they queried the operators on these live chats: were they asking for a lawyer, for information, or for legal advice?³⁶ In an analysis of live chat streams from two different legal aid websites, one in a rural state and one in a state where a majority of the population resides in a single large metropolitan area, researchers found that visitors sought legal advice—an analysis of their legal situation and suggestions about how to

of “over 2,500 impoverished immigrant households in five large cities:” Los Angeles, New York, Houston, Miami and Chicago. The survey was administered in multiple languages: English, Spanish, Haitian Creole, Polish, Chinese and Vietnamese. *Id.* at 3.

32. *Id.* at 53.

33. LEGAL SERVS. CORP., STATEWIDE WEBSITE ASSESSMENT: REPORT FOR THE JUSTICE COMMUNITY 5-7 (2017), <https://perma.cc/2DLT-ZPEV>.

34. For example, as reported in an early study, one live chat visitor asked, “My husband just left and I need get [sic] all the information I can about what I need to insure [sic] I keep my home. Can I get finacial [sic] help and if so what paper do I need. He says I can keep the house if he pays no child support, is it possible to get public assitance [sic] with no child support.” RICHARD ZORZA, LIVEHELP PILOT PROJECT: CHAT SERVICES FOR ACCESS TO JUSTICE WEB SITE USERS 46 (2007), <https://perma.cc/H55C-TJBZ>.

35. *Id.* at 1, 26.

36. Author’s original analyses of data from the Legally Empowering Technologies project, on file with the author. In this study, with assistance from legal aid providers, the research team collected all of the live chat interactions in one populous and one rural state during a specific time period. In order to ensure that both states provided roughly equal amounts of data, one month’s worth of chats (April 2018) were analyzed from the populous state, while six months’ worth (November 2017-April 2018) were analyzed from the rural state. A team of four research assistants then reviewed and double-coded the nearly 800 live chat interactions collected to reflect what the visitor asked for from the operator on the site: advice (guidance about what to do in their specific circumstances, help handling the situation), information (general questions about the law or process without reference to their own specific circumstances), and/or a lawyer (asked for a lawyers’ services, a referral to a lawyer, or how to find a lawyer).

handle it—about two-fifths of the time: in 38% of queries in the rural state and 42% in the more urban state.³⁷ But prohibitions on the delivery of legal advice outside of lawyer-client relationships prevented operators from answering with legal advice. Instead, chat operators referred visitors to other places on the website or to resources offline.³⁸ People visiting legal information websites and asking questions through live chat were far less often seeking the services of lawyers: in 10% of chats in the rural state people asked about finding a lawyer to help them, while they did so in 31% of chats in the more urban state.³⁹

When people seek help with justice problems from others in their communities, they are often seeking legal advice. An illustration comes from a survey that queried ordinary Americans about their experiences with civil justice problems.⁴⁰ In 2013, the Community Needs and Services Study surveyed a representative sample of adults in a middle-sized Midwestern city about their experiences with events that had civil legal aspects, raised civil legal issues, or had consequences shaped by the civil law.⁴¹ The most common way people responded to justice problems was to handle them on their own, without any assistance.⁴² If people did reach out to a third party for help—whether to a friend, family member, community organization, government agency, lawyer, or anyone else—the survey asked participants what they had wanted from their contact with that potential helper.⁴³

Respondents could report seeking multiple kinds of assistance, including acts of advocacy, referrals to other services, and moral support. But the help people sought often looked a lot like legal advice. In half (50%) of contacts seeking help with a justice problem from any source, survey respondents said they wanted the helper to do one or more of the following:

Help you understand your rights/the different ways you could go about handling the situation;

37. *Id.*

38. *Id.*

39. *Id.*

40. While civil justice surveys have become more widely used globally, nationally representative survey data for the civil justice experiences of Americans at all income levels has not been collected since the 1980s. *See* Rebecca L. Sandefur and James Teufel, *Assessing America's Access to Civil Justice Crisis*, 14, 21 (Mar. 13, 2020), (unpublished manuscript), (on file with author); *see generally* OECD/Open Society Foundations, *supra* note 2.

41. *See generally* REBECCA L. SANDEFUR, AM. BAR FOUND., U. ILL. AT URBANA-CHAMPAIGN, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY*, (2014), <https://perma.cc/8FD7-SQ7X>. This single-site study was the first in recent years to survey a sample that included all income levels. *Id.* at 6. The survey was administered face-to-face, usually in respondents' homes, during the summer and fall of 2013, and had a completed sample size of 668. *Id.* at 5-6.

42. *Id.* at 11-12.

43. Rebecca L. Sandefur, Community Needs and Services Study survey instrument (on file with author).

Help you understand anything the other side had said or any letter or emails you received;

Get information or advice for you about the situation;

Help you write letters or fill in forms; and/or

Write letters or fill in forms.⁴⁴

By contrast, only 25% of contacts consisted of requests for referrals to a place or person where they “could get help to handle the situation.”⁴⁵ They were seeking advocacy—having the helper communicate directly or negotiate with the other side, or handle the situation for them—in 28% of contacts.⁴⁶

When the analysis is restricted only to help sought from third parties outside of respondents’ immediate social networks, the pattern is even clearer. When people went to formal sources of assistance for help with civil justice problems, advice was the most common form of assistance sought (64% of contacts), followed by advocacy (45% of contacts), with referrals to help lagging behind as the hoped-for outcome of 24% of contacts.⁴⁷

B. Evidence from Other Countries

1. When given a choice, consumers often prefer nonlawyer providers over lawyers

The experience of jurisdictions outside the United States that offer a wider range of nonlawyer legal services reveals strong consumer demand for these services. The first example comes from Canada. Until 2007, legal practice by independent paralegals was unregulated in Ontario.⁴⁸ When regulation began, over 2000 already-existing paralegal practices entered the licensing scheme: consumers had already been using their services.⁴⁹ As part of a study five years into the new regulatory regime, 1001 people who had used paralegal services at

44. Author’s original analyses of data from the Community Needs and Services Study (on file with author).

45. *Id.*

46. *Id.*

47. *Id.*

48. The offered justification for increased regulation of paralegals was access to justice: “[T]he Ontario government introduced paralegal regulation in 2007 with the promise that regulation would increase access to justice by ensuring paralegal competence, increasing choice of qualified legal services provider, and making legal services more affordable.” Lisa Trabucco, *What Are We Waiting For? It’s Time to Regulate Paralegals in Canada*, 35 WINDSOR Y.B. OF ACCESS JUST. / RECUEIL ANNUEL DE WINDSOR D’ACCÈS À LA JUSTICE, 2018, at 149.

