Access to Legal Services Working Group

Texas Access to Justice Commission | January 30, 2023

Introductory Materials

1. Supreme Court of Texas Letter to the Texas Access to Justice Commission (Oct. 24, 2022)
2. Overview | National Center for State Courts
3. *The Landscape of Allied Legal Professionals Program in the United States* | IAALS
4. *Regulatory Sandboxes for the Legal Industry* | 2Civility
5. Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J.F. 228 (Oct. 19, 2022)
6. Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J.F. 259 (Oct. 19, 2022)

1

Supreme Court of Texas Letter to the Texas Access to Justice Commission (Oct. 24, 2022)

The Supreme Court of Texas

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October 24, 2022

Ms. Harriet Miers
Chair, Texas Access to Justice Commission
Locke Lord LLP
By email

Dear Chair Miers:

The Texas Commission to Expand Civil Legal Services recommended in its December 2016 report that a primary objective of future rulemaking projects should be to foster access to the civil justice system by Texans who cannot afford traditional legal representation. Many Texans have incomes low enough to qualify for assistance from legal aid and volunteer attorney organizations, but resource and staffing constraints allow these organizations to serve only a small fraction of qualified applicants. Often, the only option for Texans who cannot be served is to attempt to represent themselves.

To help address this civil justice gap and expand access to justice for low-income Texans, the Supreme Court requests that the Commission examine existing rules and propose modifications in the following areas:

- Modifications that would allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans. Among other things, the Commission should consider: qualifications, licensing, practice areas, and oversight of providers; eligibility criteria for clients; and whether compensation for providers should be limited to certain sources, such as government and non-profit funds.

- Modifications that would allow non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence. The Commission should consider whether to recommend that these modifications be studied through a pilot program or regulatory sandbox and whether modifications should focus on certain services for which there is a particular need.

The Court understands that the Commission will seek input from the bar and a range of other relevant constituencies in developing these proposals, which the Court would appreciate receiving by fall 2023. The Commission should work with the State Bar of Texas to provide periodic updates to bar members regarding its work on the proposals.

The Court is grateful for the Commission's service and your leadership.

Sincerely,

J. Brett Busby
Justice

cc: Access to Justice Commission Members and Staff
State Bar of Texas

2

Overview

Texas Access to Legal Services Project

Texas Access to Justice Commission | National Center for State Courts

Problem

Legal services providers do not have sufficient resources to meet the legal needs of low-income Texans who qualify for legal services. According to the Texas Access to Justice Foundation, approximately 5.2 million Texans qualify for legal aid.[1] Legal aid organizations help more than 140,000 Texas families with their civil legal needs each year; however, there is only one legal aid lawyer for every 7,000 Texans who qualify. Due to a lack of resources, only 10% of low-income Texans' civil legal need are being met.[2]

Assignment to Help Address the Problem

To help address this problem, other states have modified their ethical rules to allow trained non-lawyers to provide legal advice in limited areas of the law. States have also modified their rules prohibiting non-lawyer ownership of entities providing legal advice to allow legal organizations to partner with companies to help drive technological solutions to more efficiently deliver legal services to low-income individuals.

The Texas Supreme Court has requested that the Texas Access to Justice Commission examine existing court rules and consider proposing modifications to those rules that would:

1. allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans; and
2. allow non-attorneys to have economic interests in entities that provide legal services to low-income Texans.

A Working Group has been formed to address the Texas Supreme Court's request.

Potential Solution 1: Paraprofessionals

***Texas Supreme Court Study Topic**: Modifications that would allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans.*

Background

Under current law, Texas Penal Code 38.122 prohibits people from holding themselves out as lawyers licensed to practice law if it is done with the intent to obtain an economic benefit. The Texas Disciplinary Rules of Professional Conduct Rule 5.05 prohibits lawyers from assisting a person who is not a member of the bar in engaging in the unauthorized practice of law.

[1] Legal aid organizations primarily assist individuals and families living at or below 125% of the federal poverty guidelines. 125% of the 2023 federal poverty guidelines for a family of four is $37,500 a year and for an individual it is $18,225. U.S. Federal Poverty Guidelines for 2023, *available at* https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (last accessed Jan. 23, 2023).

[2] Access to Justice Facts, Texas Access to Justice Foundation, *available at* https://www.teajf.org/news/statistics.aspx (last accessed Jan. 23, 2023).

Landscape of Navigator and Paraprofessional Programs

Several potential models have emerged as more and more states have implemented paraprofessional programs and pilot projects, ranging from legal navigators to fully licensed legal paraprofessionals able to provide legal assistance without supervision within the scope of their license. This section will introduce the different types of programs currently in place and under consideration.

Court Navigators

Court navigators do not provide legal advice but rather provide guidance and information to self-represented litigants to facilitate access to justice and improve court effectiveness.[3] Court navigators provide information and nonlegal guidance to self-represented litigants to allow them to effectively navigate courts, access legal resources, and file appropriate paperwork. When self-represented litigants are better prepared and can more effectively navigate court systems, this reduces the burden on court staff, helping processes run more smoothly.

Tasks that court navigators can perform include:

- helping find things in the courthouse, such as the clerk's office or courtroom;
- making referrals for further legal assistance and legal resources;
- providing information about legal rules and procedures so the self-represented litigant can understand the procedural posture of the case, what to expect, and next steps in the process;
- assisting with legal forms, including identifying the correct form, preparing the form, reviewing the form for completeness, organizing the self-represented litigant's paperwork, helping with access to computers and technology;
- providing language assistance; and
- providing support in the courtroom, including emotional support and taking notes on the judge's ruling to help the self-represented litigant understand what happened in court.

Importantly, unlike Legal Paraprofessional models, court navigators do not provide legal advice. In addition, court navigators receive training on what constitutes legal advice versus information.

Court navigators may focus on certain case types where there is a high percentage of self-represented litigants, such as landlord tenant (*e.g.*, eviction, habitability), debt collection, family law (*e.g.*, child custody, uncontested divorce, name change), or filing conservatorships.

Supervised Legal Paraprofessional

Supervised Legal Paraprofessionals are permitted to provide legal services within a limited scope of practice under the supervision of an attorney. The supervising attorneys use their professional judgment to determine what tasks are suitable for legal paraprofessionals based on the complexity of the work and the legal paraprofessionals' skills and experience, alleviating the need for the bar or a different licensing entity to oversee the work of legal paraprofessionals.

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[3] *Non-lawyer Navigators in State Courts: An Emerging Consensus: A Survey of the National Landscape of Non-Lawyer Navigator Programs in State Courts Assisting Self-Represented Litigants*, Georgetown Law Justice Law, at 15 (June 2019), *available at* https://www.srln.org/system/files/attachments/Final%20Navigator%20report%20in%20word-6.11.hyperlinks.pdf (last accessed Jan. 23, 2023).

Alaska

Alaska has a Community Justice Worker Program in which non-lawyers ("Community Justice Workers") can provide legal assistance to low-income Alaskans under the supervision of the Alaska Legal Services Corporation. The Program provides free online training through the Alaska Pacific University, including training on the rules of professional conduct. Currently, Community Justice Workers may train in the following areas: SNAP applications and appeals, wills, ICWA enforcement, debt collection defense, and domestic violence protective orders. Rules formalizing the program were enacted by the Alaska Supreme Court, effective November 29, 2022.

Delaware

In January 2022, the Delaware Supreme Court enacted Rule 57.1 that allows non-lawyer Qualified Tenant Advocates to provide legal advice in landlord-tenant cases under the supervision of a Delaware legal aid lawyer. Notably, prior to enacting Rule 57.1, landlords were allowed to be represented by non-lawyer agents in eviction proceedings, but tenants were not permitted to have non-lawyer representation.

Minnesota

In 2022, the Minnesota Supreme Court implemented two pilot projects, focusing on landlord-tenant and family law cases. For family law cases, legal paraprofessionals may provide advice and appear in court on behalf of client for less complex matters (which, depending on the circumstances, could include child support modifications, parenting time disputes and paternity matters); may represent the client in mediations where, based on the judgment of the supervising attorney, the matters at issue are less complex, such as simple property division, parenting time, and spousal support; and may prepare and file certain documents. To qualify to be a Supervised Legal Paraprofessional, an applicant must meet certain paralegal education or experience requirements and meet certain ethics and continuing legal education ("CLE") requirements. In October 2022, the Minnesota Supreme Court entered an order expanding the areas of permitted practice in family law to include cases involving allegations of domestic or child abuse and orders of protection, as long as the legal paraprofessional has completed specialized training and educational requirements.

Program Size: Minnesota currently has 22 legal paraprofessionals participating in the pilot project.

New Hampshire

In 2022, New Hampshire passed a bill enacting a Legal Paraprofessional Pilot Project to begin in January 2023. Legal paraprofessionals may represent clients in domestic violence, divorce, custody, and landlord-tenant cases, including in the courtroom; however, the legal paraprofessional must be supervised by an attorney admitted to practice in New Hampshire who has professional liability insurance.

Independent Legal Paraprofessional

Independent Legal Paraprofessional programs typically allow licensed legal paraprofessionals[4] to practice law in a specific substantive area in which they are certified to practice. Washington, Utah, and Arizona

[4] States use different terms to refer to legal paraprofessionals, including Limited Licensed Legal Technicians (WA) and Licensed Paralegal Practitioner (UT).

have implemented Independent Legal Paraprofessional Programs, and Oregon will start a program in July 2023.[5]

Substantive Areas of Law: While programs vary, substantive areas of law in which Legal Paraprofessionals may practice include landlord-tenant, debt collection, family law, administrative law, and some aspects of criminal law where the defendant is not at risk of incarceration.

Permissible Tasks Legal Paraprofessionals Can Perform: State have allowed Legal Paraprofessionals to provide most legal services within their certified area of practice to clients, except states typically prohibit Legal Paraprofessionals from representing a client in a courtroom. Legal Paraprofessionals can provide navigator-type services, such as informing client about navigating court processes and explaining what court orders mean, but Legal Paraprofessionals can also provide legal advice, advocacy, and representation, including counseling and advising clients on legal rights and remedies, drafting and filing court documents, and representing clients in settlement negotiations or mediation.

Client Qualifications: As long as Legal Paraprofessionals are representing a client within their permissible scope of practice, there are no limits on the clients that they can represent.

Supervision: Washington, Utah, and Arizona do not require licensed Legal Paraprofessionals to be supervised by an attorney; the Oregon Pilot Project sets forth legal services that a Legal Paraprofessional can handle independently and different tasks that a Legal Paraprofessional can handle under the supervision of an attorney.[6]

Qualifications and Training: States may require applicants to have an associate's degree, a paralegal certification, and a certain number of years of experience in an area of law to qualify to be a licensed Legal Paraprofessional. Legal Paraprofessionals typically must take a test, assessing general legal knowledge, understanding of ethics rules, and knowledge of the substantive area of law in which they seek to be licensed or certified. Some states also require applicants to pass a character & fitness examination.

Ongoing Responsibilities: Legal Paraprofessionals have similar responsibilities as attorneys in their state, including paying annual dues, ethical responsibilities, malpractice insurance requirements, trust account requirements, and CLE requirements. Some states require Legal Paraprofessionals to obtain CLE hours within the scope of the Legal Paraprofessionals' specific area of practice and ethics.

Program Size:

- Washington is sunsetting its Program (Limited License Legal Technician ("LLLT") Program) in 2023, due to the overall costs of sustaining the program and the small number of interested individuals, concluding that this "was not an effective way to meet [legal] needs."[7] The program admitted its first LLLT in 2015 and currently has 91 LLLTs.

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[5] *The Landscape of Allied Legal Professional Programs in the United States,* Institute for the Advancement of the American Legal System, at 7-12 (Nov. 2022), *available at* https://iaals.du.edu/sites/default/files/documents/publications/landscape_allied_legal_professionals.pdf (last accessed Jan. 23, 2023).

[6] Compare Rules for Licensing Paralegals in Oregon Rule 11.1(a) with 11.1(b) (family law) and Rule 11.2(a) with 11.2(b) (landlord-tenant), available at https://www.osbar.org/_docs/resources/Exhibit1-2022.06.14LPRFAadoptedbyPLIC.pdf (last accessed Jan. 23, 2023).

[7] Letter from Chief Justice Debra L. Stephens, Wash. Sup. Ct. to Stephen R. Crossland et al., Ltd. License Legal Technician Bd. & Wash, State Bar Ass'n (June 5, 2020), *available at* https://wsba-

- Utah implemented its Program in 2019 and currently has 26 licensed legal paraprofessionals.
- Arizona implemented its Program in 2021 and currently has 26 licensed legal paraprofessionals.

Programs Currently Under Consideration

Connecticut (under consideration)

In September 2021, one of the Connecticut Bar Association State of the Legal Profession Task Force subcommittees recommended developing a program for licensed non-lawyers to provide legal advice and to advocate for clients in limited practice areas, including evictions, small claims, portions of family law, administrative law, and criminal law with express limitations (carry no prospect for incarceration).

New Mexico (under consideration)

In January 2020, the New Mexico Supreme Court endorsed a proposal by the Ad Hoc Licensed Legal Technicians Workgroup, recommending further study regarding allowing licensing non-lawyers to perform limited legal work, including monitoring the currently existing legal paraprofessional programs to get a sense of how successful these programs might be. The Supreme Court created a committee to work on this recommendation and study the feasibility of creating a licensed legal technician program.

New York (under consideration)

The 2020 Commission to Reimagine the Future of New York Courts created a work group to explore regulatory and structural innovations to more effectively adjudicate cases and improve the accessibility, affordability, and quality of services. In December 2020, the work group proposal included a recommendation to allow social workers to provide limited legal services and advocacy. The full Commission accepted the recommendations and work is underway to implement them.

South Carolina (under consideration)

In 2022, the South Carolina Board of Paralegal Certification sent South Carolina Supreme Court a letter with a proposal to expand the role of South Carolina Certified Paralegals. The Supreme Court has not yet acted on this recommendation.

Non-Profit Driven Change: UpSolve's American Justice Movement Program

While regulatory reform is usually driven by changes to the rules of ethics, UpSolve has at least temporarily driven change through its American Justice Movement Program. Upsolve is a non-profit that initially created tools to help consumers file for bankruptcy. In 2022, UpSolve launched its American Justice Movement to empower low-income New Yorkers who have been sued for a debt to get free legal advice from a Justice Advocate in their community.

To protect justice advocates from prosecution for violating New York's Unauthorized Practice of Law ("UPL") rules, UpSolve successfully obtained a preliminary injunction prohibiting the Attorney General from enforcing UPL rules against UpSolve and its American Justice Movement Program to prevent a violation of the justice workers' right to free speech.

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uat.azurewebsites.net/docs/default-source/licensing/lllt/1-2020-06-05-supreme-court-letter-to-steve-crossland-et-al.pdf?sfvrsn=8a0217f1_7 (last accessed Jan. 23, 2023).

Potential Solution 2

Texas Supreme Court Study Topic: *Modifications that would allow non-attorney to have economic interests in entities that provide legal services to low-income Texas while preserving professional independence.*

Background

Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct ("Texas Rule 5.04") prohibits lawyers and law firms from sharing legal fees or forming a partnership providing legal services with a non-lawyer and restricts the circumstances in which a lawyer may form a professional corporation authorized to practice law for profit. Texas Rule 5.04's purpose is to protect the lawyer's independent professional judgment from improper influence.

Texas Rule 5.04 substantially aligns with American Bar Association Model Rule 5.4.

Regulatory Reform Endeavors

Utah Regulatory Sandbox

In 2020, Utah implemented a "regulatory sandbox" in which legal business models that would have been prohibited under the rules of professional conduct (e.g., Rule 5.4 (professional independence of lawyer), Rule 5.5 (UPL), or other regulatory rules) can apply for permission from the Utah Supreme Court to conduct business. The purpose of the sandbox is to experiment with and test innovative business models, products, and services with the ultimate goal of ensuring "consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services."

Businesses are initially given a risk categorization (e.g., low-, medium-, or high-risk), which controls reporting requirements. With reports and data, the Utah Office of Legal Services Innovation (the regulatory authority, hereinafter referred to as "the Office") can then assess actualized risk and regulate accordingly moving forward by assessing whether the goal is being achieved and whether consumers are being harmed.

The Office provides the following examples of potential businesses:

- traditional law firms taking on non-lawyer investment or ownership;
- traditional law firms and lawyers entering into fee sharing relationships with non-lawyers;
- non-lawyer-owned or corporate entities employing Utah-licensed lawyers to practice law;
- firms or companies using technology platforms or non-lawyer service providers to practice law; or
- lawyers or firms entering joint ventures or other forms of business partnerships with non-lawyer entities or individuals to practice law.

After a period of review, entities can exit the regulatory sandbox. They remain under the oversight of the Utah Supreme Court and the Office and must make quarterly reports concerning consumer complaints to the Office.

The Office has a form that consumers can fill out about complaints; however, the form expressly states that the Office will not provide the consumer with assistance to resolve their complaints.

Utah currently has 47 authorized entities, with 35 entities assessed as a low risk level, 11 assessed as a moderate risk level, and 1 assessed as a high risk level. Below are some examples of business entities authorized in Utah that may be of particular interest to the Working Group:

- AAA Fair Credit Foundation partners with People's Legal Aid to provide legal assistance from non-lawyers related to medical debt, including debt negotiation, advising, and form completion.
- Holy Cross Ministries provides assistance to consumers facing medical debt through non-lawyers, including providing advice and completing forms.
- Timp Legal Certified Advocate Partner Program is a non-profit entity with non-lawyer domestic advocates who provide limited services, such as legal assistance and assistance with protective orders.
- Angel Advocates, PLLC is a firm with lawyers and non-lawyers providing legal services to families impacted by loved one with special needs.
- Standout Legal LLC is a partnership between lawyers and non-lawyers who assist consumers with end-of-life planning, contracts, and family law.
- Fair Credit employs attorney to assist consumers with credit violations.
- Hello Divorce provides dissolution of marriage services through a tech platform and lawyer employees.
- LawPal provides software-facilitated legal document assistance in family and housing law.

Arizona: Permit Alternative Business Models: Repeal of Rule 5.4

In 2020, Arizona amended its rules to repeal prohibitions on fee sharing and non-lawyer economic interests in law firms. The purpose of this change to allow lawyers to partner with non-lawyers to develop a range of different business forms, which, in turn, would improve access to justice and the delivery of legal services. Arizona lists several advantages to Alternative Business Structures ("ABSs"), including allowing for greater technological innovations in the delivery of legal services, providing additional capital to law firms, allowing firms to attract the best and brightest non-lawyer partners, and allowing for one-stop shops to provide both legal and non-legal services.