49. THE LAW SOC’Y OF UPPER CAN., REPORT TO THE ATTORNEY GENERAL OF ONTARIO PURSUANT TO SECTION 63.1 OF THE *LAW SOCIETY ACT 2* (2012).

least once in the previous two years participated in an online survey about their experiences.⁵⁰ The results revealed that people went to paralegals for help with a wide range of justice problems, including traffic, small claims, landlord/tenant, worker's compensation, real estate, probate, and family issues.⁵¹ Among these consumers, over two fifths (43%) had used the services of paralegal at least twice during the previous two years.⁵² The most common reasons that consumers reported turning to paralegals were because paralegals were cheaper than lawyers (46%), because people believed their matters were too simple to require a lawyer (41%), and because they believed the paralegal to be an experienced specialist (33%).⁵³

A second example of consumer preference for nonlawyer providers comes from the United Kingdom, where providing legal advice is not a "reserved activity"—it is not a regulated part of the practice of law.⁵⁴ A wide range of different kinds of providers offer legal advice, which means that consumers have a much broader choice of authorized sources than in the United States.⁵⁵ For example, litigants can use the services of lay people to accompany them to court and "provide moral support," "take notes," "help with case papers," and "give advice on any aspect of the conduct of the case;" these nonlawyer assistants are often known as McKenzie Friends.⁵⁶ Consumers use their services. For example, in a purposive sample of 151 family law cases observed in five courts in 2013, 24 (16%) involved the assistance of a McKenzie Friend.⁵⁷ Some McKenzie Friends are friends or family of litigants, but others are paid service providers.⁵⁸ The Society of Professional McKenzie Friends, a membership organization for fee-charging McKenzie Friends, lists 26 Friends, their fees and contact information on a "Find a McKenzie Friend" page.⁵⁹ A recent study estimates that

50. The survey was conducted in March 2012, using a proprietary panel. No further information is available about how respondents were selected or recruited. DAVID KRAFT ET AL., STRATCOM STRATEGIC COMM'NS, FIVE YEAR REVIEW OF PARALEGAL REGULATION: RESEARCH FINDINGS. FINAL REPORT FOR THE LAW SOCIETY OF UPPER CANADA 6 (2012).

51. *Id.* at 36.

52. *Id.* at 12.

53. *Id.* at 37.

54. *Reserved Legal Activities*, LEGAL SERVS. BD., <https://perma.cc/M96B-266J>.

55. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV., 949, 963-66 (2009).

56. LORD NEUBERGER OF ABBOTSBURY & SIR NICHOLAS WALL, PRACTICE GUIDANCE: MCKENZIE FRIENDS (CIVIL AND FAMILY COURTS) 1 (2012), <https://perma.cc/36H9-JNAE>.

57. LIZ TRINDER ET AL., MINISTRY OF JUSTICE, LITIGANTS IN PERSON IN PRIVATE FAMILY LAW CASES 94 (2014).

58. LEANNE SMITH ET AL., CARDIFF UNIV. & UNIV. OF BRISTOL, A STUDY OF FEE-CHARGING MCKENZIE FRIENDS AND THEIR WORK IN PRIVATE FAMILY LAW CASES 5-6 (2017).

59. *Find a McKenzie Friend*, SOCIETY OF PROFESSIONAL MCKENZIE FRIENDS LTD. <https://perma.cc/EE4A-CMWG>. Their rates range from £40-£125, or roughly \$50-\$160 per hour. *Id.*

about 100 McKenzie Friends offer legal advice for fees in England and Wales.⁶⁰ That same study finds that people choose to work with McKenzie Friends because they are “cheaper than lawyers,” “flexible, available and informal,” and seen as “allies.”⁶¹

2. Even when lawyers are free, people sometimes prefer nonlawyer legal services providers

Finally, consumers sometimes prefer the services of nonlawyers even when traditional lawyers’ services are free. One of the most striking findings about demand for legal advice comes from a comparative study of how people handle justice problems in jurisdictions where legal advice is widely available from nonlawyers, while lawyers’ services are at the same time free or greatly subsidized. In such contexts, consumer choice is less constrained by cost. In England and Wales, consumers have a wide range of choices of legal advice providers, including a national network of Citizens’ Advice offices staffed by trained volunteers who provide legal advice about a range of issues, as well as the McKenzie Friends described above.⁶² At the time of the study, a majority of the population of England and Wales was eligible for free or subsidized services from lawyers through a *judicare* scheme, where citizens receive government vouchers to pay private lawyers for their services.⁶³ By comparison, the United States limits federally-funded civil legal aid to people with incomes no more than 125% of the federal poverty level, a group comprising about 16% of the U.S. population.⁶⁴ Existing free civil legal services in the U.S. are so strapped that legal aid offices turn away at least as many people as they serve due to lack of resources.⁶⁵ And, of course, in the United States, legal advice is generally not available from anyone other than lawyers. A comparison of consumer behavior in these two contexts reveals that even when lawyers are *free*, if legal advice from nonlawyers is available, people are more likely to use these advice services

60. TRINDER ET AL., *supra* note 57, at 14-15.

61. *Id.* at 36-40.

62. *Introduction to Citizens Advice Service*, CITIZENS ADVICE, <https://perma.cc/YLW4-MS8K> (last visited May 26, 2020).

63. Sandefur, *supra* note 55, at 963.

64. For the eligibility guidelines see *Income Eligible*, LEGAL SERVS. CORP., <https://perma.cc/VBL4-6YFL>. For the population of the U.S. living below 125% of the federal poverty level, see *POV01: Age and Sex of All People, Family Members and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race: 2018 Below 125% of Poverty—All Races*, U.S. CENSUS BUREAU, <https://perma.cc/U69H-L8TS>. See generally EARL JOHNSON, JR., *TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* 919-24 (2013).

65. LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 43 (2017), <https://perma.cc/4RLR-8XBH>.

than the services of fully qualified attorneys.⁶⁶

C. How Consumers Decide

Consumers shop around. For example, a 2019 survey of a representative sample of 2000 American consumers found that nearly three fifths (57%) of people who had sought the services of a lawyer contacted more than one law firm in that search.⁶⁷ People found lawyers both through referrals from family and friends and through their own searching on the internet and in paper directories like the phonebook.⁶⁸ And while price was one element in their consideration, the most common things clients reported looking for from lawyers were timely response and help understanding processes and next steps—all goods that can be provided by nonlawyers, as shown below.⁶⁹

To the extent that researchers have explored how consumers choose between different kinds of legal services providers, their findings suggest that people weigh a range of factors. A 2009 U.K. study that presented hypothetical justiciable problem scenarios to members of the public and asked how those problems should be handled found that people were more likely to recommend lawyers for problems that they judged to be more severe and that they understood to be legal in nature.⁷⁰ Problems that people regarded as less severe or as not legal problems were more likely to be recommended for nonlawyer services.⁷¹ Since research has shown that American consumers are highly unlikely to consider their justiciable problems to be legal in nature,⁷² sources of assistance that connect with their problems in the terms in which they understand them are an essential tool in access to justice, as such services are more likely to actually

66. Sandefur, *supra* note 55, at 969-71. The study compared how consumers reporting civil justice problems in the areas of money and housing handled them in the United States in 1992 and in the United Kingdom in 2004. *Id.* Data came from two surveys: the 1994 American Bar Association report on the *Legal Needs of the Low- and Moderate-Income Public* and the 2004 England and Wales Civil and Social Justice Survey. Further details about the data and analysis are available in the cited article.

67. CLIO, LEGAL TRENDS REPORT 26 (2019). According to Clio, the “sample was representative across all adult age groups, genders, and geographic regions in the United States.” *Id.* at 6.

68. *Id.* at 21.

69. See *infra* Part IV (discussing nonlawyers’ success in meeting consumer needs).

70. Pascoe Pleasence et al., *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, OÑATI SOCIO-LEGAL SERIES 1, 16-17 (2011). The online study surveyed 1031 people between the ages of sixteen and sixty-six who were recruited from the ipoints™ panel, which provides rewards in exchange for completing surveys. *Id.* at 6.

71. See *id.* at 16-17.

72. For example, in a survey of a representative sample of adults in a middle-sized city in the American Midwest, people recognized only 9% of the civil justiciable problems they experienced as “legal.” Sandefur & Teufel, *supra* note 40, at 14.

be used.⁷³

Existing evidence shows that the cost of services is sometimes but not always a factor. Consumers do at times report turning to nonlawyer providers because they believe them to be cheaper.⁷⁴ But they also report turning to nonlawyers for help with justice problems even when attorneys' services are free.⁷⁵ Consistent with that finding, consumers report turning to nonlawyers because they find them competent and accessible.

Another factor that shapes how people choose legal services providers is the complexity of the issues they confront. People are more willing to select nonlawyer providers for simpler legal issues. For example, a situation being too simple to justify hiring a lawyer was a motivation for 41% of the consumers using paralegal services in the Ontario study.⁷⁶ Similarly, a study comparing the use of lawyers and do-it-yourself kits in divorce and bankruptcy cases in Arizona in the early 1980s found that people were much more likely to use kits for the legally simpler problem of divorce than the legally more complex problem of bankruptcy.⁷⁷ The study also found that people were less likely to use kits and more likely to use lawyers when their divorce or bankruptcy situations were more factually complex.⁷⁸

D. Summary

In sum, a range of evidence indicates robust demand for legal advice. Consumers often seek it, and when they are able to access it and other legal services from providers who are not lawyers, they often do so. What evidence exists on how consumers make choices between types of providers indicates that they make reasoned choices, considering not only cost but also the nature and complexity of the situations they confront.

III. NONLAWYER COMPETENCE AND EFFECTIVENESS

Legal advice can be competent or incompetent, well-intentioned or

73. See Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 736 (2015) (reviewing evidence that people are more likely to use assistance with justice problems if that assistance is timely, targeted to problems as people understand them, and provided through trusted sources).

74. See *supra* notes 61, 69, and accompanying text.

75. See *supra* note 67 and accompanying text.

76. See KRAFT ET AL., *supra* note 50, at 12.

77. STEVEN R. COX & MARK DWYER, A REPORT ON SELF-HELP LAW: ITS MANY PERSPECTIVES 21 (1987) (on file with author). The study analyzed "large case samples . . . selected at random for each of six years (1980-85)." *Id.* at 72. For the analysis of the factors shaping choices between types of assistance, a smaller subsample of cases was selected for detailed analysis. *Id.* at 73.

78. *Id.* at 25.

malicious, regardless of who or what provides it. To be done competently, the analysis of a person's legal situation and recommendations about what to do require knowledge of relevant laws, rules, legal procedures, and standard operating practices of courts and other parts of the justice ecology, and also more-or-less correct application of that knowledge to specific factual circumstances.

Regardless of the source, consumers benefit from access to legal advice only when that advice is competent. Vanishingly few systematic empirical studies assess the quality of lawyers' work,⁷⁹ and little research compares the quality of the legal work produced by lawyers to that produced by people or things that are not lawyers. Nonetheless, some investigations into work product quality exist, as well as studies that assess consumer satisfaction and that compare the outcomes achieved by different kinds of legal services providers. In what follows, I review findings from five different sources of information about the quality or competence of nonlawyers' work: effectuation, consumer satisfaction, consumer complaints, case outcomes, and expert review of completed legal work.

A. Effectuation

One measure of the effectiveness of a service is effectuation⁸⁰—is the user of the service able to complete a desired step in a legal process, like producing a viable document or receiving a divorce decree after petitioning for divorce. One common means of assisting consumers in effectuation is to convey legal expertise in paper or digital form, outlining choices in plain language and guiding the user through the steps and choice points in taking a legal action.⁸¹ For example, New York state courts created an eviction form that offers tenants the choice of 17 different reasons for contesting a landlord's petition, ranging from poor conditions to improper service to having actually paid the rent.⁸² This form

79. Though the literature is small, empirical research into lawyer quality does exist. One strand, prominent in the United Kingdom, draws on peer assessments of the quality of legal work. See, e.g., Avrom Sherr & Alan Paterson, *Professional Competence: Peer Review and Quality Assurance in England and Wales and in Scotland*, 45 ALTA. L. REV. 151 (2008). Another strand, more prominent in the United States, explores lawyers' bad practice through the lens of ethical failure. For example, Richard Abel's *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) explores violations of trust through neglect, overcharging, and "excessive zeal" in advocacy. Bruce L. Arnold and Fiona M. Kay investigate how the social isolation of solo practitioners contributes to these kinds of ethical failures in *Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-regulation*, 23 INT'L J. SOC. L. 321, 330-32 (1995).

80. I thank Elizabeth Chambliss for suggesting this term.

81. See *The Case for . . . Court-Based Forms and Instruction Programs*, SELF-REPRESENTED LITIG. NETWORK, <https://perma.cc/W7JA-XWQC> (explaining how a court-based forms and instructions program operates and why it is helpful to litigants).

82. *Answering in Writing and Verification*, N.Y.C. HOUSING CT.,

is the tenant's answer to the landlord's petition, and must be filed within a specific time in order to avoid default, set the first court date, and establish defenses to the claim.⁸³ Before forms like this one, people lacking legal assistance had to figure out what the relevant law was that governed their opportunities to offer defenses or raise claims and what the possible defenses or claims could be. Based on that analysis, they then had to write a narrative outlining their legal argument.⁸⁴ With these kinds of forms, lay people can simply read and select what may apply in their specific case.

Research shows that these forms can help unrepresented litigants present their cases in legally cognizable terms. In a random sample of cases in a New York City housing court, for instance, all of the answer forms were legally cognizable: the forms were accepted and provided the basis for tenant defenses in every case, whether the case involved a tenant who received no discernible assistance in filling out the form, the assistance of a nonlawyer following a legal information script, or a tenant represented by an attorney.⁸⁵ Many states have standardized forms meant to be accepted in every court. As of 2016, 23 states had moved to put at least some interactive, standardized court forms online to be accessible to the general public.⁸⁶ As one study concluded, the success of projects assisting unrepresented litigants with helpers short of a fully qualified attorney "depends heavily upon the . . . development and use of simplified pleading forms."⁸⁷ As unglamorous as court forms may be, they are a valuable tool in promoting access to justice by codifying legal expertise in a way that nonlawyers can use.

Legal expertise can also be provided effectively by computer programs. For example, a Michigan study compared divorces attempted by people with no representation on record, people who had no lawyer but used interactive forms from a website, and people represented by attorneys. People using the interactive forms were about as likely to achieve a central goal of filing for divorce, i.e. actually getting divorced, as people represented by attorneys: among those using

<https://perma.cc/F8B7-BKA5>.

83. *Answering a Case*, N.Y. ST. CTS., <https://perma.cc/WQR6-FLHU>.

84. John M. Greacen has documented some of the challenges faced by unrepresented litigants trying to navigate legal processes without guidance. For example, "I just got this here summons and complaint . . .", a litigant asked court staff. And, "What is an answer? What does one look like? What does it say?" or "What does 'interrogatory' mean?" John M. Greacen, "No Legal Advice from Court Personnel" *What Does That Mean?*, JUDGES JOURNAL 10, 10 (1995).