ABSs must apply for a license (Section E); the Committee on ABSs reviews the applications and makes recommendations to the Arizona Supreme Court, which ultimately grants or denies an application. In making its recommendations to the Arizona Supreme Court, the committee must state the factors in favor of approval (Subsection E(2)), including taking into account regulatory objectives, such as protecting the public interest, promoting access to legal services, promoting and maintaining adherence to principles of professionalism, and ensuring that adequate safeguards are in place to protect consumers (e.g., ensuring that lawyers act in the best interests of their clients, maintain confidentiality, and maintain the independence of their professional judgment).

ABSs must also have a compliance lawyer, whose duties and responsibilities (Subsection G(3)) include ensuring that the ABS complies with policies and procedures to prevent non-lawyers in the business from interfering with lawyers' ethical duties.

In addition, ABSs must comply with a Code of Conduct (Section K), which addresses ethical issues concerning conflicts of interest, professional independent judgment, and false and misleading conduct.

Currently, Arizona has licensed 29 ABSs.

Regulatory Reform and Access to Justice

One hypothesis of regulatory reform is that it will improve access to justice by increasing access to legal services. Some argue that the rules prohibiting non-lawyer ownership and fee splitting with non-lawyers prevents "innovation in marketing, finance systems, project management and more" because law firms cannot offer equity interest to non-lawyers.[8]

Some argue that prohibitions on non-lawyer ownership interests in a law firm and barriers to outside investments from non-lawyers present barriers to innovations in legal services.[9]

International territories have reported that non-lawyer ownership has resulted in increased choice and competition, improved services, reduced prices, and an increase in innovation.[10]

Critiques of ABS Regulatory Reform

Critiques of regulatory reform efforts, particularly non-lawyer ownership reform, typically focus on a lack of data to support claims that non-lawyer ownership will increase access to justice and contend that such reform will undermine professionalism and potentially transform law firms into profit maximizing entities without regard to the public good.[11]

Conflicts of interest may also arise in the ABS models, such as entities providing both insurance and legal services. While it may be in the company's short-term best interest to achieve highly favorable legal results for its clients, long-term, it is more favorable to settle claims efficiently.[12]

In August 2022, the ABA reaffirmed Resolution 00A10F, stating that:

> The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.

In 2020, the California State Bar began exploring regulatory reform, including allowing more fee sharing between lawyers and non-lawyers. In response, however, California enacted a law requiring the State Bar to prioritize protecting consumers from "unscrupulous actors" in the legal field, prioritize access to justice for persons who qualify for legal services, and not consider regulatory reform that would allow corporate ownership of law firms and splitting legal fees with non-lawyers or abrogate UPL restrictions.

In 2021, a Florida Supreme Court-created special committee recommended establishing a regulatory sandbox modeled after Utah to test non-lawyer ownership and fee sharing with non-lawyers to the Florida

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[8] Jason Solomon, Deborah Rhode & Annie Wanless, *How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice*, Stanford Center on the Legal Profession, April 2020 at 1, available at https://law.stanford.edu/publications/how-reforming-rule-5-4-would-benefit-lawyers-and-consumers-promote-innovation-and-increase-access-to-justice/ (last accessed Jan. 23, 2023).

[9] *Id.* at 6.

[10] *Id*. at 8.

[11] *When Lawyers Don't Get All the Profits*, 29 The Georgetown J. of Legal Ethics, at 13 (2016).

[12] *See id.* at 24-25 (identifying potential conflict of interest in insurance-legal alternative business models in the United Kingdom, noting that many insurance companies with ABSs opted to follow a voluntary code of conduct that promoted settlement of clients' legal claims whenever possible to contain legal costs).

Bar. The State Bar Board of Governors unanimously rejected the proposal, and the Florida Supreme Court declined to adopt the majority of the special committee's recommendations. The Florida Supreme Court, however, did adopt a recommendation to allow nonprofit legal services providers to organize as a corporation and permit non-lawyers to serve on their boards of directors.

Working List of Relevant Texas Resources

General Filing Trends by Case Type

Statewide Filing Trends (2020)[13]

- 28% of civil cases are debt cases, up 35% in civil courts and 147% in justice/municipal courts over the last five years.
- 14% of civil cases are landlord-tenant; landlord tenant cases significantly declined during the pandemic but were at an all-time high in 2019.
- Family cases comprised 45% of the total civil caseload (excluding civil cases related to criminal matters); most family matters are handled in district court. Divorce constitutes 37% of the cases (20% divorce with no children and 17% divorce with children); child support constitutes another 33% of cases.

Relevant Rules, Laws, and Cases

Texas Disciplinary Rules of Professional Conduct

Rule 5.03: Responsibilities Regarding Non-Lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

> (a) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer; and
>
> (b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:
>
> > (1) the lawyer orders, encourages, or permits the conduct involved; or
> >
> > (2) the lawyer:
> >
> > > (i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and
> > >
> > > (ii) with knowledge of such misconduct by the non-lawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

[13] FY 2020 Annual Statistical Report for the Texas Judiciary, available at https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf.

Rule 5.04: Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that:

> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order.
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
>
> (3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer 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 a profit, if:

> (1) a non-lawyer 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 non-lawyer is a corporate director or officer thereof; or
>
> (3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.05: Unauthorized Practice of Law

A lawyer shall not:

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law

Statutes

Tex. Gov. Code 81.101

(a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

(c) In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.

The above statute does not provide an exhaustive list of what constitutes the practice of law. The Texas Supreme Court has held that the courts ultimately decide what is the practice of law.

Tex. Gov. Code 81.102

(a) Except as provided by Subsection (b), a person may not practice law in this state unless the person is a member of the state bar.

(b) The supreme court may promulgate rules prescribing the procedure for limited practice of law by:

(1) attorneys licensed in another jurisdiction;

(2) bona fide law students; and

(3) unlicensed graduate students who are attending or have attended a law school approved by the supreme court.

Tex. Gov. Code 83.001(a)

(a) A person, other than a person described in Subsection (b), may not charge or receive, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, mortgage, and transfer or release of lien.

Subsection (b) exempts licensed attorneys, real estate brokers, or salesmen and mineral property lease transactions."

Tex. Penal Code 38.122: Prohibits a person from holding himself out to be a lawyer unless licensed to practice law if it is done with an intent to obtain an economic benefit

Tex. Penal Code 38.123: Prohibits a person from taking certain actions with respect to personal injury claims if done with an intent to obtain an economic benefit

Caselaw

Unauthorized Practice Committee v. Cortez, 692 S.W.2d 47 (Tex. 1985) (concluding that courts decide whether an activity is the practice of law; selecting and preparing immigration forms constitutes the practice of law).

Crain v. Unauthorized Practice of Law Committee, 11 S.W.3d 328 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), cert denied, 532 U.S. 1067, 150 L. Ed. 2d 211, 121 S. Ct. 2218 (2001) (preparing and filing mechanic's lien affidavits constitutes the practice of law).

Greene v. Unauthorized Practice of Law Committee, 883 S.W.2d 293 (Tex. App.—Dallas 1994, no writ) (preparing and sending demand letters on personal injury and property damage claims and negotiating and settling the claims with insurance companies constitutes the practice of law).

Fadia v. Unauthorized Practice of Law Committee, 830 S.W.2d 162 (Tex. App.—Dallas 1992, writ denied) (selling will forms and manuals constitutes the practice of law).

Brown v. Unauthorized Practice of Law Committee, 742 S.W.2d 34 (Tex. App.—Dallas 1987, writ denied) (contracting to represent persons with regard to personal injury and property damage claims constitutes the practice of law).

Working List of Resources:

ABA Model Rules of Professional Conduct

ABA 2022 Resolution No. 402

Texas Disciplinary Rules of Professional Conduct

Texas Professional Ethics Committee Opinions

Texas UPL Committee Resources

Conference of Chief Judges and Conference of State Court Administrators, Resolution 2: Endorsing Standards for Regulatory Reform Metrics

FY 2020 Annual Statistical Report for the Texas Judiciary

The Landscape of Allied Legal Professionals Programs

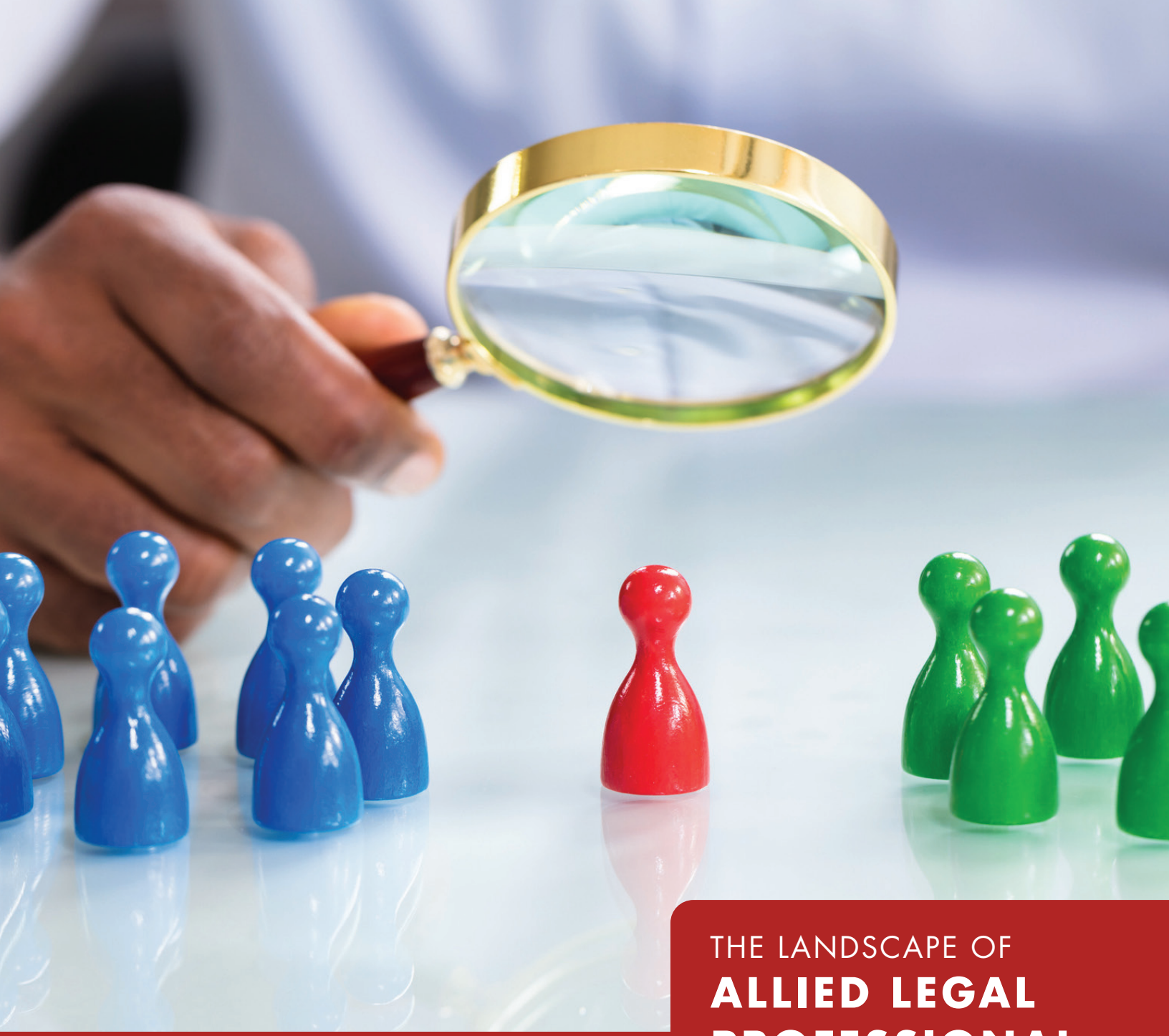
Regulatory Sandboxes for the Legal Industry

Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 Yale L.J.F. 228 (Oct. 19, 2022).

Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 Yale L.J.F. 259 (Oct. 19, 2022).

3

The Landscape of Allied Legal Professionals Program in the United States, IAALS



THE LANDSCAPE OF **ALLIED LEGAL PROFESSIONAL PROGRAMS** IN THE UNITED STATES

IAALS
INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM
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The Landscape of Allied Legal Professional Programs in the United States

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a "think tank" that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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Table of Contents

Acknowledgements 1

I. Purpose & Organization 2

II. Overview 2

III. Methodology 6

A. Discovery of Which States Have Active Programs & Proposals 6

B. The Framework of Allied Legal Professional Programs 6

C. Verification of Accuracy 7

IV. Discussion 7

A. Programs & Their Varying Stages 7

i. Programs Implemented 7

ii. Programs Under Development 11

iii. Programs Under Consideration 12

iv. Programs Currently Not Moving Forward 17

B. Practice Areas 19

i. States' Considerations of Practice Areas 19

ii. Considerations When Creating an ALP Program 26

C. Roles & Responsibilities 26

i. States' Considerations of Roles & Responsibilities 29

ii. Considerations When Creating an ALP Program 31

D. Attorney Supervision 32

i. States' Considerations for Requiring Attorney Supervision 32

ii. States' Considerations for Not Requiring Attorney Supervision 33

iii. Considerations When Creating an ALP Program 33
E. Title/Terminology 34
i. States' Considerations of Title 34
ii. Considerations When Creating an ALP Program 35
F. In-Court Representation 35
i. States' Considerations of Full Representation 36
ii. States' Consideration of Limited Representation 37
iii. States' Considerations of No Representation 37
iv. Considerations When Creating an ALP Program 38
G. Ownership Interest 38
i. States' Considerations of Majority/Minority Interest 40
ii. States' Considerations of No Interest 40
iii. States' Considerations of Fee Sharing 40
iv. Considerations When Creating an ALP Program 41
H. Eligibility 41
I. Education 42
i. Foundational, Specialty & Waiver Requirements 42
ii. Considerations When Creating an ALP Program 43
J. Practical Training 43
i. States' Considerations of Practical Training 44
ii. Considerations When Creating an ALP Program 45
K. Testing 45
i. States' Considerations of Examinations 45

ii. Makeup of Examinations 47
iii. Examination Results 47
iv. Considerations When Creating an ALP Program 48
L. Regulatory Requirements 48
i. States' Considerations of Regulatory Requirements 48
ii. Considerations When Creating an ALP Program 49
M. Program Costs 49
i. Costs to Become an ALP 50
ii. Costs to Fund an ALP Program 50
iii. Considerations When Creating an ALP Program 51
V. Existing Data on the Outcomes/Successes/Challenges of ALP Programs 51
A. Sources of Data 51
B. Benefits 52
i. Client Satisfaction 53
ii. Competent Work 53
iii. Decreased Cost for Legal Services 54
C. Challenges 54
i. Low Numbers of Applicants 54
ii. Poor Test Passage Rates 55
VI. Conclusion 55
Appendix A: Educational & Practical Training Requirements 57
Appendix B: Examinations 77
Appendix C: Regulatory Requirements 80

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I. Purpose & Organization

The purposes of this paper are to explain why many states have begun to create a new tier of legal service providers ("Allied Legal Professional" or "ALP")[1] and to describe the similarities and differences between each one. One of the first steps states have taken when developing their own program has been to look at what other states are doing. This report is designed to be used as a resource for states interested in creating their own ALP program to understand not only what other states' programs consist of, but also their reasoning behind many of their decisions.

The paper begins with an overview of the current access to justice problem that is plaguing the United States of America. It then details which states currently have active programs and which states have created proposals for a program in the future. The paper then describes each of the major pieces of the framework that makes up an ALP, how states' programs and proposals differ from one another, and why states have chosen the framework they have. It ends with a look at the benefits and challenges that exist with the active programs based on the various studies that have been done.

II. Overview

There is a well-documented and critical access to justice problem that exists in the United States and across the world. According to a national 2021 joint study—*Justice Needs and Satisfaction in the United States of America*—by IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, and HiiL, The Hague Institute for Innovation of Law, two-thirds of Americans faced at least one legal issue in the past four years.[2] Of the issues experienced, 46% either have no expected future resolution or were resolved in a way perceived as unfair.[3] A Pew Research Center study found that, in 2018 alone, less than half of all U.S. households that experienced legal issues sought relief in court, and those who sought such relief

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[1] There is no single commonly used name for allied legal professionals around the country, as jurisdictions have adopted a broad range of different titles and acronyms. IAALS selected this title as a placeholder name for this project, starting from what ALPs contribute as professionals rather than how they differ from lawyers. It is IAALS' goal to work with industry leaders to develop a standard name for these providers so that there is uniformity among states, as opposed to the current situation where most states have created a different name for their providers. *See infra* Section III.E.

[2] Hague Inst. for Innovation of Law & Inst. for the Advancement of the Am. Legal Sys., Justice Needs and Satisfaction in the United States of America 31 (2021), https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf.

[3] *Id.* at 222.

largely did so on their own.[4] Studies suggest that over 70% of civil[5] and family[6] law cases have at least one party that is self-represented, with over 90% of eviction[7] and debt-collection[8] cases in some jurisdictions involving an unrepresented defendant. These problems have only grown with the COVID-19 pandemic.

The crisis in access to justice is a crisis for our democracy. According to the World Justice Project, in 2021 the United States ranked 126 out of 139 countries for accessibility to court and legal services, and the problem reaches far up the income scale.[9] It is not only the poorest who lack access to legal services, but also the middle class and small businesses. In a 2022 justice gap survey by the Legal Services Corporation, only 59% of the middle class (yearly income of $34,689 to $111,000 for a family of four) were confident in their ability to afford an attorney.[10] Other studies show a grimmer view—that between 40–60% of the needs of middle-income individuals are unaddressed.[11] People want legal help, and they are not getting the help they need. When this reality collides with our ideal of "equality under the law," the sustainability of the legal system is threatened.

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[4] PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 4 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf (*citing* Erika Rickard, *Many U.S. Families Faced Civil Legal Issues in 2018*, PEW CHARITABLE TRS. (Nov. 19, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/many-us-families-faced-civil-legal-issues-in-2018).

[5] PAULA HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 31 (2015), https://www.ncsc.org/__data/assets/pdf_file/0015/25305/civiljusticereport-2015.pdf.

[6] PAULA HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS 20-24 (2018), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf.

[7] Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URBAN L.J. 37, 47 n.44 (2010), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2321&context=ulj.

[8] PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 2 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf.

[9] *WJP Rule of Law Index (Civil Justice in the U.S. in 2021)*, WORLD JUSTICE PROJECT, https://worldjusticeproject.org/rule-of-law-index/factors/2021/United%20States/Civil%20Justice (results from query "Country: United States" + "Year: 2021" + "Factors: Civil Justice") (last visited Nov. 1, 2022).

[10] LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 64 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1.

[11] Deborah L. Rhode, *Access To Justice: A Roadmap For Reform*, 41 FORDHAM URBAN L.J. 1227, 1228 (2016), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2544&context=ulj.