85. REBECCA L. SANDEFUR & THOMAS CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 29-30 (2016). The authors reviewed 181 randomly selected case files collected during the summer of 2015. *Id.* at 54.

86. *SRL Interactive Court Forms by State (2016)*, NAT'L CTR. FOR STATE COURTS, <https://perma.cc/KJ3W-AA9>.

87. Michael Millemann et al., *Rethinking the Full-Service Legal Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1182 (1996).

the forms, 74% achieved a judgment of divorce, while among those working with attorneys, 77% achieved divorce.⁸⁸ Notably, people represented by attorneys were only marginally more likely (at 77%) to achieve a judgment of divorce.⁸⁹ The biggest difference observed between lawyers and interactive forms was the likelihood of involuntary dismissal: six percent of people represented by lawyers had their cases involuntarily dismissed, while this was the fate of eighteen percent of those using the interactive forms and twenty-one percent of people who tried to get divorced without either representation or the assistance of the form.⁹⁰ The most common reason for involuntary dismissal was lack of service.⁹¹ However, service is another procedural aspect of divorce that could be automated, and thereby made easier for those pursuing divorce without a lawyer.

B. Consumer Satisfaction

Consumer satisfaction measures reveal lay people's subjective assessment of expert services. While this information is valuable, it is only loosely tied to professional competence. Consumers readily report their experiences of things they can evaluate, like demeanor, customer service, and the like. But the nature of professional services is that lay people are not able to fully evaluate the quality of the work, because they lack the expertise to do so.⁹² It is for this reason that economists conceptualize professional services as 'credence goods': "producers of credence goods identify and treat problems that their clients do not know how to solve and may not even know they confront."⁹³ Evidence about consumer complaints bears this out. Consumers typically do not complain about legal errors, such as inappropriate choice of forum or specious legal arguments; rather, consumers most commonly complain about neglect.⁹⁴ Consumers know when

88. BRIDGEPORT CONSULTING, MICHIGAN LEGAL HELP EVALUATION REPORT 6, 23 (2015), <https://perma.cc/R2TA-JLMK>. The study drew a sample of divorce filings from counties across the state that was "designed to be representative of all cases filed in Michigan in 2013." *Id.* at 13. Within each county, the project randomly selected case files of three types: those using the online forms, those where the petitioner was unrepresented and did not use the forms, and those where an attorney drafted the documents. *Id.*

89. *Id.* at 23.

90. *Id.* at figs.10, 12. For example, as Figure 10 reports, 25% of people using the forms had their cases dismissed, while 19% of people represented by lawyers had their cases dismissed. As Figure 12 reports, 27% of dismissals experienced by people using the forms were by the parties, meaning that 73% of their dismissals were initiated by court. Thus, 73% of the 25% of cases that were dismissed were dismissed involuntarily, meaning that 18% ($0.25 \times 0.73 = 0.18$) of all cases pursued by people using the interactive forms were involuntarily dismissed.

91. *Id.* at fig.12.

92. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 911 (2015).

93. *Id.*

94. ABEL, LAWYERS IN THE DOCK, *supra* note 79, at 57. Seventy-five years of research

their lawyers are unresponsive, but they are likely less adept at recognizing whether unresponsiveness is legally significant. It is one thing to miss an important filing date through inattention, and another to be slow at returning phone calls, as infuriating as the latter can be for clients. The first is malpractice; the second is bad customer service.

When customer satisfaction is the measure of quality and competence, existing studies reveal high customer satisfaction with paralegal services. This is true even of studies that compare satisfaction with paralegals to satisfaction with lawyers. In the above-mentioned study of consumers of paralegal services in Ontario, most people (74%) were satisfied with the services they received, and most believed that the paralegal they worked with behaved professionally (79%), understood the law (75%), and knew how to do their job (71%).⁹⁵ Asked whether being able to use paralegals as well as lawyers made the justice system “better,” 85% either agreed that it did so or believed it had no impact one way or the other.⁹⁶ A study of litigants in Maryland who received legal advice from law students similarly found that consumer satisfaction with this nonlawyer service was “high,” particularly when the task the consumer needed assistance with was “most mechanical,” as in the case of an uncontested divorce.⁹⁷ Consumer satisfaction dropped somewhat as the student-advisors were required to use more discretion and make more complex judgments.⁹⁸

Studies that compare satisfaction with lawyers to nonlawyers also find that nonlawyers are highly rated, sometimes even more highly rated than attorneys. In the United States, the Immigrants Legal Needs survey described earlier assessed consumer satisfaction with different kinds of legal services providers. This survey found that 70% of people who used *notarios* were satisfied with the service they received.⁹⁹ By comparison, only 54% of the clients of legal aid

reveals that neglect—most often, unresponsiveness—is the most common complaint against lawyers filed by individual consumers. Neglect is likely a much more common experience than complaint data reveal; indeed, it appears to be endemic to the profession. For example, a recent study of email handling practices by a sample of 1,000 law firms found that 71% of firms provided responses that were “unsatisfactory:” they were delayed, confusing, answered none of the client’s questions, and gave little information about process and next steps. CLIO, *supra* note 67, at 33. The sampled firms had “equal representation across five practice areas, including Family, Criminal, Bankruptcy, Business Formation, and Employment, and comprised firms of all sizes.” *Id.* at 6.

95. KRAFT ET AL., *supra* note 50, at 13.

96. *Id.* at 48-49.

97. Milleman et al., *supra* note 87, at 1185. Beginning in the mid-1990s, Michael Milleman and colleagues at the University of Maryland School of Law trained law students to provide “legal information and advice to otherwise unrepresented parties in family law cases” at courthouses. As part of an evaluation conducted by a statistician unaffiliated with the clinical project, 275 consumers who had used the law students’ services were contacted and interviewed about their experiences roughly a year after receiving the service. *Id.* at 1181.

98. *Id.* at 1186.

99. BACH, *supra* note 31, at 60.

agencies and 65% of the clients of private attorneys were satisfied, though 85% of the clients of law firms were satisfied.¹⁰⁰ A 1999 U.K. study comparing the work of solicitors and nonprofit agencies providing legal advice across a range of civil case types found greater customer satisfaction with nonlawyers than with solicitors.¹⁰¹ Nonlawyers received higher customer ratings than lawyers on seven of ten different criteria of evaluation, including “really standing up for [the client’s] rights,” “telling [clients] what was happening” and what “would happen at the end,” and “knowing the right people to speak to.”¹⁰² A 2011 U.K. study comparing the work of specialist will-writers to that of solicitors found that 77% of will-writers’ clients were satisfied with the quality of their will, while 84% of solicitors’ clients were satisfied.¹⁰³ Consumers appreciated that the will-writers provided a more flexible and accessible service, including through visits to consumers’ homes.¹⁰⁴ Clients of will-writing companies “were more likely [than clients of solicitors] to have spent over an hour discussing their personal circumstances:” 47% of will-writing clients responding to a survey reported spending at least an hour with their advisor, compared with only 16% of the clients of solicitors.¹⁰⁵ “Respondents who spent longer” talking with advisors “tended to be more satisfied with the overall quality of their will.”¹⁰⁶

C. Consumer Complaints

Another measure of service quality is the frequency and severity of mistakes. In the United States, key sources of information about legal professionals’ mistakes are consumer complaints and malpractice claims.¹⁰⁷ Complaint data likely underreport some kinds of lawyer errors—in particular, errors that require legal expertise to recognize—and overreport behaviors that consumers may not

100. *Id.*

101. RICHARD MOORHEAD ET AL., QUALITY AND COST: FINAL REPORT ON THE CONTRACTING OF CIVIL, NON-FAMILY ADVICE AND ASSISTANCE PILOT (The Stationery Office 2001). The findings reflect 867 responses to a survey sent out in November 1999 to clients in a sample of cases closed during the last week of August in 1999. Sample characteristics differ somewhat from the population of clients; however, the differences are small in absolute size. *Id.* at 124. The study authors concluded that the differences “do not lead to the conclusion that overall the representativeness of this sample of respondents is compromised.” *Id.* at 125.