The access to justice problem reflects the stranglehold current regulations have on the delivery of legal services. With few exceptions, anyone other than a lawyer providing legal services is engaging in the unauthorized practice of law and can be punished—regardless of whether those services actually help consumers. Current regulations constrict new pathways to accessible legal services and leave consumers with few alternatives. And, while legal aid services and pro bono work are critical in mitigating the access to justice issue, reliance on lawyers and these programs is not enough. According to law professor and economist Gillian Hadfield, it would cost roughly $70 billion to provide just one hour of legal help to all the households in America currently facing legal problems.[12] And relying on pro bono work alone is just as unrealistic. If every lawyer in the country did 100 hours more of pro bono work on top of the pro bono work they already do, this would provide just 30 minutes of legal help per dispute-related problem per household.[13] Not only is this additional 100 hours unfathomable—in 2016, the average amount of pro bono hours provided by the 52% of lawyers who provide such services is around 37[14]—the 30 minutes of legal help it would provide is a far cry from the actual amount of help people need.

As a result, organizations and states have begun creating a variety of advocacy programs to help people who cannot afford an attorney. Some states have altered their unauthorized practice of law rules to allow a new tier of legal services providers—allied legal professionals (ALPs)—to perform limited services in discrete areas of the law. The few programs that have been created—and those still in the planning stage—have all been set up with a slightly different framework to fit their jurisdictions' needs. IAALS' created its *Allied Legal Professionals* project with the goal to map out what these different programs look like, understand the benefits and challenges that exist within each one, and then create recommendations for a national model with the assistance of subject-matter experts based on data and best practices.

Separate from the ALP programs mentioned above, organizations and states have created other advocacy programs that allow for people other than attorneys to provide legal services. In 2014, New York City created a Court Navigator Program where specially trained professionals who are not attorneys can provide general information, written materials, and one-on-one assistance for

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[12] Gillian K. Hadfield & Jamie Heine, Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans, USC L. LEGAL STUD. PAPER NO. 15-2, 37 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547664, *reprinted in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21-52 (Samuel Estreicher & Joy Radice eds., Cambridge Univ. Press 2016).

[13] *Id*.

[14] AM. BAR ASS'N, STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 6 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf.

self-represented litigants during their court appearances in landlord-tenant and consumer-debt cases. Upsolve is different in that it is a nonprofit organization that has implemented a program—the American Justice Movement—"to train professionals who are not lawyers to provide free legal advice on whether and how to respond to a debt collection lawsuit."[15] Innovation for Justice (i4J) is different from Upsolve, as it is a social-justice-focused legal innovation lab that creates disruptive, human-centered solutions to the access to justice gap. In 2019, it created a Licensed Legal Advocate pilot where nonlawyer community-based advocates could give free legal advice on family law issues. Most recently, i4J published a report on how Utah's and Arizona's ALP programs could be leveraged to create a less intensive specialized certificate for people who work in community-based organizations and help low-income tenants with housing issues.[16] The certificate would allow them to provide free, limited-scope legal advice on the common legal problems their clients face.[17] And while not created as an advocacy program, the United States Department of Justice allows accredited representatives who are not attorneys to represent clients before immigration courts.

The United States is not alone is creating programs that allow for people other than lawyers to provide legal services with the aim of increasing access to legal help. Unlike the United States, paralegals in Canada have been allowed to provide limited legal services for many years. In Ontario, the existence of the independent paralegal profession dates back around the 1960s,[18] and paralegals have been regulated by the Law Society of Ontario since 2007.[19] While there are restrictions on the types of cases they can handle, licensed paralegals are allowed to provide legal advice, prepare documents, and represent clients in court.[20] And since 2012, designated

[15] Complaint at 2, Upsolve, Inc. & Rev. John Udo-Okon v. Letitia James, No. 1:22-cv-00627 (S.D.N.Y. 2022).

[16] INNOVATION FOR JUSTICE, UNIV. ARIZ. JAMES E. ROGERS COLL. OF LAW & UNIV. UTAH DAVID ECCLES SCH. OF BUS., REPORT TO ARIZONA AND UTAH SUPREME COURTS: EXPANDING ARIZONA'S LP AND UTAH'S LPP PROGRAM TO ADVANCE HOUSING STABILITY 46 (2022), https://docs.google.com/document/d/1j-K2L1FOm6lFkXKkSZ89MeEumuFeGtuBQJ2-8ocTx5w/edit.

[17] *Id*. at 46.

[18] R. W. IANNI, REPORT OF THE TASK FORCE ON PARALEGALS 11 (1990), https://archive.org/details/mag_00004736/mode/2up.

[19] *Paralegal Regulation Resources*, L. SOC'Y ONT., https://lso.ca/paralegals/about-your-licence/paralegal-regulation-resources (last visited Nov. 1, 2022).

[20] *About Paralegals*, L. SOC'Y ONT., https://lso.ca/public-resources/choosing-the-right-legal-professional/about-paralegals (last visited Nov. 1, 2022).

paralegals in British Columbia have been permitted to give legal advice and appear before a court or tribunal while under the supervision of a lawyer.[21]

III. Methodology

In an effort to obtain the most comprehensive and accurate information available on the many states' allied legal professional programs and proposals, IAALS implemented a multi-step process to understand the current landscape.

A. Discovery of Which States Have Active Programs & Proposals

We started this process with a basic understanding of the states with active programs and the states with proposals by participating in a virtual roundtable group created by Steve Crossland, which meets monthly and is attended by many leaders of these states. Throughout the other steps of our research, such as the reviewing of states' proposals and speaking with state leaders, we discovered the remaining states that have created proposals for ALP programs.

B. The Framework of Allied Legal Professional Programs

We reviewed the proposals and adopted rules from the four states that have active programs to gain an understanding of the many framework pieces that make up an ALP program. We created a detailed chart of each state, including a description of what they included and excluded for each piece of the general framework. We followed the same process with each state that has an ALP proposal, whether the proposal has been accepted, rejected, or not yet voted on. We then reached out to program/proposal leaders to get a sense of why their committees chose to include or exclude different pieces of their programs' framework. In conjunction with speaking to program leaders, we reviewed available meeting minutes from each state to get a better sense of why each committee chose to develop their program the way they did.

[21] Code of Prof'l Conduct B.C. app. E (2013), https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/appendix-e-%E2%80%93-supervision-of-paralegals/.

C. Verification of Accuracy

Lastly, once we drafted an initial version of this landscape report based on all the information we had gathered, we reached back out to program/proposal leaders in each state to review the accuracy of the report. Based on the responses we received, we revised this report to include the most accurate information available.

IV. Discussion

A. Programs & Their Varying Stages

Of the 16 programs listed below, many of them are in varying stages of implementation. States under "Programs Implemented," including Washington, Utah, Arizona, and Minnesota, have active programs with licensed providers. States under "Programs Under Development," including New Hampshire and Oregon, have proposed programs that have been approved by their state supreme court or legislature but are not yet implemented. States under "Programs Under Consideration," including Colorado, Connecticut, New Mexico, New York, North Carolina, South Carolina, and Vermont, have developed proposals, but those proposals have not yet been accepted or denied. And states under "Programs Currently Not Moving Forward," including California, Florida, and Illinois, have developed proposals that are currently halted.

i. Programs Implemented[22]

WASHINGTON

In 2002, Washington created the Practice of Law Board (POLB) that was to, in part, propose a rule to the Washington Supreme Court that nonlawyers be authorized to engage in certain legal or law-related activities. The POLB twice submitted recommendations to the Board of Governors of the Washington State Bar Association, which rejected POLB's recommendations

[22] The states in this subsection are listed in order of implementation, as opposed to alphabetically like the three subsections that follow this one.

both times.[23] Many lawyers voiced concerns that nonlawyers would be unqualified to deliver legal services and that they would take away work from lawyers.[24]

After the POLB revised its recommendations, in June 2012 the Washington Supreme Court issued an order adopting the Limited License Legal Technician (LLLT) Rule.[25] The court stated that "[w]e have a duty to ensure that the public can access affordable legal and law related services, and that they are not left to fall prey to the perils of the unregulated marketplace."[26] Washington admitted its first LLLTs in 2015.

In June 2020, the Washington Supreme Court voted to sunset the LLLT program. The court stated that due to "the overall costs of sustaining the program and the small number of interested individuals . . . the LLLT program is not an effective way to meet these needs."[27] Current LLLTs and those working at the time to become a LLLT, so long as they completed the licensing requirements by July 31, 2020, can continue to be licensed and provide services. There are a total of 91 licensed LLLTs.[28]

UTAH

In May 2015, the Utah Supreme Court created the Supreme Court Task Force to Examine Limited Legal Licensing with the charge to "examine emerging strategies and programs that authorize individuals to provide specific legal assistance in areas currently restricted to licensed lawyers."[29] The task force recommended, among other things, the creation of "a subset of

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[23] Stephen R. Crossland, *The Evolution of Washington's Limited License Legal Technician Rule*, 83 B. EXAMINER 20, 21 (June 2014), https://thebarexaminer.ncbex.org/article/june-2014/the-evolution-of-washingtons-limited-license-legal-technician-rule/.

[24] *Id.*

[25] *Id.*

[26] In the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005 (Wash. S. Ct. June 15, 2012), https://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.

[27] Letter from C.J. Debra L. Stephens, Wash. Sup. Ct., to Stephen R. Crossland et al., Ltd. License Legal Technician Bd. & Wash. State Bar Ass'n (June 5, 2020), https://www.wsba.org/docs/default-source/licensing/lllt/1-2020-06-05-supreme-court-letter-to-steve-crossland-et-al.pdf?sfvrsn=8a0217f1_7.

[28] *LLLT Legal Directory*, MYWSBA, https://www.mywsba.org/PersonifyEbusiness/LegalDirectory.aspx?ShowSearchResults=TRUE&LicenseType=LLLT (last visited Nov. 1, 2022).

[29] SUP. CT. TASK FORCE TO EXAMINE LTD. LEGAL LICENSING, UTAH STATE COURTS, REPORT AND RECOMMENDATIONS 7 (2015),

discrete legal services that can be provided by a licensed paralegal practitioner in three practice areas."[30] These three areas include family law, debt collection, and unlawful detainer or eviction actions. The task force's recommendations were assigned to a Licensed Paralegal Practitioner (LPP) Steering Committee.[31] The steering committee developed the criteria for LPPs and, in November 2018, the Utah Supreme Court adopted amendments to Utah's Authorization to Practice Law Rule, creating the new role of LPPs.[32] There are currently a total of 26 LPPs.[33]

ARIZONA

In November 2018, the Arizona Supreme Court established the Task Force on Delivery of Legal Services.[34] The task force's purpose was, in part, to "[e]xamine and recommend whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services."[35] The task force submitted its October 2019 report and recommendations to the Arizona Supreme Court, which included the development of a tier of nonlawyer legal service providers ("Legal Paraprofessionals" or "LPs").[36] In August 2020, the Arizona Supreme Court voted unanimously in favor of modifying the court rules regulating the practice of law so that LPs could provide limited legal services, including going into court with their clients.[37] The creation of LPs went into effect in January 2021. There are currently a total of 26 LPs.[38]

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https://www.utcourts.gov/committees/limited_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf.

[30] *Id.* at 8.

[31] *Licensed Paralegal Practitioner*, UTAH COURTS, https://www.utcourts.gov/legal/lpp/ (last visited Nov. 1, 2022).

[32] *Id.*

[33] *Licensed Paralegal Practitioners*, LICENSED LAWYER, https://www.licensedlawyer.org/Find-a-Lawyer/Licensed-Paralegal-Practitioners (last visited Nov. 1, 2022).

[34] TASK FORCE ON THE DELIVERY OF LEGAL SERVS., ARIZ. SUPREME COURT, REPORT AND RECOMMENDATIONS 1 (2019), https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf.

[35] *Id.*

[36] *Id.* at 39-43.

[37] News Release, Ariz. Supreme Court, Arizona Supreme Court Makes Generational Advance in Access to Justice (Aug. 27, 2020), https://www.azcourts.gov/Portals/201/Press%20Releases/2020Releases/082720RulesAgenda.pdf.

[38] *Legal Paraprofessional Program Directory*, ARIZ. JUDICIAL BRANCH, https://www.azcourts.gov/Portals/26/LP/Directory/LP%20Master%20Directory%208-9-2022.pdf?ver=VEuH1wOYfYJ7Y4cAa_oKPg%3d%3d (last visited Nov. 1, 2022).

MINNESOTA

In 2014, the Minnesota State Bar Association's (MSBA) Task Force on the Future of Legal Education examined ways of making legal careers more affordable while also addressing the existing unmet need for legal representation.[39] One of their recommendations was to create a separate task force focused on studying the LLLT program.[40] The MSBA then created the Alternative Legal Models Task Force with the charge of "examin[ing] the advisability of supplementing traditional lawyer representation through the creation of a new type of limited-scope certified legal assistance provider to increase access to justice for those who cannot afford a lawyer."[41] In 2017, the Alternative Legal Models Task Force submitted its report and recommendations to the MSBA that included the recommendation to create legal practitioners, based on the British Columbia model of paralegals.[42]

In 2019, the Minnesota Supreme Court issued an order establishing the Implementation Committee for Proposed Legal Paraprofessional Pilot Project with the charge to expand the task force's recommendations and develop a pilot project that would allow legal paraprofessionals (LPs) to provide legal advice under the supervision of an attorney.[43] The implementation committee submitted its March 2020 report and recommendations to the Minnesota Supreme Court, recommending the framework for the LP pilot project. [44] In September 2020, the

[39] ALT. LEGAL MODELS TASK FORCE, MINN. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS 2 (2017), https://msbawebtest.mnbar.org/docs/default-source/policy/alm-task-force-report-and-recommendations-final.pdf?sfvrsn=3c0f1d10_0.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 8-14.

[43] IMPLEMENTATION COMM. FOR PROPOSED LEGAL PARAPROFESSIONAL PILOT PROJECT, MINN. SUPREME COURT, REPORT AND RECOMMENDATIONS TO THE MINNESOTA SUPREME COURT 2 (2020) [hereinafter 2020 REPORT AND RECOMMENDATIONS TO THE MINNESOTA SUPREME COURT], https://static1.squarespace.com/static/5e3ad81df16b3b261f358798/t/5f3ee98c960c20305f9e7111/1597958553059/Report-and-Recommendations-to-Minnesota-Supreme-Court-reduced-size.pdf.

[44] *Id.* at 8-13.

Minnesota Supreme Court ordered that the LP pilot project be implemented starting in March 2021.[45] There are currently a total of 23 LPs.[46]

II. Programs Under Development

NEW HAMPSHIRE

In November 2021, the New Hampshire House introduced House Bill 1343, which would allow limited legal services by paraprofessionals.[47] The bill was passed by the house and senate and then signed by the governor in June 2022. The bill provides for a two-year pilot program beginning on January 1, 2023. It will allow qualified paraprofessionals, working under the supervision of a licensed attorney, to provide legal services in domestic violence, divorce, custody, and landlord-tenant cases, including courtroom representation in three of New Hampshire's Circuit Courts.

OREGON

In 2017, the Oregon State Bar (OSB) Futures Task Force recommended that a limited-scope license be established for paralegals to help address the access to justice gap.[48] In September 2019, the OSB Board of Governors voted unanimously to establish the Paraprofessional Licensing Implementation Committee and charged the committee to "[e]ngage stakeholders to develop a regulatory framework for licensing paralegals consistent with the recommendations of the OSB Futures Task Force Report in order to increase access to the justice system while ensuring the competence and integrity of the licensed paralegals and improving the quality of their legal services."[49]

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[45] Order Implementing Legal Paraprofessional Pilot Project, ADM19-8002 (Minn. S. Ct. Sept. 29, 2020), https://mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/Administrative-Order-Implementing-Legal-Paraprofessional-Pilot-Project.pdf.

[46] *Roster of Approved Legal Paraprofessionals*, Minn. Judicial Branch, https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/LPPP-Roster-of-Approved-Legal-Paraprofessionals.pdf (last visited Nov. 1, 2022).

[47] H.B. 1343, 2022 Reg. Sess. (N.H. 2022), https://legiscan.com/NH/text/HB1343/2022.

[48] Futures Task Force, Or. State Bar, Reports and Recommendations of the Regulatory Committee and Innovations Committee 3 (2017) [hereinafter Or. Futures Report 2017], https://iaals.du.edu/sites/default/files/documents/publications/or_futures_tf_reports.pdf.

[49] *Id*.

In April 2022, the implementation committee submitted its final report to the OSB Board of Governors, detailing the framework of a licensed paralegal ("LP") program.[50] The Board of Governors approved the recommendations in the report in July 2022 and submitted it to the Oregon Supreme Court, [51] which approved the proposal that same month.

III. Programs Under Consideration

COLORADO

In February 2015, the Colorado Supreme Court's Attorney Regulation Advisory Committee formed the Providers of Alternative Legal Services (PALS) subcommittee to study Washington State's LLLT program.[52] The PALS subcommittee met for four years and published its preliminary report in August 2019, recommending that the Colorado Supreme Court create and fund a legal paraprofessional pilot project to provide legal assistance in eviction cases.[53] In February 2020, the Colorado Supreme Court ordered the creation of a new subcommittee of the Supreme Court Advisory Committee to explore the creation and licensing of qualified paraprofessionals to practice law in uncomplicated domestic cases.[54] It was to focus on the 73% of parties in Colorado domestic cases who represent themselves. The Advisory Committee's Paraprofessionals and Legal Services (PALS II) Subcommittee proposed a licensed legal paraprofessionals (LLP) program,[55] which the Advisory Committee approved in May 2021. In

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[50] Paraprofessional Licensing Implementation Comm., Or. State Bar, Final Report 9-31 (2022) [hereinafter Or. Implementation Comm. 2022 Report], https://paraprofessional.osbar.org/files/2021_PPLIC_BOGReport.pdf.

[51] Letter from Helen M. Hierschbiel, CEO, Or. State Bar, to Martha L. Walters, C.J., Or. Supreme Court (July 11, 2022), https://www.osbar.org/_docs/resources/2022.07.11SupremeCourtPLICletterFINAL.pdf.

[52] *Subcommittees: Paraprofessionals and Legal Services (PALS) Subcommittee*, Colo. Supreme Court, https://www.coloradosupremecourt.us/AboutUs/Subcommittees.asp#:~:text=PALS%20was%20originally%20formed%20on,access%2Dto%2Djustice%20issues (last visited Nov. 1, 2022).

[53] Subcomm. on Providers of Alt. Legal Servs. (PALS) of the Colo. Supreme Court Attorney Regulation Advisory Comm., Preliminary Report 2 (2019), https://chicagobarfoundation.app.box.com/s/155oiqddgvqz5f8dlg9wjhtfww5isgpy.

[54] In RE: Advisory Committee's Recommendation of a Pilot Program Concerning Paraprofessionals and Legal Services (Colo. S. Ct. Feb. 27, 2020), https://coloradosupremecourt.com/PDF/AboutUs/PALS/Order%20re%20PALS.pdf.

[55] Paraprofessionals and Legal Servs. (PALS) Subcomm., Colo. Supreme Court, Preliminary Report (May 2021) Outlining Proposed Components of Program for Licensed Legal Paraprofessionals 3 (2021), https://coloradosupremecourt.com/PDF/AboutUs/PALS/PALSprelimrept%20Final%20as%20amended%20by%20Advisory%20Comm%205-21-21.pdf.

June 2021, the Colorado Supreme Court ordered that the Advisory Committee develop a plan to implement the LLP program.[56]

In May 2022, the Providers of Alternative Legal Services (PALS) II Subcommittee submitted its report[57] to the Colorado Supreme Court Advisory Committee, who voted unanimously to recommend the LLP program to the Colorado Supreme Court.[58] The Colorado Supreme Court has requested and received written public comment on the PALS II implementation report, and a public hearing is scheduled for November 16, 2022.

CONNECTICUT

In December 2016, a task force commissioned by the Judiciary Committee of the Connecticut General Assembly produced a report with the recommendation to "enact a statute establishing an accredited representative pilot program allowing trained nonlawyers to assist in matters ancillary to eviction defense proceedings and consumer debt cases."[59] In 2020, the Connecticut Bar Association created a State of the Legal Profession Task Force with five subcommittees, one of which is the Advancing the Legal Industry through Alternative Business Models.

That subcommittee was tasked with "study[ing] the pros and cons of allowing legal paraprofessionals to assist clients and provide a variety of legal services."[60] In September 2021, the subcommittee submitted its report and recommendations to the task force, including a recommendation to develop a program to license nonlawyers ("Limited Legal Advocates" or

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[56] In RE: Advisory Committee's Recommendation Concerning Paraprofessionals and Legal Services (Colo. S. Ct. June 3, 2021), https://coloradosupremecourt.com/PDF/AboutUs/PALS/PALS%20Committee%20Order%2006-03-2021.pdf.

[57] PROVIDERS OF ALT. LEGAL SERVS. (PALS) II SUBCOMM., COLO. SUPREME COURT, LICENSED LEGAL PARAPROFESSIONALS IMPLEMENTATION REPORT AND PLAN 1 (2022) [hereinafter PALS II 2022 REPORT], https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/PALS%20attachment%201.pdf.

[58] Letter from Jessica E. Yates, Colo. Supreme Court Attorney Regulation Counsel, to JJ. Monica M. Márquez & Maria E. Berkenkotter, Colo. Supreme Court (May 20, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/PALS%20letter%20to%20advisory%20committee.pdf.

[59] SUBCOMM. ON ADVANCING THE LEGAL INDUS. THROUGH ALT. BUS. MODELS, STATE OF THE LEGAL PROFESSION TASK FORCE, CONN. BAR ASS'N, REPORT AND RECOMMENDATIONS 1 (2021) [hereinafter] (on file with author).

[60] *Sub-Committees*, CONN. BAR ASS'N, https://www.ctbar.org/members/sections-and-committees/task-forces/state-of-the-legal-profession-task-force/sub-committees (last visited Nov. 1, 2022).

"LLAs") to provide legal advice and to advocate for clients within a limited scope of practice.[61] The subcommittee recommended that LLAs be trained and authorized to counsel clients and to appear in court for clients within limited practice areas, including summary process (evictions), small claims, portions of family law, administrative law, and criminal law with express limitations (i.e., those that carry no prospect for incarceration).

NEW MEXICO

In 2015, the New Mexico Access to Justice Commission recommended that the New Mexico Supreme Court consider a legal paraprofessional program.[62] A few years later, in 2018, a team of judges, court staff, and bar representatives attended a Conference of Chief Justices Innovation Summit, which sparked them to identify projects to address the access to justice gap.[63] An Ad Hoc Licensed Legal Technicians Workgroup was created and tasked with "studying alternative methods to address unmet legal needs for low and moderate needs individuals, specifically considering an assessment of licensed legal technicians or other non-attorney professionals."[64]

The working group submitted its December 2019 report to the New Mexico Supreme Court.[65] One of its four recommendations was to conduct further study regarding licensing nonlawyers to perform limited legal work, including monitoring the currently existing legal paraprofessional programs to get a sense of how successful these programs might be. In January 2020, the New Mexico Supreme Court endorsed this proposal.[66] In July 2020, the New Mexico Supreme Court created a committee to work on this recommendation and study the feasibility of creating a licensed legal technician ("LLT") program.

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[61] Hon. Elizabeth A. Bozzuto et al., *Task Force Final Report*, 32 CONN. LAW. 20, 22-23 (2022), https://www.ctbar.org/docs/default-source/publications/connecticut-lawyer/ctl-vol-32/6-julyaug-2022/ctl_julyaug-2022---state-of-the-legal-profession-task-force-report.pdf.

[62] Letter from J. Donna J. Mowrer, N.M. Ninth Jud. Cir., to JJ. Nakamura et al., N.M. Sup. Ct.(Dec. 23, 2019) *in* AD HOC N.M. LICENSED LEGAL TECHNICIANS WORKGROUP, N.M. SUPREME COURT, INNOVATION TO ADDRESS THE ACCESS TO JUSTICE GAP 2 (2019) [hereinafter N.M. 2019 WORKGROUP REPORT], https://cms.nmcourts.gov/uploads/files/News/Report%20to%20Supreme%20Court-Ad%20Hoc%20Licensed%20Legal%20Technicians%20Workgroup.pdf.

[63] *Id.*

[64] *Id.*

[65] *See id.*

[66] Jayne Reardon, *New Mexico Supreme Court Endorses Proposals to Expand Civil Legal Services*, 2CIVILITY (Jan. 30, 2020), https://www.2civility.org/new-mexico-supreme-court-endorses-proposals-to-expand-civil-legal-services/.

NEW YORK

In June 2020, the Chief Judge of New York appointed the Commission to Reimagine the Future of New York's Courts. One of its working groups, the Working Group on Regulatory Innovation, was charged with "explor[ing] regulatory and structural innovations to more effectively adjudicate cases and improve the accessibility, affordability and quality of services for all New Yorkers."[67] In December 2020, the working group submitted its report and recommendations to the commission, including a recommendation to allow social workers to provide limited legal services and advocacy.[68] The full commission accepted the recommendations and, per the request of the Chief Judge of the State of New York, work is underway to implement them.

NORTH CAROLINA

In January 2021, the North Carolina Justice for All Project[69] submitted to North Carolina's Chief Justice and the Chair of North Carolina's State Bar Board of Paralegal Certification a Proposal for a Limited Practice Rule to Narrow North Carolina's Access to Justice Gap.[70] In June 2021, the Bar's Issues Subcommittee on Regulatory Change recommended that the bar create an ad hoc committee to lay out a plan for limited licensing. A month later, the Executive Committee of the Bar approved the formation of an ad hoc committee to develop a limited licensing plan.

While the ad hoc committee was never formed, in January 2022 the Subcommittee on Regulatory Change submitted a report to the Issues Committee with recommendations that included pursuing a limited license for paraprofessionals.[71] In July 2022, the state bar voted to create a standing Access to Justice Committee.

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[67] REGULATORY INNOVATION WORKING GRP., COMM'N TO REIMAGINE THE FUTURE OF N.Y.'S COURTS, REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON REGULATORY INNOVATION 3 (2020) [hereinafter N.Y. REGULATORY INNOVATION WG 2020 REPORT], https://www.cravath.com/a/web/53HijtU9o67QzfYo7BAr8v/2fWXYD/report-and-recommendations-of-the-working-group-on-regulatory-innovation.pdf.

[68] *Id.* at 8.

[69] N.C. JUSTICE FOR ALL PROJECT, https://www.ncjfap.org/ (last visited Nov. 1, 2022).

[70] JUSTICE FOR ALL PROJECT, PROPOSAL FOR A LIMITED PRACTICE RULE TO NARROW NORTH CAROLINA'S ACCESS TO JUSTICE GAP 1 (2021), https://ncbarblog.com/wp-content/uploads/2021/03/Justice-for-All-Proposal-for-Limited-Practice-Rule-to-Supreme-Court-and-North-Carolina-State-Bar-Final.pdf.

[71] N.C. STATE BAR ISSUES SUBCOMM. ON REGULATORY CHANGE: REPORT AND RECOMMENDATIONS 5 (2022), https://www.ncjfap.org/_files/ugd/8a3baf_e6fe61abff614570a7c73eaf98342f07.pdf.

The proposed charge of the new committee is as follows:

> Access to Justice Committee. It shall be the duty of the Access to Justice Committee to study and to recommend to the council programs and initiatives that respond to the profession's responsibility, set forth in the Preamble to the Rules of Professional Conduct, 'to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel.'[72]

On October 19, 2022, the Access to Justice Committee met for the first time to discuss its charge and first assignment. During that meeting, they established that they would meet four times per year and that subcommittees, including the only currently existing subcommittee on the study of legal deserts, may meet at other times. Limited licensing was not discussed as a group during that meeting, and the only action item was for committee members to bring ideas to the next meeting for pro se initiatives. Of note, this is a study committee, not an action committee.

SOUTH CAROLINA

In 2015, the South Carolina Chief Justice's Commission on the Profession requested that the South Carolina Supreme Court adopt a voluntary certification of paralegals program. The South Carolina Supreme Court adopted the program in November 2015,[73] leading to the creation of the South Carolina Board of Paralegal Certification, which has jurisdiction over the certification of paralegals. The South Carolina Supreme Court asked the board to study which areas of practice would be the most practical to assist the underserved communities of South Carolina.

The board explored ways to expand the role of South Carolina Certified Paralegals (SCCPs), focusing on 1) appropriate tasks that many be performed by certified paralegals to broaden the availability of legal services currently provided by attorneys only, and 2) the process for implementation.[74] In February 2021, the board sent a letter to Chief Justice Beatty with a proposal to expand the role of SCCPs.[75] Following, the board met in October 2021 and voted to advance three of their previously proposed areas to expand the role of SCCPs, and in June 2022 the board submitted its proposal to the South Carolina Supreme Court.

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[72] At its meeting on October 19, 2022, the North Carolina Access to Justice Committee proposed an amendment to N.C. Admin. Code § 01A .0701(a) that would add a 9th paragraph outlining the charge of the Access to Justice Committee (on file with author).

[73] S.C. APP. CT. R. 429 (2022).

[74] Letter from Meliah Bowers Jefferson, Chair, S.C. Bd. of Paralegal Certification, to C.J. Donald W. Beatty, S.C. Sup. Ct. (Feb. 9, 2021) (on file with author).

[75] *Id.*

VERMONT

In 2014, the Vermont Bar Association created a Joint Commission on the Future of Legal Services after the Vermont Chief Justice called on the legal community, business community, and the public to come together to determine how Vermonters can obtain quality, affordable legal representation.[76] In September 2015, the Joint Commission submitted its final report to the Vermont Bar Association, which comprised the work of four committees on legal education, court process, legal services, and technology.[77] One of its recommendations was to expand the role of paralegals ("paraprofessionals") who work under the supervision of a licensed attorney.

IV. Programs Currently Not Moving Forward

CALIFORNIA

In March 2018, the State Bar of California Board of Trustees updated the State Bar's 2017–2022 Strategic Plan to include exploring "options to increase access to paraprofessionals, limited license legal technicians, and other paraprofessionals."[78] Later that year in July 2018, the board of trustees directed the creation of the Task Force on Access Through Innovation of Legal Services (ATILS), following consideration of the Legal Market Landscape Report. ATILS was charged with "identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models."[79] The following year, the state bar completed a comprehensive study of California's justice gap, which highlighted a significant gap between the need and availability of civil legal services.[80]

In January 2020, coming off the heels of the 2019 justice gap study and to fulfill part of its strategic plan, the board of trustees adopted a resolution to form a working group to develop

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[76] VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., VT. BAR ASS'N, FINAL REPORTS & RECOMMENDATIONS OF THE FIRST YEAR STUDY COMMITTEES 3 (2015) [hereinafter VT. FUTURE OF LEGAL SERVS. 2015 REPORT], https://www.isba.org/sites/default/files/committees/futures/Vermont%20Joint%20Bar%20%26%20Court%20Report%20%28September%202015%29.pdf.

[77] *Id.*

[78] CAL. PARAPROFESSIONAL PROGRAM WORKING GROUP, STATE BAR OF CAL., REPORT AND RECOMMENDATIONS 4 (2021) [hereinafter CAL. PARAPROFESSIONAL WG 2021 REPORT], https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/CPPWG-Report-to-BOT.pdf.

[79] *Task Force on Access Through Innovation of Legal Services*, STATE BAR OF CAL., https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Task-Force-on-Access-Through-Innovation-of-Legal-Services (last visited Nov. 1, 2022).

[80] ROCIO AVALOS ET AL., STATE BAR OF CAL., 2019 CALIFORNIA JUSTICE GAP STUDY: EXECUTIVE REPORT 4 (2019), https://www.calbar.ca.gov/Access-to-Justice/Initiatives/California-Justice-Gap-Study.

recommendations for a paraprofessional program.[81] Two months later, as the California Paraprofessional Program Working Group (CPPWG) was being formed, ATILS submitted its report to the board of trustees with a recommendation that the CPPWG consider key principles it identified as it studied the regulatory issues presented by a paraprofessional program.[82]

The CPPWG was directed to develop recommendations for creating a paraprofessional licensure/certificate program, and in September 2021 it submitted its report and recommendations to the State Bar of California.[83] The CPPWG revised its recommendations in May 2022 based on comments it received from the public, the large majority of which came from lawyers.[84] In June 2022, the California Senate's Judiciary Committee advanced Assembly Bill 2958 requiring the state bar to, among other things, "[a]dhere to, and not propose any abrogation of, the restrictions on the unauthorized practice of law."[85] The board of trustees sent a letter in July 2022 to the Chair of the Senate Judiciary Committee and the Chair of the Assembly Judiciary Committee with proposed amendments to Assembly Bill 2958 that would allow the state bar to continue studying legal regulatory reform while also addressing concerns from the legislature,[86] but state lawmakers passed the bill without the board of trustees' proposed amendments, effectively shutting down the CPPWG until January 1, 2025.

FLORIDA

In November 2019, the Florida Supreme Court sent a letter to the president of the Florida Bar with a request that the bar "conduct a study of the rules governing the practice of law to ensure that our regulation meets the needs of Floridians for legal services while also protecting against misconduct and maintaining the strength of Florida's legal profession."[87] The Special Committee

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[81] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78.

[82] TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS., STATE BAR OF CAL., FINAL REPORT AND RECOMMENDATIONS 24-31 (2020), https://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf.

[83] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78.

[84] *State Bar of Cal. – Paraprofessional Proposal – Sept. 2021*, STATE BAR CAL., https://drive.google.com/drive/folders/1Sp-EHL3GRNTVZRpmw_CJsQP5xT50D8IV (open "Paraprofessional Recommendations - Support and Opposition" folder; scroll to "Attorneys and Consumers (Individuals)" pie charts).

[85] A.B. 2958, 2022 Leg. (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2958&showamends=false.

[86] Letter from Ruben Duran & Leah T. Wilson, State Bar Cal., Sen. Tom Umberg & Assemb. Mark Stone, Cal. State Leg. (Dec. 7, 2021), https://fingfx.thomsonreuters.com/gfx/legaldocs/akpezwogevr/CA%20Bar%20letter.pdf.

[87] Letter from J. Charles T. Canady, Fla. Supreme Court, to Pres. John M. Stewart, Fla. Bar (Nov. 6, 2019) *in* JOHN STEWART ET AL., FINAL REPORT OF THE SPECIAL COMMITTEE TO IMPROVE THE DELIVERY OF LEGAL SERVICES app.

to Improve the Delivery of Legal Services was subsequently appointed and submitted its final report to the Florida Supreme Court in June 2021. In its report, the committee unanimously voted to approve in concept a Limited Assistance Paralegal Pilot Program. In March 2022, the Florida Supreme Court submitted a letter to the executive director of the Florida Bar explaining that it does not intend to adopt the committee's recommendations on a limited assistance paralegal pilot program.[88]

ILLINOIS[89]

In October 2019, the Chicago Bar Association and Chicago Bar Foundation launched the Task Force on the Sustainable Practice of Law & Innovation. In October 2021, the task force submitted its report with 11 recommendations to the Illinois Supreme Court. One of the recommendations was to "recognize a new licensed paralegal model so that lawyers can offer more efficient and affordable services in high volume areas of need."[90] In April 2021, the Illinois Supreme Court deferred consideration of creating licensed paralegals ("LPs").

B. Practice Areas

The practice area/scope of ALPs is one of the first and most important determinations states make when ironing out their program's framework. It affects the success of the programs in a number of ways, from the number of people interested in joining the program to the types of issues that people can receive help on by an ALP. It also sets the stage for all other aspects of the framework, including roles and responsibilities, educational requirements, testing requirements, and practical training requirements.

1. States' Considerations of Practice Areas

States often begin looking into ALP programs to decrease the access to justice gap. With this goal in mind, the rate of self-representation is one of the major considerations for states when choosing practice areas. Aside from considering where ALPs can be of greatest benefit, states are also concerned about the potential harm that can come from these programs. Some of the worries

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A (2021), https://www-media.floridabar.org/uploads/2021/06/FINAL-REPORT-OF-THE-SPECIAL-COMMITTEE-TO-IMPROVE-THE-DELIVERY-OF-LEGAL-SERVICES.pdf.

[88] Letter from John A. Tomasino, Clerk of Court Fla. Supreme Court, to Joshua Doyle, Exec. Dir. Fla. Bar (Mar. 3, 2022), https://www.abajournal.com/files/Florida_Supreme_Court_letter.pdf.

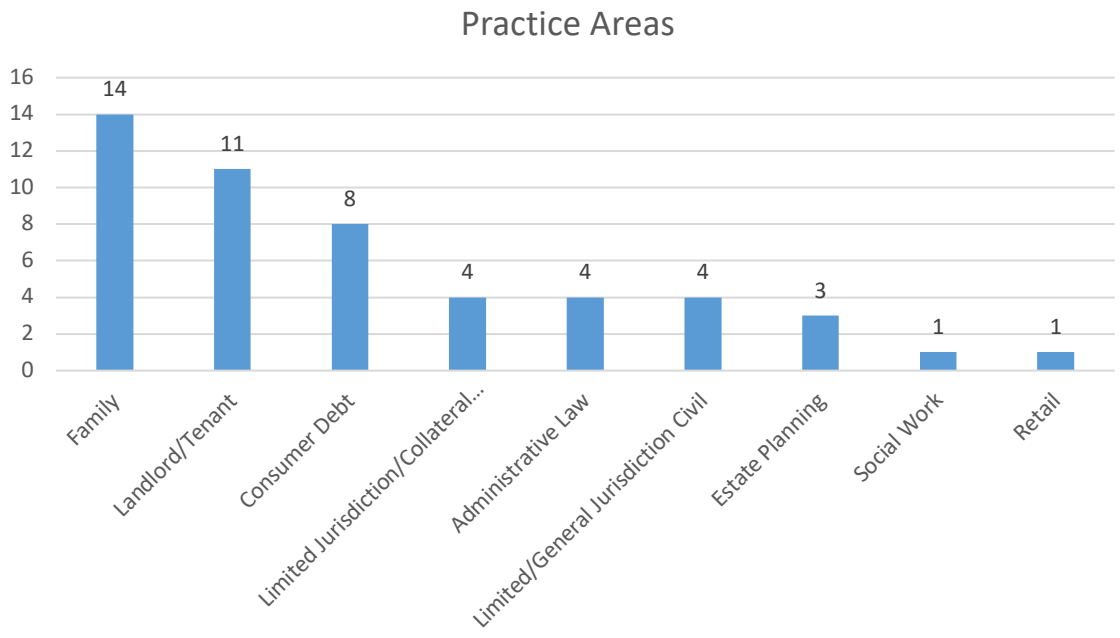
[89] The proposed recommendations apply solely to Chicago, Illinois.