102. *Id.* at 132.

103. LEGAL SERVS. CONSUMER PANEL, REGULATING WILL-WRITING tbl.7 (2011). The study surveyed 500 people who had recently purchased a will from a solicitor or will-writing company. *Id.* at 1.4.

104. *Id.* at 1.8.

105. *Id.* at 4.26.

106. *Id.*

107. Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Malpractice Claims and Their Resolution*, in DUKE SCH. OF PUB. L. & LEGAL THEORY RESEARCH PAPER SERIES 15-16 (June 2015).

like but that are actually not errors, as discussed above.¹⁰⁸

Some complaints will eventuate in lawyers' claims to malpractice insurers, but such claims can only be observed for those lawyers who carry malpractice insurance. Only Oregon and Idaho require lawyers to do so, though lawyers in other states purchase it nonetheless.¹⁰⁹ Malpractice claims present a high bar as a measure of practitioner error: the consumer must pursue the complaint to a point where there is a demand for a remedy that is successful in convincing the lawyer to make a claim on their insurance. As one scholar observes, "Legal malpractice often goes undetected. Even when a client learns of lawyer malpractice, the problem is sometimes resolved informally without notifying the LPL insurer of a possible claim."¹¹⁰ Nonetheless, such claims are made: a recent study of lawyers' malpractice insurance claims between 2009 and 2013 finds insurers reporting between 2.71 and 12 claims per 100 lawyers insured, depending on the year, the state, and the insurance provider.¹¹¹ Seven or more years of university training and a law license clearly do not guarantee protection against error.¹¹² Lawyers make mistakes, as do providers of legal services that are not lawyers. The question is whether nonlawyer providers make more or worse mistakes.

Among nonlawyers, *notarios* are prominent providers of legal advice. Most of the scholarly literature on *notarios* focuses on fraud—misrepresentation of the service being offered—rather than competence.¹¹³ Some *notarios* pass themselves off as attorneys when they are not, others charge fees but do nothing for their clients while purporting to be providing legal services, and some provide low quality services.¹¹⁴ Much of the data on the quality of *notario* practice is,

108. See *supra* notes 94-96 and accompanying text.

109. See Leslie C. Levin, *Book Review: When Lawyers Screw Up*, 32 *GEO. J. LEGAL ETHICS* 109, 111, 115 (2019) (noting that in most jurisdictions, lawyers can purchase malpractice insurance for \$3,000 or less annually).

110. *Id.* at 110.

111. See Kritzer & Vidmar, *supra* note 107, at 15-16.

112. Nor are mistakes unique to American lawyers. Peer review audits of the quality of legal work in individual attorneys' casefiles in Scotland found that about a tenth (9.7%) were inadequate. Sherr & Paterson, *supra* note 79, at 18. A parallel review of case files from private law firms participating in the England and Wales legal aid scheme found that about 20% received a failing grade from at least one reviewer. *Id.*

113. See generally Travis B. Olsen, *Combating Notario Fraud Locally*, 22 *BERKELEY LA RAZA L.J.* 383 (2012); Jamie G. Longaël & Benjamin Fleury-Steiner, *Beware of Notarios: Neoliberal Governance of Immigrants As Crime Victims*, 17 *THEORETICAL CRIMINOLOGY* 359 (2013).

114. Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 *VILL. L. REV.* 165, 171 (2019). Han observes that *notario* fraud can take several forms: *notarios* may overcharge for their services, may charge for a service they never intend to render, and/or file inappropriate, inaccurate and untimely paperwork" with immigration authorities. *Id.*

unfortunately, anecdotal.¹¹⁵

Though government agencies collect complaints about *notarios*, these are not reported in official statistics.¹¹⁶ However, a recent analysis of complaints obtained through Freedom of Information Act requests found that American consumers reported 2,314 immigration law scams between 2011 and 2014.¹¹⁷ Like all complaint data, these will underestimate the incidence of bad practice by *notarios*, but underreporting is likely more acute here because immigrants may fear making themselves visible to immigration and law enforcement authorities.¹¹⁸ In recent years the FTC has received 200-600 complaints annually about immigration services, despite the fact millions of immigrants have likely consulted *notarios*. Just as with lawyers, consumer complaints about *notarios* are an incomplete picture of bad practice. Nonetheless, in recognition that many *notarios* do indeed provide accessible, affordable, needed services, a number of observers call for regularizing them as legal services practitioners.¹¹⁹

D. Case Outcomes

Evidence shows that nonlawyer advocates can perform as well or better than lawyers in social security appeals, state tax courts, and unemployment compensation appeals in the United States, and in a range of government tribunals in the United Kingdom.¹²⁰ If the measure is prevailing in some kind of

115. *Id.* at 171-72.

116. See *Description of Report Categories*, U.S. FED. TRADE COMM'N (last updated 2019), <https://perma.cc/5BAM-2BLJ> (describing various fraud report categories, which do not include notarios).

117. Juan Manuel Pedroza, *Making Noncitizen's Rights Real: Evidence from Legal Services Fraud Complaints* 16-17 (2019) (unpublished manuscript) (on file with author).

118. See generally Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 L. & SOC'Y REV. 133, 139 (2020); Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593 (2011) (describing how the threat of deportation renders undocumented Latino migrants vulnerable to labor abuses and crime victimization).

119. See, e.g., Han, *supra* note 114, at 190-91 (advocating for a new licensing regime that includes notarios); Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 28, 34 (2004); Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT'L & COMP. L. REV. 111, 116-17 (2016).