[90] CBA/CBF Task Force on the Sustainable Practice of Law & Innovation, Chi. Bar Ass'n & Chi. Bar Found., Task Force Report 67-72 (2020) [hereinafter CBA/CBF 2020 Task Force Report], https://chicagobarfoundation.org/pdf/advocacy/task-force-report.pdf.

at the forefront of states' minds include the technicality or need for expertise in a practice area and the potential for significant legal consequences if litigants receive inadequate help. Others worry about ALPs working in practice areas that use a contingency-fee model (e.g., personal injury) because such a model already provides an avenue for lower-income people to retain legal help. Due to these worries—and the scrutiny and distrust that many in the profession have in these programs—most states have taken the approach to focus on a limited number of practice areas and exclude contingency-fee case types.

The hope from many states is that, once their programs have been implemented and data has been collected on the positive effects and minimal harm that have come from their programs, they will then be able to add additional practice areas into their programs to both increase membership and decrease the access to justice gap. On average, states are including around three practice areas in their initial programs, with a list of case types within those practice areas that are either explicitly included or excluded. Figure 1 breaks down the number of states that have included the varying practice areas being considered.

Figure 1: Practice Areas



FAMILY LAW

Family law is included in more programs and proposals than any other practice area, with 14 of the 16 programs and proposals including it.[91] Washington was initially looking at four practice areas (family law, landlord-tenant, elder law, and immigration) and chose to implement family law because it was the highest unmet need.[92] Leaders of Washington's program always believed, though, that the scope of practice should have been applied more broadly.[93] Other states that have included family law have done so for the same reason—the high rate of self-representation and the negative consequences that often come with it.

Within family law, most states have detailed which case types are included and excluded, while a couple states have left it general.[94] The most commonly included case types are divorce and dissolution,[95] child custody and support,[96] domestic violence,[97] and paternity.[98] A few of the excluded case types—or those that require additional qualifications—include qualified domestic relations orders (QDROs), nullity matters, contempt actions, division or conveyance of formal business entities or commercial property, and appeals to the court of appeals or supreme court.

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[91] Arizona, California, Colorado, Connecticut, Florida, Illinois, Minnesota, New Hampshire, New Mexico, North Carolina, Oregon, South Carolina, Utah, and Washington.

[92] Jean McElroy & Paul A. Bastine, Limited License Legal Technician Program: The History and Future of the Program, Presentation at the Am. Acad. of Law Libraries WestPac Annual Meeting (Oct. 10, 2014), http://chapters.aallnet.org/westpac/meeting_archive/2014seattle/files/LLLT%20Program%20Oct%202014.pdf.

[93] THOMAS M. CLARKE & REBECCA L. SANDEFUR, AM. BAR FOUND. & NAT' CTR. FOR STATE COURTS, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 6 (2017), https://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf.

[94] Connecticut and Illinois have generally included family law without indicating specific practice areas that are included or excluded.

[95] Arizona, California, Colorado, Florida, Minnesota (limited generally to drafting of stipulated agreements), New Hampshire, New Mexico, North Carolina, Oregon, South Carolina (simple uncontested divorces with no children or with an agreement on custody and support), Utah, and Washington.

[96] Arizona, California, Colorado, Florida, Minnesota (child custody limited to stipulated agreements only), New Hampshire, New Mexico, North Carolina, Oregon, Utah, and Washington.

[97] Arizona, California, Colorado, Florida, Minnesota (dependent on required training), New Hampshire, North Carolina, Utah, and Washington.

[98] Arizona, California, Colorado, Florida, Minnesota, New Mexico, North Carolina, Oregon, Utah, and Washington.

Colorado is the only state with a proposal that has put a dollar limit on family law cases by requiring parties to have no more than $200,000 combined net marital assets.[99]

While most programs allow ALPs to handle domestic-violence cases within family law, there is more opposition to its inclusion than any other case type. When Minnesota's program was implemented, cases with allegations of domestic or child abuse were excluded due to the serious and complicated nature of such cases. In June 2022, after reviewing a six-month interim report, reading public comments, and presiding over a public hearing, the Minnesota Supreme Court ordered the inclusion of cases with allegations of domestic and child abuse conditioned on additional training or experience requirements for legal paraprofessionals.[100] A workgroup of stakeholders was established but did not reach a consensus on the required training and experience. However, the standing committee submitted its recommendation, which was adopted by the court, based upon the information it received from stakeholders, including the exclusion of cases with pleadings involving allegations of sexual violence.[101]

LANDLORD-TENANT

Landlord-tenant law is the second most common practice area, with 11 of the 16 of programs and proposals including it.[102] Similar to family law, landlord-tenant cases are included in most states' programs and proposals because of its high percentage of self-represented litigants. Within the landlord-tenant category, states have included cases that deal with evictions/forcible entry and detainer and lien clearing.

There are a couple restrictions that some of the states have placed within this practice area. In Minnesota, their LPs can only represent tenants in housing law disputes.[103] This is permissible because it falls under a pilot project, but outside of a pilot project the tenant-only requirement will likely have to change to include landlords as well. New Hampshire's proposal has created a

[99] PALS II 2022 REPORT, *supra* note 57.

[100] ADM19-8002 (Minn. S. Ct. Sept. 29, 2020).

[101] *Id*.

[102] Arizona, California, Connecticut, Florida, Illinois, Minnesota, New Mexico, New Hampshire, North Carolina, Oregon, and Utah.

[103] 2020 REPORT AND RECOMMENDATIONS TO THE MINNESOTA SUPREME COURT, *supra* note 43, at 8.

restriction where the person being represented must have a household income no greater than 300% of the federal poverty guidelines[104] at the commencement of representation.[105]

CONSUMER DEBT

Consumer-debt law is the third most common practice area, with eight of the 16 of programs and proposals including it.[106] Along with family law and landlord-tenant, it is included in a number of programs and proposals because it ranks among the top three case types with the highest percentage of self-represented litigants. A few states have placed restrictions on consumer-debt cases, such that the dollar amount does not exceed the statutory limit for small claims cases[107] or that it be applied to only non-bankruptcy aspects of the relationship between creditors and debtors.[108]

LIMITED JURISDICTION/COLLATERAL CRIMINAL

Out of the 16 states that have a program or proposal, only four have proposed adding limited jurisdiction criminal cases, with Arizona being the only active state to include it.[109] In Arizona, LPs can handle criminal misdemeanor cases where, upon conviction, a penalty of incarceration is not at issue.[110] Like Arizona, Connecticut's proposal would allow their LLAs to handle any limited jurisdiction criminal law matter where incarceration is not at issue. With California's proposal, providers would have been allowed to handle expungements and reclassification of convictions, in addition to infractions. And North Carolina's proposal would allow their North Carolina Legal Technicians ("NCLTs") to handle expungements.

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[104] Office of the Assistant Secretary for Planning and Evaluation, *HHS Poverty Guidelines for 2022*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (last visited Nov. 1, 2022).

[105] N.H. H.B. 1343.

[106] Arizona, California, Connecticut, Florida, Illinois, New Mexico, North Carolina, and Utah.

[107] Arizona, Connecticut, Illinois, and Utah.

[108] North Carolina.

[109] Arizona, California, Connecticut, and North Carolina.

[110] ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(F)(2)(c)(2) (2022).

ADMINISTRATIVE LAW

Four of the 16 states also include administrative law in the list of acceptable practice areas.[111] Interestingly, it is the same four states that also include limited jurisdiction/collateral criminal cases. Three of the four states kept the scope broad, while California limited it to a small number of case types. In California's proposal, their providers would have been limited to employment and income-maintenance issues, including wage and hour cases, unemployment insurance proceedings, and all public benefit proceedings.[112]

Arizona's scope is quite broad (their LPs can engage in authorized services before any Arizona administrative agency that allows it), but they cannot represent a party in an appeal of the administrative agency's decision to a superior court, court of appeals, or supreme court, apart from filing an application or notice of appeal.[113] Arizona's LPs also cannot represent a lawyer or another LP before a court, presiding disciplinary hearing, or hearing panel.[114] The North Carolina Justice for All Project narrowed its scope a little more in its proposal by including employment law, municipal and county boards, Medicaid appeals, housing discrimination, DMV hearings, and North Carolina Department of Justice complaints.[115] And the proposal in Connecticut is high level, so it has listed "administrative law matters" without going into more detail.[116]

LIMITED/GENERAL JURISDICTION CIVIL

Four out of the 16 states have included case types within the broad practice area of limited or general jurisdiction civil.[117] Arizona has kept this practice area the most open by allowing their LPs to engage in authorized services in any civil matter that may be or is before a municipal or justice court in its state.[118] These include, in part, traffic, harassment, and landlord-tenant cases. In contrast, California had limited the case types in its proposal to consumer debt and creditor

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[111] Arizona, California, Connecticut, and North Carolina.

[112] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78, at 10.

[113] ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(F)(2)(d).

[114] *Id.*

[115] JUSTICE FOR ALL PROJECT, *supra* note 70, at 34-35 (noting that paralegals are already allowed to represent individuals in Social Security Administration, Department of Employment Security, and Equal Employment Opportunity Commission matters since the law does not restrict those areas to only attorneys).

[116] CONN. ALTERNATIVE BUSINESS MODELS 2021 REPORT, *supra* note 59, at 7.

[117] Arizona, California, Connecticut, and South Carolina.

[118] ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(F)(2)(b).

harassment, enforcement of judgment, and name and gender change.[119] Connecticut's proposal also has a more limited scope of civil law by including only summary process evictions and small claims cases.[120] South Carolina's proposal limited the case types in this area to adult name changes.

ESTATE PLANNING

Only Florida, North Carolina, and South Carolina have included estate planning in their proposals. The North Carolina Justice for All Project included in their proposal that NCLTs would be allowed to plan for the conservation and disposition of estates, prepare legal instruments to effectuate estate plans, and represent the probate of wills and administration of estates.[121] South Carolina included uncontested small estate matters—both testate and intestate—in their proposal. And while Florida's proposal did not specifically mention estate planning as a list of practice areas, it would have permitted their advanced Florida registered paralegals to work on wills, advance directives, and guardianship law cases.[122]

SOCIAL WORK

New York is the only state whose proposal has included social work in their areas of practice. In fact, New York has limited their providers' areas of practice to include only issues that social workers handle.[123] New York's working group notes in its proposal that there is a close relationship between attorneys and social workers, as they often have the same clients and their clients' problems often include both legal and social issues.[124] Often, if social workers do not recognize legal issues while helping their clients, those issues do not get resolved. New York's working group proposal is aimed at alleviating that situation by both enhancing social workers' knowledge of legal issues and allowing them to provide limited legal services.

RETAIL

Vermont is the only state that has specifically included retail services as a scope of practice for their paraprofessionals. In their proposal, the Vermont commission mentions expanding the use

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[119] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78, at 10.

[120] CONN. ALTERNATIVE BUSINESS MODELS 2021 REPORT, *supra* note 59, at 7.

[121] JUSTICE FOR ALL PROJECT, *supra* note 70, at 34.

[122] STEWART ET AL., FINAL REPORT TO THE SPECIAL COMMITTEE TO IMPROVE THE DELIVERY OF LEGAL SERVICES, *supra* note 87, app. D, at 97.

[123] N.Y. REGULATORY INNOVATION WG 2020 REPORT, *supra* note 67, at 8.

[124] *Id*. at 13.

of paralegals solely for common retail problems, permitting them to assist with preparation, service, and filing of forms; identifying unseen issues; and directing traffic under attorney supervision.[125] As the proposal is very high level, the Vermont commission does not expand on the specific case types within retail law that their paraprofessionals would be allowed to work on.

II. Considerations When Creating an ALP Program

- Which practice areas have the greatest numbers of self-represented litigants that could benefits from legal services?
- Which case types within those practice areas have the greatest number of self-represented litigants?
- Which practice areas can paralegals provide legal services in without significant additional education and training?
- How many practice areas are needed to create enough interest from potential applicants to make a program viable?
- Which practice areas bring about the strongest opposition within the legal community?
- Should ALPs be allowed to work in practice areas that do not require case filings (e.g., estate planning)?
- Should there be a process to allow ALPs to apply for admission on motion/reciprocity in other jurisdictions?
- Are there practice areas where the substantive law renders assistance less effective?

C. Roles & Responsibilities

The determination of practice areas goes hand in hand with what specific roles and responsibilities ALPs should have within those practice areas. States are mostly aligned on which tasks ALPs should be allowed to take on prior to trial, such as preparing, signing, and filing legal documents. There is greater disagreement in requiring ALPs to obtain written consent and in permitting them to represent clients at depositions. Figure 2 below includes the most common acceptable and restricted roles and responsibilities listed in various proposals.

[125] Vt. Future of Legal Servs. 2015 Report, *supra* note 76, at 48.

Figure 2: Roles & Responsibilities

	Provide Clear Provisions and Obtain Written Consent	Provide Legal Advice	Prepare, Sign, and File Legal Documents	Review Documents from Opposing Party with Client	Communicate with Opposing Party	Represent Clients at Depositions, Mediations, Settlement Conferences
Arizona[126]	✓	✓	✓	✓	✓	✓
California[127]	✓	✓	✓			
Colorado[128]		✓	✓	✓	✓	✓
Connecticut[129]	✓	✓	✓	✓	✓	✓
Florida[130]		✓	✓			
Illinois[131]		✓	✓	✓	✓	✓
Minnesota[132]		✓	✓	✓	✓	✓
New Hampshire[133]	✓	✓	✓	✓	✓	✓

[126] ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(F)(1).

[127] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78, at app. B § 1.2.

[128] PALS II 2022 REPORT, *supra* note 57, at 6-8.

[129] CONN. ALTERNATIVE BUSINESS MODELS 2021 REPORT, *supra* note 59, at 6-8 (noting that each function would be limited to the specified areas of practice of summary process (evictions), small claims, portions of family law, administrative law, and criminal law with express limitations (i.e., those that carry no prospect for incarceration).

[130] STEWART ET AL., FINAL REPORT TO THE SPECIAL COMMITTEE TO IMPROVE THE DELIVERY OF LEGAL SERVICES, *supra* note 87, at 16.

[131] CBA/CBF 2020 TASK FORCE REPORT, *supra* note 90, at 68-69.

[132] 2020 REPORT AND RECOMMENDATIONS TO THE MINNESOTA SUPREME COURT, *supra* note 43, at 8-9.

[133] N.H. H.B. 1343.

New Mexico[134]		✓	✓	✓		
New York[135]		✓	✓	✓		
North Carolina[136]	✓	✓	✓	✓	✓	
Oregon[137]	✓	✓	✓	✓	✓	✓
South Carolina[138]	✓	✓	✓[139]	✓		
Utah[140]	✓	✓	✓	✓	✓	✓
Vermont[141]		✓	✓			
Washington[142]	✓	✓	✓	✓	✓	✓[143]

[134] N.M. 2019 WORKGROUP REPORT, *supra* note 62, at 40.

[135] N.Y. REGULATORY INNOVATION WG 2020 REPORT, *supra* note 67, at 39.

[136] JUSTICE FOR ALL PROJECT, *supra* note 70, at 35-36 (omitting mention of representation in mediations and depositions).

[137] OR. IMPLEMENTATION COMM. 2022 REPORT, *supra* note 50, at 17-27.

[138] South Carolina's proposal does not mention whether their ALPs would be allowed to communicate with opposing parties.

[139] South Carolina's ALPs would be allowed to prepare and file legal documents, but not sign them.

[140] UTAH CODE OF JUDICIAL ADMIN. § 14-802(c) (2022), https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2022/02/Rule-14-802-redline.pdf. Note: Under "Represent Clients at Depositions, Mediations, Settlement Conferences," Utah's program allow representation at mediations only.

[141] VT. FUTURE OF LEGAL SERVS. 2015 REPORT, *supra* note 76, at 48.

[142] WASH. ADMISSION & PRACTICE R. 28(F) (2019), https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=apr.

[143] LLLTs can represent clients during mediations and settlement conferences but can only assist and confer with their clients at depositions.

I. States' Considerations of Roles & Responsibilities

PROVIDE CLEAR PROVISIONS AND OBTAIN WRITTEN CONSENT

There is concern among some in the legal profession that clients will unknowingly request the services of an ALP thinking they are an attorney, or mistakenly believe that they cannot afford one. Due to these concerns, most ALPs are required to inform their clients as to what services they can and cannot provide, with a few states requiring that ALPs provide clients with a disclosure letter and receive written consent before providing legal help.

In California, the proposal required that providers give clients a statement that the provider is not a lawyer. They would have also needed to disclose "other available choices for obtaining legal services, including the potential availability of a free consultation with a lawyer, limited-scope services from a lawyer, free services from a self-help center or family law facilitator's office, and that free legal services may be available to low-income individuals from a legal aid program if the client qualifies."[144] The disclosure would have also needed to highlight the provider's limitations by explaining the areas of law they are allowed to practice and the potential need to hire a lawyer if the services needed go beyond their scope.[145]

North Carolina is an example of another state whose proposal requires written consent, but their requirements are less intensive. They would require their NCLTs to explain what services will be performed, including what services are beyond their scope of practice.[146] They also require a statement that the NCLT is not a lawyer and can only provide limited services.[147]

PROVIDE LEGAL ADVICE

All active states allow their ALPs to give clients legal advice. Washington and Utah, for example, allow their ALPs to provide general opinions and recommendations, in addition to advice related to particular circumstances.[148] As for the states that have implemented or proposed the requirement of attorney supervision, none have explicitly restricted ALPs from giving legal advice.

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[144] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78, at app. B § 1.4.3(a)(2).

[145] *Id.* § 1.4.3(a)(3)-(4).

[146] JUSTICE FOR ALL PROJECT, *supra* note 70, at 66.

[147] *Id.* at 68.

[148] WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PROF'L CONDUCT 2.1 (2021); UTAH CODE OF JUDICIAL ADMIN. § 14-802(c)(1).

Within the scope of providing legal advice, states have given examples of what that advice can consist of. Arizona LPs can provide specific advice about possible legal rights, remedies, defenses, options, and strategies—essentially anything attorneys can do within the limited scope of matters.[149] In North Carolina, their proposal permits NCLTs to advise their clients on which forms to use, how to complete those forms, the applicable procedures in their case, upcoming deadlines, and the anticipated course of the legal proceeding.[150] While there is a range of advice that can be given, there seems to be a consensus that this is a task suitable for ALPs.

PREPARE, SIGN, AND FILE LEGAL DOCUMENTS

Similar to providing legal advice, all active state programs and the vast majority of proposals specifically allow ALPs to prepare, sign, and file legal documents. While only a couple of states differ on what all ALPs can do with legal documents, no state has specifically excluded all tasks. Each state's laws vary on what constitutes the unauthorized practice of law, and this has played a role in why some states omitted mention of these tasks in their proposals. California, for example, did not expressly outline these tasks in its proposal in part because these tasks can already be performed by legal document assistants, who are not attorneys.[151] As for the states that did mention these tasks, one of the reasons is that self-represented litigants have a difficult time understanding which court forms to use and how to complete and file them, all of which can create negative outcomes.

REVIEW AND EXPLAIN OPPOSING PARTY'S DOCUMENTS, FORMS, AND EXHIBITS

Reviewing and explaining documents, forms, and exhibits of another party is also permitted or proposed in the majority of states. In North Carolina, the Justice for All Project's proposal provides an example of need in unemployment claims.[152] The employer's attorney often submits exhibits to refute the former employee's claim, and the former employee is usually unaware that they can object to evidence or even introduce their own evidence, resulting in an unfavorable decision for them. The more information that a self-represented litigant has about the meaning and power of legal documents, the better chance they will have to defend their case.

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[149] ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(F)(1)(b).

[150] JUSTICE FOR ALL PROJECT, *supra* note 70, at 64.

[151] *What Is A Legal Document Assistant?*, CAL. ASS'N OF LEGAL DOCUMENT ASSISTANTS, https://calda.org/What-is-a-Legal-Document-Assistant-(LDA) (last visited Nov. 1, 2022).

[152] JUSTICE FOR ALL PROJECT, *supra* note 70, at 37.

COMMUNICATE WITH OPPOSING PARTY

For the most part, states tend to agree that communicating with the opposing party (or the opposing party's counsel) is a task that ALPs can perform. Not all proposals specifically mention whether this task is permitted or not, but the majority of states allow it. One reason for allowing this task is that self-represented litigants often need help negotiating with other parties. In Oregon's 2017 Futures Task Force report, they gave the example of self-represented litigants being encouraged to negotiate stipulated agreements in eviction proceedings. "The tenant, never having seen one before, may have no idea whether the offered terms are reasonable or whether she should (or even may) ask for something better."[153]

REPRESENT AT DEPOSITION, MEDIATIONS, AND SETTLEMENT CONFERENCES

Representation at depositions, mediations, and settlement conferences requires more technical oral advocacy skills than with the other tasks mentioned. This has played a role in why states take differing approaches on whether such responsibilities are allowed.

Out of the currently active states, only Arizona and Minnesota allow their ALPs to fully represent their clients at depositions, mediations, and settlement conferences, although in Minnesota depositions would likely not apply to any case an LP is permitted to handle. In Arizona, LPs can represent their clients the same as attorneys within the limited jurisdictions of the matter. This is also the case in Minnesota, so long as there are no allegations of domestic or child abuse and the supervising attorney believes the issues are not complex. In Washington, LLLTs are limited in how they can help during depositions. They are allowed to provide support, but they cannot themselves conduct or defend depositions. In Utah, there is no rule language or other authority that permits them to assist with depositions. There is a similar trend among other states that have detailed proposals, where ALPs can represent their clients at mediations and settlement conferences but are limited in how they can assist at depositions.

II. Considerations When Creating an ALP Program

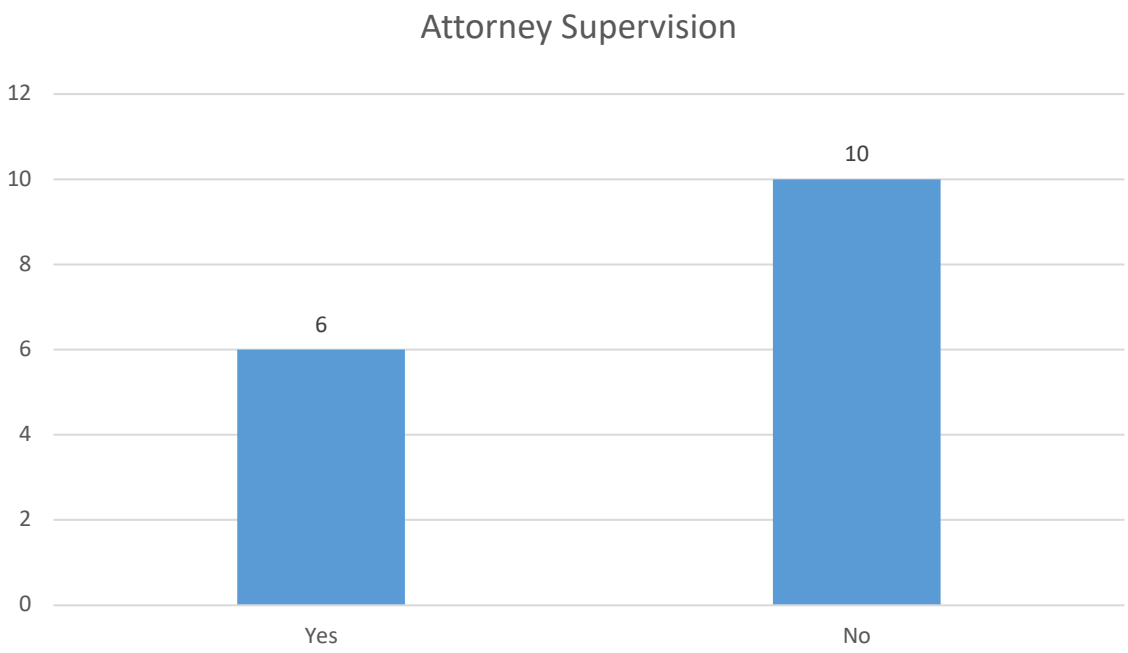
- Which services will provide the greatest benefit and positive impact to self-represented litigants and the court?
- Which services do self-help centers and pro bono programs provide the least help with?
- What is the level of complexity with each service?
- Which services, if any, are beyond the education and training that ALPs receive?

[153] Or. Futures Report 2017, *supra* note 48, at 23.

D. Attorney Supervision

As shown below in Figure 3, most states have not required attorney supervision, including both active programs and proposals.

Figure 3: Attorney Supervision



Every active state except for Minnesota has foregone requiring attorney supervision, and most of the states that are moving their proposals toward implementation are also recommending no attorney supervision. That being said, it is still an issue that states disagree on—and one that concerns many people in the legal profession.

I. States' Considerations for Requiring Attorney Supervision[154]

There are a few reasons that states have decided to require attorney supervision. Minnesota's task force, for example, looked at the different models that exist in the United States and even those in Canada; while the original task force recommended both the Washington LLLT model and the British Columbia model, the supreme court's chief justice made the determination to

[154] Florida, Illinois, Minnesota, New Hampshire, New Mexico, and Vermont.

move forward with the British Columbia model.[155] (In British Columbia, paralegals are allowed to perform legal services beyond what their license permits so long as they are supervised by a lawyer.[156]) By requiring attorney supervision, Minnesota was able to extend paralegals' responsibilities without requiring them to fulfill extensive education and testing requirements. This allowed Minnesota to accelerate the implementation of its program without sacrificing the quality of service provided by legal paraprofessionals.

Another main reason some states are requiring attorney supervision is to help get their proposals passed. A major concern from many in the legal profession is that ALPs are not competent to provide legal services because they did not attend law school and pass the bar exam; by requiring attorneys to supervise ALPs, this concern is lessened.

II. States' Considerations for Not Requiring Attorney Supervision[157]

One of the main reasons for programs and proposals not requiring attorney supervision is the belief that ALPs will have the necessary education, training, and skills to provide legal services. Other factors that have played a role in decision-making include the concern over the creation of a bottleneck (as attorneys look over every aspect of an ALP's work) and the vocal support from the state supreme court.

III. Considerations When Creating an ALP Program

- Does the data show that attorney supervision is necessary or unnecessary?
- How would attorney supervision affect interest in becoming licensed as an ALP?
- Is there interest from attorneys in supervising ALPs?
- Is there a certain amount of education and training that would alleviate the need for attorney supervision?
- Is attorney supervision a way of reducing the burden and cost of licensing or regulation, and if so, is that a reason to require it?

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[155] 2020 Report and Recommendations to the Minnesota Supreme Court, *supra* note 43, at 10.

[156] *Legal Professions Regulatory Modernization: Ministry of Attorney General Intentions Paper*, B.C. (Sept. 2022), https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/current-reviews/legal-professions-regulatory-modernization#:~:text=Paralegals%20are%20not%20directly%20regulated,is%20responsible%20for%20their%20conduct (last visited Nov. 1, 2022).

[157] Arizona, California, Colorado, Connecticut, North Carolina, New York, Oregon, South Carolina, Utah, and Washington.

E. Title/Terminology

When it comes to the creation of a new profession, the title can have a lot of influence over how successful the profession becomes. This is one area where states have struggled to settle on common terminology, with many ideas and very little consensus.

i. States' Considerations of Title

Starting in 2012, Washington came up with the first title for their providers in the United States—Limited License Legal Technicians (LLLTs). Utah was next and went a different direction, calling their providers Licensed Paralegal Practitioners (LPPs). Arizona and Minnesota have named their providers Legal Paraprofessionals (LPs). There are a whole host of other titles that states have come up with, each state having its own reasons for how they came up with them.

Figure 4: Title

Some states surveyed members of their respective task forces, including paralegals, to see which title resonated best.[158] One state, California, used professional translators to determine which title would work best in other languages. They ended up with three titles to choose from: Limited License Legal Practitioner, Limited Legal Practitioner, and Limited Legal Advisor. Two common factors that state committees have taken into consideration when thinking through the

[158] North Carolina, for example, conducted surveys of the members of the Paralegal Division of the North Carolina Bar Association and Certified Paralegals of the North Carolina State Bar, in addition to sending surveys to state and local paralegal associations.

appropriate title were avoiding a negative connotation (e.g., nonlawyer) and avoiding the perception that these professionals were attorneys. This has mainly been achieved by using the terms "Limited," "Paraprofessional," and "Paralegal." When looking at all the different titles together, there appears to be interest in "technician," "practitioner," "paraprofessional," "paralegal," "advisor," and "advocate," with a word or two beforehand showing the limited scope of their practice.

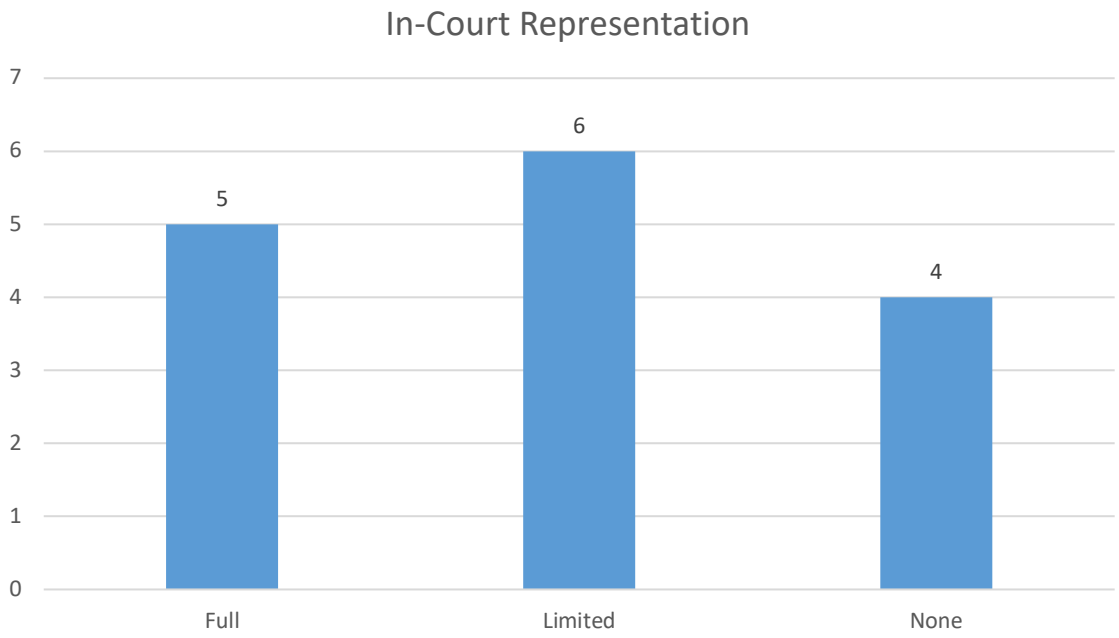
II. Considerations When Creating an ALP Program

- What does the title need to describe?
    - That they can provide legal services?
    - That the services they can provide are limited?
    - That they are not attorneys and not paralegals?
- What title can be easily translated to other languages without confusion?
- What considerations are important in the title from the perspective of clients?

F. In-Court Representation

In-court representation is another one of the ALP roles and responsibilities that states are deciding whether to allow. It is being given its own section in this report because it is highly contested within the legal community and, as such, has led to states disagreeing on how much of a role ALPs should have in the courtroom.

Figure 5: In-Court Representation



Only 15 of the 16 states with programs and proposals are represented in the above figure because North Carolina's proposal left the question for a later committee.

I. States' Considerations of Full Representation

Two of the four active states, Arizona and Minnesota, allow their ALPs to fully represent their clients in court.[159] State committees recommending full representation include California, Connecticut, and New Hampshire. While there are concerns that there would be a power imbalance in the courtroom between attorneys and ALPs, one main factor in allowing for full in-court representation has been the struggle self-represented litigants face in attempting to handle hearings on their own.[160] That being said, opponents to these programs have argued that self-represented litigants are better off on their own because the court will be more flexible with them than with allied legal professionals, though proof of this concern is lacking. Beyond the benefit that full representation provides for litigants, another factor mentioned is the benefit it would

[159] In Minnesota, LPs can fully represent their clients in housing matters, child support, child support modifications, parenting time, and paternity. LPs are also allowed to fully represent their clients in harassment restraining orders (HROs) and orders for protection (OFPs) pending completion of required training. Other family law cases are limited to default hearings, pretrial hearings, and informal proceedings.

[160] Cal. Paraprofessional WG 2021 Report, *supra* note 78, at 42.

provide courts in that hearings would likely become more efficient when there is a professional representative on both sides.[161]

II. States' Consideration of Limited Representation

The other two active states, Washington and Utah, as well as Oregon's recently adopted proposal, allow for limited in-court representation. State committees considering this approach include Colorado and New York. Illinois also considered limited representation, limiting representation to appearing "in the civil trial courts and administrative tribunals of Illinois for all pretrial proceedings, and court-annexed arbitration and mediation."[162] These limited approaches often entail allowing ALPs to sit at the table with their clients to provide emotional support, answer factual questions, and respond to direct questions from the court. A main reason for this is that litigants struggle greatly in the courtroom, often lacking a basic understanding of the process itself, so an ALP assisting in even a limited role can benefit their clients. At the same time, many of these states are wary of the limited knowledge these ALPs will have of evidentiary issues, so this limited approach strikes a balance between the needs of self-represented litigants and the worries of many in the legal profession.[163] While its proposal was ultimately rejected, Illinois also considered limited representation, proposing that their LPs be allowed to appear in civil trial courts and administrative tribunals without their supervising attorney for all pretrial proceedings and court-annexed arbitration and mediation.[164]

III. States' Considerations of No Representation

Florida, New Mexico, South Carolina, and Vermont all created proposals recommending that their ALPs not be allowed to provide in-court representation in any form. There are a few reasons that brought these state committees to recommend this approach. Like the state committees proposing a limited approach, one worry among some of these committees was that their proposal would not pass if they allowed any kind of in-court representation. Another worry is that these ALPs are not experienced enough to represent their clients in court and that their representation could result in more harm than good.

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[161] *Id*.

[162] CBA/CBF 2020 Task Force Report, *supra* note 90, at 71.

[163] Or. Implementation Comm. 2022 Report, *supra* note 50, at 18-19.

[164] CBA/CBF 2020 Task Force Report, *supra* note 90, at 71.

IV. Considerations When Creating an ALP Program

- What do self-represented litigants need the most help with in court?
- Will ALPs have enough knowledge and training to help their clients in any capacity in court?
- Will limited or full representation provide more help or more harm?
- If ALPs are allowed to represent their clients in court, should representation be full like attorneys or limited?
- Are there in-court services an ALP can provide that will help make hearings more efficient?
- Can the judiciary be adequately trained on an ALP's limited scope of practice to not encourage overreach?

G. Ownership Interest

One of the more hotly contested issues is whether ALPs should be able to have an ownership interest in law firms. The question of who should be allowed to have ownership interest in a law firm is not new. Model Rule of Professional Conduct 5.4 states that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[165] Up until a couple years ago, only Washington D.C. had allowed people other than lawyers to have an ownership interest in law firms.[166] Though Washington D.C. does require that three qualifications be met: 1) the sole purpose of the organization has to be providing legal services, 2) everyone with an ownership interest has to abide by the Rules of Professional Conduct, and 3) the lawyers with a financial interest have to be reasonable for the nonlawyer owners to the same extent as if they were lawyers.[167]

Recently, both Utah and Arizona have now permitted others to have an ownership stake in firms. Utah created a legal regulatory sandbox, whereby entities can offer new and innovative models of legal practice in a limited and controlled space outside of the traditional rules governing legal practice.[168] Arizona took a different approach, and in August 2020 it eliminated Rule 5.4 so that

[165] Model Rules of Prof'l Conduct r. 5.4 (Am. Bar Ass'n 2020).

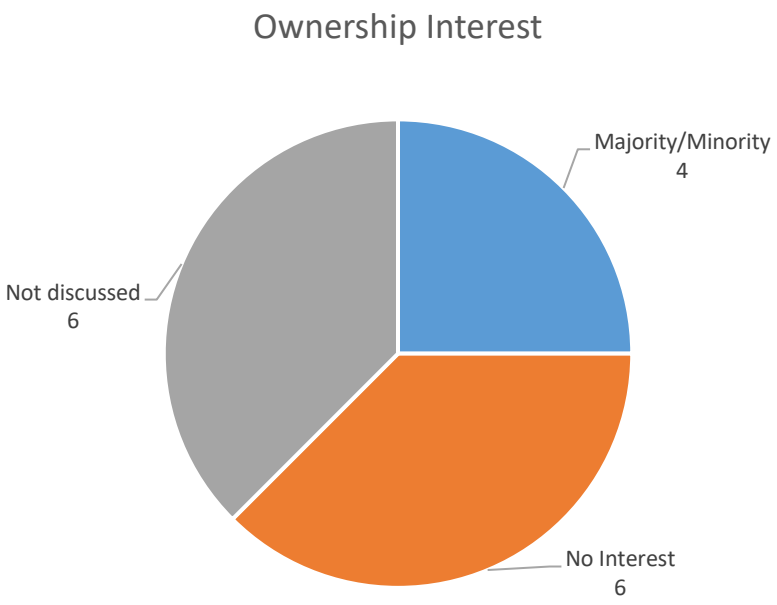
[166] D.C. Rules of Prof'l Conduct r. 5.4 (2022).