120. Kritzer, *supra* note 25; HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS* 243-44 (Lord Chancellors Department and Queen Mary College, University of London 1989). The U.K. study explored the impact of lawyer and nonlawyer representation in four types of tribunals through analysis of hundreds of tribunal files, observation of hundreds of hearings, and interviews with tribunal staff, representatives, appellants and applicants. *Id.* at 6-9. Most interviewees believed that specialization and experience, rather than a legal degree, were the most important qualifications for good representation. *Id.* at 245-46.

case before a court or hearing body, the general finding is that nonlawyer advocates perform as well or better than lawyers when nonlawyers are specialized and experienced.¹²¹ At the same time, while nonlawyer advocates can be very good at some things, they may not always be appropriate when clients face complex legal issues.¹²²

Studies that compare lawyers to nonlawyers highlight the importance of specialized expertise over generalized legal training. A U.S. study comparing the performance of lawyer and nonlawyer advocates in unemployment compensation appeals, state tax appeals, social security disability appeals, and labor grievance arbitration concluded that specialized expertise in a given area of practice was more important than general legal training in explaining the effectiveness of different types of advocates.¹²³ A U.K. study exploring the impact of lawyer and nonlawyer representatives in social security appeal tribunals, immigration adjudication hearings, industrial tribunals, and mental health review tribunals found that only in industrial tribunals did fully qualified lawyers lead all forms of lay specialists in terms of their positive impact on a case; in the other settings, nonlawyers were as positively impactful or more impactful than lawyers.¹²⁴ The authors concluded that “[i]n all tribunals, representatives who specialize and are experienced in presenting tribunal cases provide the greatest assistance to their clients and to the tribunals before whom they appear,” and that “in some tribunals specialist lay representation is presently as effective as legal representation.”¹²⁵

While nonlawyers are demonstrably effective at many of the tasks currently reserved to fully qualified lawyers, they may not be effective at all parts of legal practice. For example, authors of a study of unemployment insurance appeal hearings in Washington, D.C. concluded that “[n]onlawyers developed, through experience, specialized expertise in basic legal principles and . . . basic procedure” that amounted to the “functional equivalent of certain aspects of lawyers’ legal expertise.”¹²⁶ Thus, “[w]hen lawyers and nonlawyers appear at hearings, they disclose evidence, present documentary evidence, present testimony at similar rates, and have similar case outcomes.”¹²⁷ However, the

121. See *infra* notes 123-25 and accompanying text.

122. See *infra* notes 128-31 and accompanying text.

123. Kritzer, *supra* note 25, at 194-97, 201.

124. GENN & GENN, *supra* note 120, at 243-46 (discussing the relative impact of different types of representatives in different types of tribunals).

125. *Id.* at 247.

126. Anna E. Carpenter et al., *Trial and Error: Lawyer and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023, 1049 (2017). This study analyzed data from 5,150 unemployment benefits appeals cases heard in Washington, D.C. between January 2011 and June 2013, as well as interviews with “representatives who appeared most often before the court, including lawyers, law firms, nonlawyers, and supervising attorneys at law school clinical programs.” *Id.* at 1034.

127. *Id.* at 1049.

authors also found that the nonlawyer advocates they studied were “not equipped to challenge or disagree with judges on substantive or procedural legal issues,” because most of their understanding of law and procedure was based on what they had learned from the judges before whom they appeared.¹²⁸ As currently trained, there were some tasks, like challenging judges’ interpretations of points of law, that nonlawyers in this setting could usually not do effectively¹²⁹—but, of course, jurisdictions could reconsider how these advocates are trained.

Findings from a systematic review of forty years of U.S. research comparing lawyer and nonlawyer performance bear out the importance of complexity. This study found that when complexity is low—when the processes and documents necessary to pursue a case are rated as simple by lawyers, or when the substantive law itself is rated as simple by lawyers—average differences in the likelihood that lawyers and nonlawyer advocates win cases for their clients are relatively small, with lawyers observed to be 20% more likely on average to win than nonlawyer advocates in these simpler contexts.¹³⁰ However, in practice areas with more complex processes or substantive law, lawyers are much more likely to outperform nonlawyer advocates, being between 50% and 320% more likely to win their cases than are nonlawyers.¹³¹

E. Expert Review

One of the most valuable sources of evidence about the competence of nonlawyer practice comes from studies that rely on expert review of completed legal work. In this form of research, practitioners experienced in a given area of law or legal problem audit other practitioners’ work and rate its quality and competence. Such studies are rare, but those that exist provide important evidence about the capability of nonlawyers to provide legal services.

Expert review studies find that lawyers sometimes make more mistakes than unrepresented litigants. An early and famous U.S. study compared the work of lawyers to that of lay people using paper-based kits for divorce.¹³² As discussed above, when legal knowledge is distilled into forms, these can be effective in helping people produce their own legal documents and move their cases

128. *Id.* at 1050.

129. *Id.*

130. Sandefur, *supra* note 92, at 922-23, tbls.3, 4 (2015). The study was a meta-analysis, or “study of studies” of the impact of representation on case outcomes. The data were compiled from existing research reports and analyzed to synthesize the general patterns of findings across studies.

131. *Id.* at 923, tbl.4. The calculations reported here make no allowances for selection of cases into different forms of representation; these are the observed difference across studies. The referenced paper provides multiple estimates of lawyers’ impact, based on different assumptions about selection into different forms of representation.

132. Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 105 (1976).

forward.¹³³ As divorce became more common and many states moved to simpler no-fault divorce laws, a range of do-it-yourself divorce kits were developed that commodified legal advice into a set of instructions and forms.¹³⁴ Based on reviewing case files and auditing the quality of the legal work contained in them, the authors found that lay people using a do-it-yourself divorce kit could do so effectively and sometimes made fewer errors in the preparation of routine paperwork than did lawyers.¹³⁵

Studies of will-writing similarly find that nonlawyers outperform lawyers when legal issues are simpler.¹³⁶ A U.K. study conducting expert assessments of wills prepared by solicitors and those prepared by nonlawyer staff at will-writing companies found similar rates of error in both groups: both solicitors and will-writing companies had a failure rate of about twenty percent.¹³⁷ Errors included sloppy drafting, omission of standard clauses, and failure to follow the client's instructions.¹³⁸ In the preparation of simple wills, specialist nonlawyer will-writers actually out-performed solicitors.¹³⁹ When wills were complex, however, solicitors out-performed will-writers.¹⁴⁰

A landmark U.K. study comparing nonlawyer and solicitor providers of legal advice across a range of civil case types, including benefits, housing, debt, personal injury, immigration, and employment, assessed the quality of services provided through peer review of closed case files.¹⁴¹ Nonlawyers and solicitors were equally likely to receive failing grades for their work: a quarter of the case

133. See *supra* notes 85-91 and accompanying text.

134. Marilyn A. Meredith, *Divorce Kit Dilemma: Finding the Public Interest*, 19 U. LOUISVILLE J. FAM. L. 729, 729-30 (1980).

135. Cavanagh & Rhode, *supra* note 132, at 128. For example, unlike lawyers, pro se petitioners were not observed to put the wrong judge's name on their decree forms. *Id.* at 127.

136. See LEGAL SERV. CONSUMER PANEL, *supra* note 103, at 24. Wills are a significant access to justice issue. They help preserve assets within families, enact the wishes of property owners, and avoid disputes and litigation by providing clarity and direction. Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, U.C. DAVIS L. REV. 4-5 (forthcoming) (on file with author). Increasing rates of home ownership and complex family relationships have led to a growing number of people needing specialist advice in preparing wills. See LEGAL SERV. CONSUMER PANEL, *supra* note 103, at 20.

137. LEGAL SERV. CONSUMER PANEL, *supra* note 103, at 20. Poor overall quality was the most common reason for will failure. *Id.* The findings are based on review of 101 wills that were "shadow shopped," or requested by mystery shoppers trained to act as will-writing clients. *Id.* at 12.

138. *Id.* at 24.

139. 25% of solicitor-prepared simple wills failed, while only 11% of simple wills prepared by will-writers did so. *Id.* at tbl.2.

140. Solicitor-prepared complex wills failed 19% of the time, while will-writers' complex wills failed 27% of the time. *Id.*

141. MOORHEAD, *supra* note 101, at 23. In such studies, "an independent person with significant practical specialist expertise in the relevant field" evaluated "the quality of the work" and its "management . . . against specified criteria and levels of performance." *Id.*

files prepared by each failed the quality review.¹⁴² However, nonlawyers were six times more likely than lawyers to produce work that reviewers rated as excellent.¹⁴³ Nonlawyers can not only perform as well as lawyers, they can perform better.

F. Summary

The available evidence reveals that nonlawyers can provide competent and effective legal advice. Nonlawyer sources of assistance make mistakes, but when working on appropriate matters usually make no more mistakes than lawyers do. As this research review shows, nonlawyers do a great deal of effective and high quality work, which is likely one reason why a 2013 U.S. study of personnel heading up state authorized practice of law committees across the country found that fewer than one third of those responsible for policing the practice of law “could . . . recall an instance of serious injury [caused by nonlawyer practice] in the past year.”¹⁴⁴ At the same time, nonlawyer assistance is not always sufficient. In some situations that raise complex issues of law, nonlawyers as currently trained may not be fully equipped to provide adequate service.

IV. PUBLIC HARMS

The current restrictions on nonlawyer practice harm the public in multiple ways. By mandating that most legal services must be obtained from lawyers, they limit consumer choice.¹⁴⁵ In addition, the high cost of becoming a lawyer, which in the U.S. requires an advanced, post-baccalaureate degree, plays a key role in creating a legal services market where providers are much less diverse than the public they are meant to serve.¹⁴⁶ In this Part, I focus on two additional harms of the current restrictions on nonlawyer practice. First, many Americans who face civil justice problems receive no assistance from anyone with legal expertise because the current rules prevent them from getting competent help. Second, the current restrictions also limit the ability of communities to organize around their own interests.

Perhaps the most obvious harm of the current restrictions is that people are

142. *Id.* at tbl.5.6.

143. *Id.*

144. Rhode & Ricca, *supra* note 6, at 2595.

145. Compare the United Kingdom, where consumers have a wider choice of different types of providers and use many different types. *See, e.g.*, LEGAL SERV. CONSUMER PANEL, TRACKER SURVEY 2019, <https://perma.cc/3BES-R4MF>.

146. *See* Rebecca L. Sandefur, *The Face of Access to Justice: Diversity, Debt and Aspiration Among American Lawyers*, in IILP REVIEW 2014: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 62, 62 (Elizabeth Chambliss ed., 2014) (comparing the relatively homogenous racial and ethnic background of contemporary lawyers to that of the much more racially and ethnically diverse nation).

prevented from getting help when they need it.¹⁴⁷ In any given year, ordinary Americans experience at least 100 million civil justice problems in their personal capacity, not including those they may encounter as owners of small businesses or sole proprietorships.¹⁴⁸ These problems affect their capacity to make a living, their access to safe and healthy shelter, and their ability to care for dependent adults and children in their lives.¹⁴⁹ Most will handle these issues without assistance from anyone other than their family and friends.¹⁵⁰ People facing justice problems without legal assistance can forfeit significant rights or fail to understand important obligations.¹⁵¹ With America's high volume of civil justice problems, it is simply not feasible to provide a fully qualified attorney to everyone who might benefit from legal advice. To illustrate, one scholar estimated that the cost of giving a single hour of lawyers' advice to all of the American "households with an unmet dispute-related need" would amount to at least \$50 billion annually.¹⁵² To put that quantity in perspective, current U.S. spending on civil legal aid from all sources—local, federal, state, philanthropy—is estimated at about \$1.6 billion per year.¹⁵³ Of course, the quantity of a single hour is only illustrative: some people would need less, others would need much more. Providing the services of fully qualified lawyers for every civil justice problem experienced by Americans would not be impossible—we find ourselves able to spend much larger amounts on things like roads, healthcare, and the military—but it is unlikely to happen. Fortunately, as the evidence reviewed here shows, providing fully qualified lawyers in every instance is not necessary to achieve access to justice. Continuing restrictions on nonlawyer advice provision effectively shut out millions of people from competent help.

The harm of the current restrictions is not just that individuals who need help cannot get it. Another concerning consequence of the status quo is the way it can chill the kinds of organic, grassroots activities that keep democracy vital and enable people to use their own laws. I provide three examples below. Two come from my own research; in describing those, I have changed some details to protect the work and identities of people involved. Another comes from public reports of how powerful interests have attempted to restrict ordinary people's access to their own laws.

The first example concerns community attempts to combat wage theft, when

147. Levin, *supra* note 6, at 2613.

148. Sandefur, *supra* note 4, at 49.

149. Sandefur, *supra* note 3, at 443.

150. SANDEFUR, *supra* note 41, at fig.5.

151. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators and Clerks*, 67 *FORDHAM L. REV.* 1987, 1989 (1999).

152. Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 *INT'L REV. L. & ECON.* 44, 45 (2014).

153. ALAN W. HOUSEMAN, *CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2017* 5 (Mar. 2018), <https://perma.cc/T62L-Z9Y7>.

an employer fails to pay all that a worker is owed. Such theft is distressingly common in this country. Millions of people every year get less pay than they have earned, resulting in the loss of billions of dollars from their paychecks.¹⁵⁴ A worker whose wages were being stolen lived in a city where community groups offered “know your rights” workshops and information about how to write firm, polite, clear letters to employers asking that back wages be paid.¹⁵⁵ This worker wrote a such a letter.¹⁵⁶ When the employer did not respond, the worker wrote a second letter to the state’s labor authority.¹⁵⁷ The amount in dispute was about \$500, a substantial sum for someone in a low-wage job.¹⁵⁸

The worker’s employer hired a lawyer, who defended the employer before the state labor authority.¹⁵⁹ The lawyer also filed a complaint with the state’s attorney disciplinary authority against the community group, alleging that telling someone what the law says and helping her write a letter asking for what is hers by right is the unauthorized practice of law.¹⁶⁰ The community group was subsequently required to scale back its activities.¹⁶¹ While the first act of the lawyer—defending the employer—can stop one claim of unpaid wages, the second—reducing the capacity of a grassroots organization to help a poor community—can stop many such claims.

A more public instance of how rules about nonlawyer practice can be used to squash community efforts to look after their own interests is illustrated in the attacks during the late 1990s on Tulane University’s environmental law clinic. These began after members of the predominantly African-American community of Convent, Louisiana asked the clinic for legal help to challenge the placement of a large chemical facility in their town.¹⁶² Clinic students represented the community in public hearings and filed lawsuits challenging the issuing of permits necessary to build and operate the plant, asserting that permit decisions were made by officials who were biased or had conflicts of interest.¹⁶³ Clinic students also filed a complaint with the federal Environmental Protection Agency alleging “that the state’s actions in issuing permits to the plant violated residents’ rights under Title VI of the Civil Rights Act of 1964.”¹⁶⁴

154. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, ECON. POLICY INST. (May 10, 2017), <https://perma.cc/J57J-5UTP>.