[167] *Id.*

[168] *Frequently Asked Questions*, Office of Legal Servs. Innovation, https://utahinnovationoffice.org/frequently-asked-questions/ (last visited Nov. 1, 2022).

law firms that are licensed as alternative business structures (ABSs) can be owned by people or entities other than lawyers.[169] Only those who are otherwise licensed to practice law may deliver legal services through an ABS in Arizona.[170] Therefore, Arizona LPs can technically own a majority interest in a law firm, so long as that law firm is licensed as an Arizona ABS. While a few other states are considering making changes to Rule 5.4, there is strong opposition within the legal profession against modifying the rule.[171] As to ALP programs, some of the proposals lack any mention of the issue,[172] but those that do mention it are split between allowing minority ownership interest and not allowing any ownership interest.

Figure 6: Ownership Interest



[169] *Alternative Business Structures*, ARIZ. JUDICIAL BRANCH, https://www.azcourts.gov/cld/Alternative-Business-Structure (last visited Nov. 1, 2022).

[170] ARIZ. R. SUP. CT. 31.1(c)(3) (2022), https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/supreme-court-jurisdiction-over-the-practice-of-law/rule-311-authorized-practice-of-law.

[171] AM. BAR ASS'N, RESOLUTION 402 (Aug. 8-9 2022), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/402-annual-2022.pdf.

[172] Connecticut, Minnesota, New Mexico, New York, South Carolina, and Vermont.

I. States' Considerations of Majority/Minority Interest[173]

Out of the four states that allow for any form of ownership interest, Utah is the only state that permits majority ownership. This is because Utah LPPs are bound by the same Rules of Professional Conduct as attorneys, so Rule 5.4 does not consider LPPs and attorneys sharing a legal practice as attorneys sharing a practice with nonlawyers. One of the main considerations for states that have opted to allow for ownership interest in law firms was that it would encourage attorneys and ALPs to work together. People who have an equity stake in the organization they work at have an incentive to remain loyal and work hard to grow the organization. Additionally, in every state with an ALP program, there are some tasks that an ALP cannot perform and that they must refer out to an attorney. These limitations create an incentive for ALPs and attorneys to partner up, so that any work beyond the scope of an ALP can get passed off smoothly to the attorney. However, it should be noted that while data shows many ALPs are working in law firms with attorneys, this does not suggest they have undertaken an ownership interest in those law firms.[174]

II. States' Considerations of No Interest[175]

The prime consideration in forbidding ALP ownership interest in law firms revolves around ethical concerns. While there is no empirical evidence that nonlawyer ownership interest in law firms results in ethical malfeasance, there is a strong belief from many in the legal profession that attorneys would be unduly pressured to break their ethical code to the benefit of the firm or to stakeholders. Because of this, whether from members of the committees who drafted the proposals or from members of the legal profession who submitted public comments, there has been enough pushback to the idea of any ownership interest that many states have kept Rule 5.4 untouched.

III. States' Considerations of Fee Sharing

The issue of fee sharing is often discussed in conjunction with ownership interest, though the allowance of one has not always resulted in the allowance of the other. Fee sharing is not being

[173] Colorado, North Carolina, Utah, and Washington.

[174] Jason Solomon & Noelle Smith, Stan. Ctr. on the Legal Profession, The Surprising Success of Washington State's Limited License Legal Technician Program 19-20 (2021), https://law.stanford.edu/wp-content/uploads/2021/04/LLLT-White-Paper-Final-5-4-21.pdf.

[175] Arizona (plans to soon propose an amendment to allow LPs to have ownership interest), California, Florida, Illinois, New Hampshire, and Oregon.

recommended by all states developing an ALP program, but all existing programs do allow for some form of fee sharing between an ALP and an attorney.

In California, it was initially recommended that their ALPs be allowed to share fees with attorneys in addition to being allowed to have a minority ownership interest in law firms. After receiving public comments—the large majority of which came from attorneys—and rediscussing the issue amongst the committee, the recommendation of minority ownership interest changed to no longer allowing any ownership interest or fee sharing.[176] Oregon, on the other hand, will allow their legal paraprofessionals to share fees with attorneys—even though they are not allowed to share any ownership interest in law firms.[177]

IV. Considerations When Creating an ALP Program

- What are the potential harms of ownership interest and what does data show on how likely those harms are to occur?
- What are the potential benefits of ownership interest and what does data show on how likely those benefits are to occur?
- How does minority ownership interest versus majority ownership interest affect these potential harms and benefits?
- Do the harms outweigh the benefits or vice versa?

H. Eligibility

The eligibility requirements for ALPs are generally consistent among states and follow eligibility requirements of attorneys. There is an age requirement that applicants be at least 18 or 21 years old, and that they are a citizen or legal resident of the United States of America. States are requiring that applicants have not previously been denied admission to the practice of law, disbarred, or have had their license suspended unless they receive approval by the state supreme court. Applicants must also have good moral character and a proven record of ethical, civil, and professional behavior like that of attorneys. This is often determined via the information provided in applications, which includes a background check and history on employment and housing.

[176] Memorandum from the Cal. State Bar to the Cal. State Bar Bd. of Trs. 3 n.3 (May 20, 2022), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000029067.pdf.

[177] Or. Implementation Comm. 2022 Report, *supra* note 50, at 5.

In Utah, for example, applicants must provide a variety of documents to the bar that illustrate the applicant's character, including criminal records, military records, credit history, bankruptcy records, traffic violations, child/spousal support, and history of past jobs.[178] Most ALP programs are requiring similar documentation from their applicants, mirroring the character and fitness requirements that their states have imposed on attorneys.

I. Education

Every state has come up with its own unique educational requirements, though many states' requirements are similar. They start with a degree or certification requirement as a foundation, followed by topic-specific classes based on the practice areas being pursued. Limited-time waivers of some of these educational requirements are often included based on the applicant's prior degrees and substantive law-related experience. Directly below is an example of Washington's education and waiver requirements. For a full list of the requirements laid out in each state, see Appendix A.

i. Foundational, Specialty & Waiver Requirements

WASHINGTON

Pathways	Foundational Education	Additional/Specialty Education	Experience Waiver
Pathway 1	Associate degree or higher	• 45 hours of core curriculum instruction: ○ 8 credit hours in civil procedure ○ 3 credit hours in contracts ○ 3 credit hours in interviewing and investigating techniques ○ 3 credit hours in the introduction to law and legal process ○ 3 credit hours in law office procedures and technology ○ 8 credit hours in legal research, writing, and analysis ○ 3 credit hours in professional responsibility	X

[178] *Licensed Paralegal Practitioner Program*, Utah State Bar, https://wordpress-678678-2232594.cloudwaysapps.com/wp-content/uploads/LPP-Application-Steps_12_2020.pdf (under the subheading "LPP Admissions Information" click on No. 2 "LPP Applications Steps") (last visited Nov. 1, 2022).

		• For domestic relations: o 5 credit hours in basic domestic relations subjects o 10 credit hours in advanced and Washington-specific domestic relations subjects	
Pathway 2[179]	X	X	10 years of legal work experience in the past 15 years

II. Considerations When Creating an ALP Program

- What educational courses do paralegals complete that overlap with existing ALP programs' requirements?
- Should educational requirements be tailored to available practice areas, or should they include general aspects of the law?
- Should an evidence course be required if allowed to represent clients in court?
- How many credit hours would potential applicants consider overly burdensome compared to the benefits of the license?
- What types of schools (e.g., law schools, universities, community colleges) should provide the courses, and how does this impact cost?
- What is the potential cost of a given education requirement, and how will that impact client fees?

J. Practical Training

There is a consensus among states that ALPs should have practical training experience prior to licensure. In terms of how many hours of practical training and whether that training should be practice-area-specific or more general, states vary from as little as 1,000 hours to as many as 4,000 hours (see Appendix A).

[179] In addition to completing 10 years of legal work experience in the past 15 years, LLLTs must pass an LLLT Board approved national paralegal certification examination and have an active certification from an LLLT Board approved national paralegal certification organization.

I. States' Considerations of Practical Training

Both active and proposal states are requiring and recommending a certain number of hours of total work experience, including in the specific practice area in which they will concentrate. These hours often must be worked within the last few years prior to licensure. For example, Washington requires 1,500 hours of experience in the three years prior to taking the LLLT exam. Interestingly, Washington initially required 3,000 hours of experience, which LLLTs felt was appropriate,[180] but the requirement was lowered to 1,500 hours because it was difficult finding attorneys willing to supervise for that long.

In terms of the ratio of overall hours and practice area-specific hours, states differ. Both Utah and Colorado require a total of 1,500 hours of substantive work experience, with a minimum of 500 family-law hours for those choosing that specialty. Utah also requires a minimum of 100 hours worked in debt collection or forcible entry and detainer if their LPPs plan to specialize in that area of law.[181] In Arizona, however, most pathways to licensure require only 120 hours of experiential learning in each practice area for endorsement.

Some states are providing options for how the work experience requirement may be fulfilled, including combinations of work and education or work and certification. Illinois, for example, offers multiple pathways to earning an ALP license. An applicant with a high school degree must complete 4,000 hours as a general litigation paralegal; an applicant with a bachelor's degree in any discipline must complete 2,000 hours as a general litigation paralegal. In contrast, applicants with a paralegal degree or certification or a law degree would not be required to complete any additional practical training. Other states, such as Utah, also remove the practical training requirement for applicants who have earned a law degree.

Most states require the practical training be completed in the "real world," such as at a law firm under a supervising attorney. California's program, in addition to having a 1,000-hour work experience requirement (to be completed in a minimum of six months, with 500 hours in the area of specialization), allowed for the work to be completed in a law clinic, if the clinic director deems it sufficient.[182]

Depending on the state, the practical training requirement can also include trauma-informed training or ethics training. California required trauma-informed training for its

[180] CLARKE & SANDEFUR, *supra* note 93, at 9.

[181] In May 2022, Utah amended the rule to allow for "qualifying academic credit" to be applied toward the requirement of 1,500 hours of experience, at a cap of 700 hours.

[182] CAL. PARAPROFESSIONAL WG 2021 REPORT, *supra* note 78, at 14.

paraprofessionals,[183] and Minnesota recently adopted a trauma-informed training requirement for their legal paraprofessionals who wish to work on domestic and child abuse cases.[184] Meanwhile, Colorado requires ethics training for its paraprofessional licensure program.[185]

II. Considerations When Creating an ALP Program

- To what extent, if at all, should practical experience be allowed to substitute for education requirements?
- Should practical training requirements be more extensive than those for attorneys?
- How many hours could be considered overly burdensome for either the ALP or the supervising attorney?
- Can practical training be completed in clinics or as part of classes, or must it be completed outside of education?
- Should all or some of the practical training be in the area that ALPs plan to practice?
- Who or what entities should be qualified to sign off on an applicant's experience hours?

K. Testing

The testing requirements that states have created for ALPs are roughly consistent with each other, with a few differences in some states. ALPs must complete a general exam (or the educational requirements include the completion of a paralegal exam), a practice-area-specific exam, and a professional responsibility exam. The exams include multiple choice, essay, and/or issue spotting, and the passage rates have been under 50%.

I. States' Considerations of Examinations

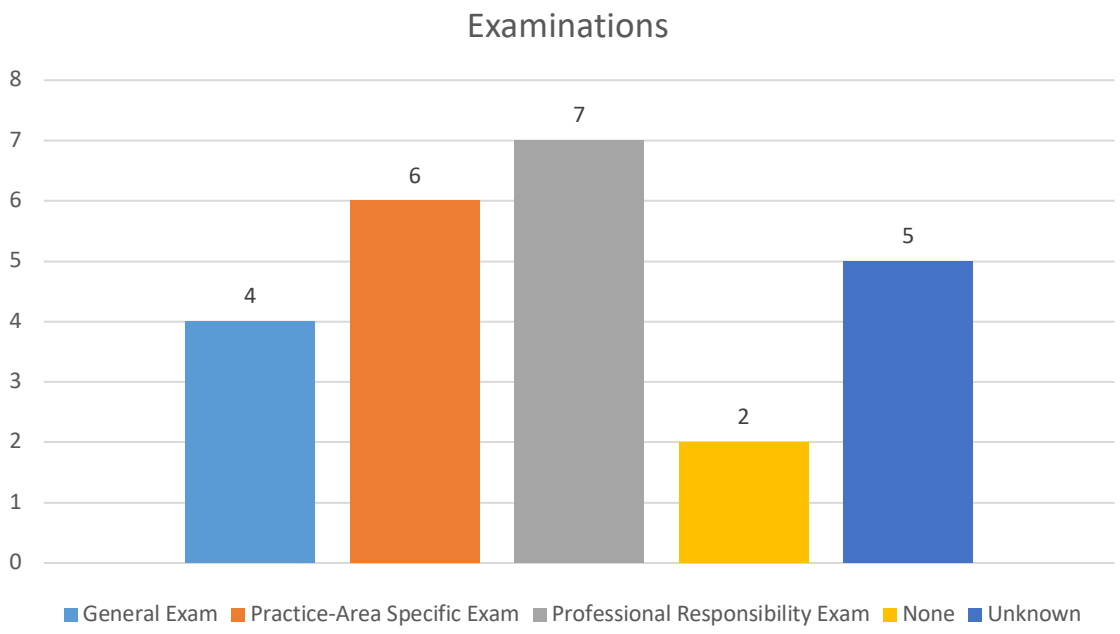
Not every state that has created a proposal has also outlined their testing requirements, but Figure 7 provides a general view of how many states are requiring which types of examinations.

[183] *Id.*

[184] Order Implementing Legal Paraprofessional Pilot Project, ADM19-8002.

[185] PALS II 2022 Report, *supra* note 57, at 41.

Figure 7: Examinations



The information below provides details on the active states and their testing requirements. See Appendix B for a full list of states and their testing requirements.

WASHINGTON

Applicants must pass three examinations:

1. LLLT Board Approved Paralegal Exam, which includes the National Federal of Paralegal Associations Paralegal Core Competency Exam
2. Practice area exam
3. Washington State Bar Association Professional Responsibility exam

UTAH

Applicants must pass two examinations:

1. Licensed Paralegal Practitioner examination for each practice area for which the applicant seeks to practice
2. Professional ethics examination

ARIZONA

Applicants must pass two examinations:

1. Core examination, which includes the topics of legal terminology, substantive law, client communication, data gathering, document preparation, the ethical responsibilities of legal paraprofessionals, and professional and administrative responsibilities pertaining to the provision of legal services
2. Substantive law examination, with one exam for each of the areas of practice in which the applicant seeks to be licensed

MINNESOTA

No examinations are required since Minnesota's program is in a pilot test phase.

II. Makeup of Examinations

There are three states—Washington, Utah, and Arizona—that have fully developed the makeup of their examinations. Both Washington and Utah have structured their examinations similar to state bar exams, where they consist of multiple-choice questions, essay, questions, and an issue spotting/practical section. Arizona has opted to have their examinations consist solely of multiple-choice questions.

III. Examination Results

Data on examination results is sparse due to only three of four active programs implementing testing, and two of those three programs have been in existence for five years or less. A common theme so far has been that passage rates are low. In Washington, passage rates are around 50%. And in Arizona, from June 2021 through June 2022, less than 40% of test takers passed their exams.[186] It is important to note that Arizona does not require candidates to apply for licensure prior to taking the examinations, so many examinees are not qualified to practice or are not adequately prepared for the examinations. In fact, applicants have noted that they did not study enough—and the improvement in second-time pass rates show this to be the case. It should also be noted that these poor passage rates are nothing new to the legal profession. In February 2022, California's bar exam passage rate was 33.9%.[187]

[186] *Legal Paraprofessional Exam: Exam Results*, ARIZ. JUDICIAL BRANCH, https://www.azcourts.gov/Licensing-Regulation/Legal-Paraprofessional/Legal-Paraprofessional-Exam/Exam-Results (access updated exam passage rates through "Updated June 22, 2022" under the "Overall" column) (last visited Nov. 1, 2022).

[187] News Release, State Bar of Cal., State Bar of California Releases Results of February 2022 Bar Exam (May 6, 2022), https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-releases-results-of-

IV. Considerations When Creating an ALP Program

- Should exams cover the law generally or focus on the practice areas the ALPs will work in?
- Should states create a professional responsibility exam that is tailored toward ALPs, or is the attorney Multistate Professional Responsibility Examination (MPRE) sufficient?
- Which examination format, if any, best tests for minimum competency?
- Are exams necessary, or is a certain amount of education and practical training sufficient?
- Should all jurisdictions incorporate a mandatory ethics component?
- How should, if at all, subject-matter experts be retained to write and grade the examinations?

L. Regulatory Requirements

As with attorneys, ALPs are subject to an array of regulatory requirements. Some states have put in place the same requirements given to attorneys, while other states have created stricter requirements, but for the most part states align around these requirements.

I. States' Considerations of Regulatory Requirements

The following is a list of the main regulatory requirements that states are placing upon ALPs. Not all states require or recommend each of these items. For a complete list of each state's regulatory requirements, see Appendix C on Regulatory Requirements.

- Trust account
- Liability/malpractice insurance
- Pay into the state's client security fund
- Continuing Legal Educating (CLE)
- Pro bono work

Some of the states took the regulatory requirements placed on attorneys and copied them over for ALPs, reasoning that if attorneys are required to adhere to certain requirements to protect clients and the public, so should ALPs. In Colorado, LLPs, like attorneys, are required to use a trust

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february-2022-bar-exam#:~:text=This%20year's%2033.9%20percent%20pass,pass%20rate%20of%2026.8%20percent.

account. They are not required to have malpractice insurance (because attorneys are not required to have it), but if attorneys are ever required to have malpractice insurance, then LLPs should as well. The proposal also specifies that the ethics rules for LLPs should parallel the Colorado Rules of Professional Conduct for attorneys. In Oregon, "LPs should be required to comply with the same requirements in dealing with clients and the public as apply to attorneys."[188] This includes having a trust account, paying into the Client Security Fund, having malpractice insurance, and fulfilling continuing legal education requirements.

Other states have modified the regulatory requirements placed on attorneys and made them more rigorous. In Washington, attorneys are not required to carry malpractice insurance, but LLLTs must either have an individual professional liability insurance policy or their employer must have one and agree to provide coverage for the LLLT. Likewise, North Carolina recommends that NCLTs be required to have professional liability insurance, despite attorneys having no such requirement.