155. Confidential Telephone Interview with an attorney supporting the community organization (Sept. 25, 2019).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Law Clinic*, 4 WASH. U.J.L. & POL’Y 33, 37-38 (2000).

163. *Id.* at 47-49.

164. *Id.* at 49.

When these “legal efforts [against business interests] were largely successful,”¹⁶⁵ the clinic faced a significant backlash. This included industry groups encouraging the state supreme court to investigate clinic activities and change the student practice rules to restrict the activities that law students were able to pursue and limit their ability to represent community organizations.¹⁶⁶ “Attorneys representing businesses that were defeated in proceedings by clinic students played a prominent role in the effort to restrict availability of clinic services.”¹⁶⁷ The court subsequently investigated the clinics and changed the student practice rules, making it “impractical” for clinic students to “appear on behalf of citizen organizations in state forums.”¹⁶⁸ Students also may no longer represent clients if the clinic reaches out to that potential client; clients must make the “first contact.”¹⁶⁹ Thus, an effective nonlawyer support to communities seeking to organize around their own interests was made less effective in supporting that grassroots activity.

Regulators need not actively engage in suppression to prevent nonlawyers from giving advice. As part of my research into consumer-facing legal technologies, I spoke with a number of technology developers who worried about being pursued for the unauthorized practice of law if the tools they created were too effective at assisting people with their civil justice problems. Among these was a nonprofit that works closely with community groups to assist people with a very common type of civil justice problem among low-income communities, safe and healthy housing. Nationally, millions of renters live in housing where conditions are “inadequate” by federal standards.¹⁷⁰ As one advisor to this project explained to me, a prosecution of this small nonprofit organization for the unauthorized practice of law could quickly bankrupt the program and stop its activities, whether or not the program was ultimately found to be “practicing law.”¹⁷¹ Complaints about unauthorized practice of law come less from consumers or clients, and more from the bar itself.¹⁷² And most complaints are

165. *Id.* at 50.

166. Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions: Some Questions and Answers*, 32 ENVTL. L. REP. 11476, 11476 (2002).

167. Kuehn, *supra* note 162, at 72 (capitalization altered).

168. Babich, *supra* note 166, at 11477.

169. *Id.*

170. A 2013 study found that 9.8% of rental units in the U.S. evidenced “severely” or “moderately” inadequate conditions. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, AMERICA’S RENTAL HOUSING EVOLVING MARKETS AND NEEDS 16 (2013), <https://perma.cc/TT6E-6QJQ>. At that time, the United States had at least 43 million households living in rented accommodations. *Id.* at 1.

171. Confidential in-person interview with the author (Jan. 14, 2019).

172. Rhode & Ricca, *supra* note 6, at 2591-92. As Table 3 shows, about a quarter (26%) of jurisdictions reported that a majority of complaints come from consumers. By contrast, Table 4 shows that 42% of jurisdictions reported that a majority of complaints come from lawyers.

about the activities of nonlawyers.¹⁷³ At present, this pernicious dynamic prevents activity that would bring to many American communities both access to justice and the collective goods that flow from it, like a healthy environment and safe and healthy housing stock.

CONCLUSION

The facts lead in a clear direction. Consumers value and purchase legal services from providers who are not fully qualified attorneys. The legal work produced by nonlawyers can be as good as—and sometimes better than—that of lawyers. The current restrictions on nonlawyer practice are unsupported by evidence about nonlawyer quality or consumer demand. Nor are the current restrictions supportive of access to justice or of communities’ ability to organize around their own interests in our democracy. Millions of people who need help with their justice problems and could benefit from nonlawyer services currently cannot get any help. And groups around the country that seek to mobilize around their rights are hampered by fears of the bar’s attempts to police their activities. The facts are friendly to advocates of expanded roles for nonlawyers.

As is so often the case in the empirical study of civil justice, the evidence base is uneven and composed mostly of case studies of specific populations, services, products, programs, or courts.¹⁷⁴ Nonetheless, the tendency of the body of research is clear: there is demand for legal advice and other services from nonlawyer providers, and such providers can produce services that are as good or better than those of attorneys. If the regulation of the practice of law is to be guided by honest concerns for consumer protection, the evidence shows that there is much more scope for nonlawyers to practice law safely and effectively than is permitted by the current rules.

These facts are also friendly to regulators and other members of the profession who heed Elizabeth Chambliss’s call to “engage in the growing national research conversation about access to justice, and . . . expand [their] commitment to evidence-based” regulation of legal services.¹⁷⁵ A growing evidence base can guide smarter regulation that expands consumer choice and opens up access to justice for millions currently excluded.

Lawyers are sometimes essential to ensuring lawful resolution of justice

173. *Id.* at 2591.

174. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class and Gender Inequality*, 34 ANN. REV. SOC. 339, 352 (2008) (reviewing many such studies and arguing that scholars should move away from “single-case case studies”); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295 (2016) (documenting the lack of reliable and consistently-collected data about civil justice in the U.S. context and offering solutions); Sandefur & Teufel, *supra* note 40, at 3-4.

175. Chambliss, *supra* note 6, at 350.

problems.¹⁷⁶ The point of reviewing the evidence in this paper is to demonstrate that, in fact, they are frequently also *not* essential for this purpose. For people whose legal situations are complex enough to require a fully qualified lawyer's expertise, competent nonlawyer advice service will be second-best to full representation by an attorney. However, it will often be better than navigating a life-changing justice problem with no legal assistance at all, which is the situation many currently confront. At the same time, the research reviewed here shows that nonlawyer legal advice will not only be sufficient for the needs of some individuals—it will be actively preferred.

Nonetheless, expanding the scope of nonlawyer practice is not enough. A just and accessible legal system would include a range of kinds of providers, both traditional lawyers and others. It would also include means for connecting people with services that they need and want and that are appropriate and proportionate to their situations.¹⁷⁷ A more just and accessible system is completely achievable: it requires only the will to change.

176. For evidence-based approaches to exploring when this is the case, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37 (2010) (reviewing studies of the impact of counsel and analyzing factors that make lawyers necessary and unnecessary), and the work of Harvard's D. James Greiner (e.g., D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901 (2012) (reporting on a randomized controlled trial of limited legal assistance and showing that this is not always sufficient)); ELLEN DEGNAN ET AL., *TRAPPED IN MARRIAGE* (2018) (reporting on a randomized controlled trial of the need for lawyer representation in divorce proceedings), <https://perma.cc/XY48-KHW6>.

177. See PASCOE PLEASENCE ET AL., *RESHAPING LEGAL SERVICES: BUILDING ON THE EVIDENCE BASE* iii (2014) (reviewing a decade of research evidence and arguing that legal aid services should be targeted to people's needs, linked with other services likely to be needed, timely, and appropriate to the capabilities of those receiving the service); Sandefur, *supra* note 73, at 729 (reviewing a range of evidence in support of the conclusion that legal services delivery to personal clients should be through channels that are timely, targeted to people's needs as they understand them, and via trusted sources); Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 *DENV. U. L. REV.* 859, 886 (2011) (advocating and offering design principles for an integrated system of triage of a variety of legal services and court processes, because "[w]e will never build either an efficient court system or a 100% access-to-justice system without a triage system").



THE SUPREME COURT *of* OHIO