II. Considerations When Creating an ALP Program

- Should regulatory requirements for ALPs follow those for attorneys, should they be stricter, or should they be looser?
- Should ALPs be subject to the Rules of Professional Conduct?
- What impact on cost of services will regulatory requirements create?

M. Program Costs

When it comes to program costs, this section looks at both the cost it takes to become an ALP and the cost it takes to fund an ALP program. The information available is understandably limited given the small number of active programs.

[188] Or. Implementation Comm. 2022 Report, *supra* note 50, at 28.

I. Costs to Become an ALP

In Washington, the typical cost to become a LLLT is around $15,000.[189] This takes into account all necessary education, from an associate degree up to the specialized family law classes. Annual licensing fees to remain active cost around $250.[190]

In Utah, the cost varies significantly depending on the education one has already attained. For paralegals who are already working, getting certified can cost roughly $600.[191] For those who have not attained an associate degree or higher, that cost increases to around $10,000 or more.[192] Annual licensing fees to remain active cost around $220 per year.[193]

In Arizona, the cost depends on the applicants' previous education and the school they go to for the remainder of their studies. Those interested have a variety of schools they can attend to obtain the necessary LP education, including but not limited to the University of Arizona, Pima Community College, Maricopa Community Colleges, Yavapai College, and Arizona State University. As an example, for the cost of an LP education, the University of Arizona educational track for enrolled MLS students consists of 30 units and costs $19,500 for online learning, and $26,010 for in-person learning.[194] Annual licensing fees to remain active cost around $345 per year.

II. Costs to Fund an ALP Program

In Washington, Utah, and Arizona, the state bar associations have taken it on themselves to fund these programs. The Washington State Bar Association (WSBA) spent less than $200,000 per year funding their LLLT program.[195] While one of the main reasons for sunsetting Washington's program was due to the overall costs of sustaining the program, $200,000 is less than one-tenth

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[189] Solomon & Smith, *supra* note 174, at 25.

[190] *License Fees*, Wash. State Bar Ass'n, https://www.wsba.org/for-legal-professionals/license-renewal/license-fees (last visited Nov. 1, 2022).

[191] Annie Knox, *How a new program connects Utahns to lower-cost legal advice*, Deseret News (2020), https://www.deseret.com/utah/2020/2/17/21069591/utah-paralegal-practitioner-program-lawyer-advice-cheaper-himonas-supreme-court-state-bar-divorce.

[192] *Id.*

[193] *Licensing*, Utah State Bar, https://www.utahbar.org/licensing/ (last visited Nov. 1, 2022).

[194] Innovation for Justice, *supra* note 16, at 39.

[195] Solomon & Smith, *supra* note 174, at 31.

of 1% of the WSBA's budget.[196] In contrast, the Utah State Bar spends just over $100,000 per year to fund their LPP program.[197]

III. Considerations When Creating an ALP Program

- What is the cost to become an ALP compared to an ALP's earning potential?
- How many ALPs need to be licensed for a program to be self-sustaining?
    - Around how many years will it take to license that many ALPs?
- Who is best situated to fund ALP programs until they can be self-sustaining?

V. Existing Data on the Outcomes/Successes/Challenges of ALP Programs

With the creation of any new program—especially ones as large and detailed as these ALP programs—it is vital to collect data to see what is working and what needs to be revised. No matter how many bright minds work on creating a program of this scale, there will always be room for improvement. Since the implementation of Washington's program, and even more so with additional programs, researchers have been gathering data to assess impact. The data that has been gathered is limited because of the short timespan many of these programs have existed and because of the small sample size of ALPs across these four states. Nevertheless, the existing data does highlight where these programs are succeeding, where there is room for improvement, and where more research is needed.

A. Sources of Data

To date, data has been gathered on all three programs at varying levels. Most of the data has been gathered on Washington's LLLT program because it has been around for 10 years, but Utah, Arizona, and Minnesota have also been collecting data to see where improvements can be made.

[196] *Id.*

[197] Utah State Bar, Utah State Bar Final Budget FY 2022/23 30 (May 26, 2022), https://www.utahbar.org/wp-content/uploads/USB_2022-23BudgetWorkbook.pdf.

- *Preliminary Evaluation of the Washington State Limited License Legal Technician Program*[198]
- *The Surprising Success of Washington State's Limited License Legal Technician Program*[199]
- *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*[200]
- *Nonlawyers in the Legal Profession: Lessons from the Sunsetting of Washington's LLLT Program*[201]
- *Expanding Arizona's LP and Utah's LPP Program to Advance Housing Stability*[202]
- *Interim Report and Recommendations to the Minnesota Supreme Court*[203]
- *Utah's Licensed Paralegal Practitioner Program: Preliminary Findings and Feedback from Utah's First LPPs* [204]

B. BENEFITS

Some of the biggest concerns focus on whether ALPs would be able to provide competent legal service and whether they would end up charging a similar fee to attorneys, thereby undermining the goals of the programs. Based on the available data, it appears that these concerns have not come to fruition.

[198] CLARKE & SANDEFUR, *supra* note 93.

[199] SOLOMON & SMITH, *supra* note 174.

[200] Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1 (2018), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2561&context=sulr.

[201] Lacy Ashworth, *Nonlawyers in the Legal Profession: Lessons from the Sunsetting of Washington's LLLT Program*, 74 ARK. L. REV. 689 (2022), https://www.wsba.org/docs/default-source/licensing/lllt/nonlawyers-in-the-legal-profession_-lessons-from-the-sunsetting-of-washington's-lllt-program.pdf?sfvrsn=e5b11f1_4.

[202] INNOVATION FOR JUSTICE, *supra* note 16.

[203] STANDING COMM. FOR LEGAL PARAPROFESSIONAL PILOT PROJECT, MINN. SUPREME COURT, INTERIM REPORT AND RECOMMENDATIONS TO THE MINNESOTA SUPREME COURT (2021) [hereinafter MINN. STANDING COMM. 2021 REPORT], https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Administrative-Interim-Report-and-Recommendations-from-the-Standing-Committee-for-LPPP.pdf.

[204] Ashton Ruff, Anna E. Carpenter & Alyx Mark, Utah's Licensed Paralegal Practitioner Program: Preliminary Findings and Feedback from Utah's First LPPs (unpublished manuscript) (on file with author).

I. Client Satisfaction

In the National Center for State Court's 2017 Preliminary Evaluation, clients uniformly reported that their Washington LLLTs provided competent assistance and that their legal outcomes were improved by utilizing the services of LLLTs.[205] While unable to articulate how justice was improved, they did report less stress, fear, and confusion. In another survey, Washington LLLT clients reported that LLLTs were "gamechangers" and were able to provide them the relief they wanted in just months after years of trying to navigate the system themselves.[206]

There are countless stories of clients who were very satisfied but expressed a desire that LLLTs could do more.[207] Some clients wished their LLLT could have been able to represent them in negotiations with the other party, and other clients wished their LLLTs could have accompanied them in court and helped with answering questions.

II. Competent Work

In a study conducted by the Stanford's Deborah L. Rhode Center on the Legal Profession,[208] attorneys who worked with Washington LLLTs reported a high level of satisfaction their work. Attorneys reported that LLLTs at their firm were more knowledgeable about family law and required less training than new attorneys.[209] This is not surprising, as LLLTs are required to take classes, pass exams, and complete practical training requirements in family law, whereas new attorneys have no such family law-related requirements. To corroborate this thought, a law professor at the University of Washington Law School said that LLLTs "know a lot more about family law than the ordinary JD graduate."[210]

In Minnesota, attorneys that supervised LPs had equally positive things to say. They found their LPs to be "careful, serious, and excellent."[211] They did not have complaints with their

[205] CLARKE & SANDEFUR, *supra* note 93, at 9.

[206] SOLOMON & SMITH, *supra* note 174, at 11.

[207] CLARKE & SANDEFUR, *supra* note 93, at 9.

[208] SOLOMON & SMITH, *supra* note 174.

[209] *Id*. at 12.

[210] *Id.*

[211] MINN. STANDING COMM. 2021 REPORT, *supra* note 203, at 6.

performance in or outside of the courtroom, and they wished that their LPs would be allowed to work on more serious family law cases that involve claims of domestic abuse and child abuse.

In both Washington and Minnesota, judicial officers have been impressed with ALPs. In Washington, most family law judges are grateful when self-represented litigants work with a LLLT. They report LLLTs being "enormously helpful," and that their quality of work is "very high."[212] Judges and commissioners have said that "LLLT work product is often higher quality and easier for the court to consume than attorney work product."[213] In Minnesota, judges who have worked with LPs in their courtroom reported that they "displayed appropriate decorum in the courtroom and knew the applicable court rules."[214]

III. Decreased Cost for Legal Services

In Washington, LLLTs in law firms bill around a rate of $160 per hour.[215] While this amount remains a barrier for people in lower income brackets, it is lower than the comparable attorney rate of $300, thereby making it more affordable for many.[216] That difference grows significantly as the number of hours increases.

C. Challenges

In their short time since implementation, while programs have increased access to legal services, there are improvements to be made. Two big challenges are the low number of licensees, and—similar to the legal profession—poor exam passage rates.

I. Low Numbers of Applicants

There are many factors that may have contributed to the low number of licensees (Washington, 91; Utah, 26; Arizona, 26; and Minnesota, 23), from a new profession causing concerns of instability to a lack of advertisement by the programs and understanding by the public. Whatever the reason, it is a serious issue.

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[212] SOLOMON & SMITH, *supra* note 174, at 13.

[213] *Id.*

[214] MINN. STANDING COMM. 2021 REPORT, *supra* note 203, at 7.

[215] SOLOMON & SMITH, *supra* note 174, at 20.

[216] *Id.*

The Washington Supreme Court cited their low numbers as one of the main reasons for sunsetting their program, even though the program was continuing to receive an increase in applicants each year. Using Washington as an example, other states need to be sure to secure appropriate funding while they work to build up their program, anticipating a slow start in their numbers of licensees. But the numbers in each state do show signs of hope. Arizona's program has been running for less than two years, and it already has nearly as many licensees as Utah. As more states create these programs—and more people recognize this new profession is not going to disappear in the next few years—there is hope that more people will become interested in earning an ALP license and joining the profession. But it is vital that states and state bar associations go beyond just creating these programs; they must actively promote and advertise ALPs and the services they provide.

II. Poor Test Passage Rates

The issue of poor test passage rates has been discussed previously in the testing section above, but it bears repeating because it is a hindrance to more ALPs joining the profession. Clients deserve to be represented by someone who is competent to give them legal advice, so there need to be measures in place to make sure only people competent in the law are becoming ALPs. That said, it is not clear that the current tests are the appropriate gatekeepers as many of these tests are modeled after the bar exam, which itself has been shown to lack being an appropriate gatekeeper of minimum competence.[217]

VI. Conclusion

The ability of people other than attorneys to provide some form of legal help is not a new concept. From New York City's Court Navigators to the Department of Justice's accredited representatives, the legal profession has viewed the providing of legal assistance as a task not strictly reserved for attorneys. In 2012, Washington was the first state to create an ALP program, and to date there are three other states with active programs and close to a dozen other states with proposals to do the same. Each of these programs are modeled off each other, having more similarities than they do differences. And the data coming out of these programs highlights that

[217] Deborah Jones Merritt & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Building a Better Bar: The Twelve Building Blocks of Minimum Competence (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (noting that the fairness, efficacy, and validity of the bar exam all depend upon one thing: a clear definition of what minimum competence means when it comes to allowing lawyers to practice law. Yet, the bar exam continues to be administered to incoming lawyers without taking into account the minimum competence they should possess upon entering the profession. IAALS' *Building a Better Bar* project has now contributed that critical missing piece—a fair, evidence-based definition of minimum competence—which must now be used to improve the lawyer licensing process.).

not only are these professionals competent enough to handle the work, but they have more specialized education and training in their focused areas of practice than most incoming attorneys.

As more data comes out on these programs showing that ALPs provide an avenue to legal help for many who cannot afford an attorney, it is likely that more states will join in implementing these programs. One of the first steps states have taken when developing their own program has been to look at what other states are doing. This report is designed to be used as a resource for states interested in creating their own ALP program to understand not only what other states' programs consist of, but also their reasoning behind many of their decisions.

Appendix A: Educational & Practical Training Requirements

ARIZONA[218]

Pathways	Foundational Education	Additional/Specialty Education	Practical Training

Pathway 1	Associate degree in paralegal studies or associate degree in any subject plus a paralegal studies certificate[219]	• Family law and civil practice endorsement:
		  ○ 3 credit hours in family
		  ○ 6 credit hours in civil procedure
		  ○ 3 credit hours in evidence
		  ○ 3 credit hours in legal research and writing
		  ○ 3 credit hours in professional responsibility
		• Criminal law endorsement:
		  ○ 3 credit hours in criminal law
		  ○ 3 credit hours in evidence
		  ○ 3 credit hours in legal research and writing
		  ○ 3 credit hours in professional responsibility
		• Administrative law endorsement:
		  ○ 3 credit hours in administrative law
		  ○ 3 credit hours in evidence
		  ○ 3 credit hours in legal research and writing
		  ○ 3 credit hours in professional responsibility
			• 120 hours of experiential learning in each endorsement; and
			• One year of substantive law-related experience under the supervision of a lawyer in the area of practice of each endorsement sought

Pathway 2	Bachelor's degree in law	• Family law and civil practice endorsement:
		  ○ 3 credit hours in family
		  ○ 6 credit hours in civil procedure
		  ○ 3 credit hours in evidence
			120 hours of experiential learning in each endorsement

[218] ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(E)(3)(b)(9).

[219] Arizona intends to include Bachelor's degrees along with Associate degrees in Pathway 1.

		○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility • Criminal law endorsement: ○ 3 credit hours in criminal law ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility • Administrative law endorsement: ○ 3 credit hours in administrative law ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility	
Pathway 3	Certification Program	The Arizona Supreme Court reserved a section in the Arizona Code of Judicial Administration to allow for the creation and proposal of a certification program for licensure that is approved by the Arizona Judicial Council. This would allow individuals with specialized training (e.g., social workers) to complete certain requirements that would allow them to become licensed as LPs. No programs have been proposed to date.	X
Pathway 4	MLS (Master of Legal Studies)	• Family law and civil practice endorsement: ○ 3 credit hours in family ○ 6 credit hours in civil procedure ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility • Criminal law endorsement: ○ 3 credit hours in criminal law ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing	120 hours of experiential learning in each endorsement

		○ 3 credit hours in professional responsibility • Administrative law endorsement: ○ 3 credit hours in administrative law ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility	
Pathway 5	Juris Doctor	X	X
Pathway 6	Foreign Juris Doctor[220] with an LLM	• Family law and civil practice endorsement: ○ 3 credit hours in family ○ 6 credit hours in civil procedure ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility • Criminal law endorsement: ○ 3 credit hours in criminal law ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility • Administrative law endorsement: ○ 3 credit hours in administrative law ○ 3 credit hours in evidence ○ 3 credit hours in legal research and writing ○ 3 credit hours in professional responsibility	120 hours of experiential learning in each endorsement
Waiver	X	X	Complete 7 years of full-time substantive law-related experience within the 10 years preceding the application:

[220] Non-ABA approved Juris Doctors will be included in the definition of "Foreign Juris Doctor."

			• 2 years of substantive law-related experience in each area the applicant seeks licensure

CALIFORNIA

Pathways	Foundational Education	Additional/Specialty Education	Practical Training

Pathway 1	Juris Doctor or LLM	If not completed with degree, applicants must complete the following pursuant to the practice area they plan to work in:
		• All practice areas (13 units):
		  ○ 3 units in ethics and professional responsibility
		  ○ 3 units in pretrial discovery and evidence
		  ○ 3 units in court procedure
		  ○ 3 units in court advocacy
		  ○ 1 unit in trauma-informed representation
		• Collateral criminal: 3 units
		• Consumer debt and general civil: 9.5 units
		• Family, children, and custody: 13 units
		• Employment and income maintenance: 3 units
		• Housing: 13 units
			1,000 hours over a minimum of 6 months
			• 500 hours in specific practice area
			• Must include trauma-informed training

Pathway 2	Paralegal program	If not completed with degree, applicants must complete the following pursuant to the practice area they plan to work in:
		• All practice areas (13 units):
		  ○ 3 units in ethics and professional responsibility
		  ○ 3 units in pretrial discovery and evidence
		  ○ 3 units in court procedure
		  ○ 3 units in court advocacy
		  ○ 1 unit in trauma-informed representation
		• Collateral criminal: 3 units
		• Consumer debt and general civil: 9.5 units
		• Family, children, and custody: 13 units
			1,000 hours over a minimum of 6 months
			• 500 hours in specific practice area
			Must include trauma-informed training

		• Employment and income maintenance: 3 units • Housing: 13 units	

Pathway 3	Legal Document Assistant	• All practice areas (13 units):
		  ○ 3 units in ethics and professional responsibility
		  ○ 3 units in pretrial discovery and evidence
		  ○ 3 units in court procedure
		  ○ 3 units in court advocacy
		  ○ 1 unit in trauma-informed representation
		• Collateral criminal: 3 units
		• Consumer debt and general civil: 9.5 units
		• Family, children, and custody: 13 units
		• Employment and income maintenance: 3 units
		• Housing: 13 units
			1,000 hours over a minimum of 6 months
			• 500 hours in specific practice area
			• Must include trauma-informed training

COLORADO

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Juris Doctor	X	1,500 hours of substantive law-related experience within 3 years prior to application • Including 500 hours of substantive law-related experience in Colorado family law
Pathway 2	Associate's degree in paralegal studies	X	1,500 hours of substantive law-related experience within 3 years prior to application • Including 500 hours of substantive law-related experience in Colorado family law
Pathway 3	Bachelor's degree in paralegal studies	X	1,500 hours of substantive law-related experience within 3 years prior to application • Including 500 hours of substantive law-related experience in Colorado family law
Pathway 4	Bachelor's degree in any subject	• Paralegal certificate, or • 15 hours of paralegal studies	1,500 hours of substantive law-related experience within 3 years prior to application • Including 500 hours of substantive law-related experience in Colorado family law
Pathway 5	Master's degree in legal studies	X	1,500 hours of substantive law-related experience within 3 years prior to application

			• Including 500 hours of substantive law-related experience in Colorado family law
Waiver	X	X	3 years of full-time substantive law-related experience within 5 years • Including 500 hours of substantive law-related experience in Colorado family law

FLORIDA

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Florida Registered Paralegal	Be certified as a Certified Legal Assistant or Certified Paralegal	Additional work experience (number of years undetermined)

ILLINOIS

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	• Associate's degree in paralegal education • Bachelor's degree in paralegal education • Bachelor's degree in any discipline plus a post-bachelor's certificate or master's degree in paralegal or legal education/studies program	X	X
Pathway 2	Bachelor's degree in any discipline	5 hours of approved CLEs in legal ethics and professional responsibility	2,000 hours of substantive legal work in any of the permitted case types, or as a general litigation paralegal under the supervision of a licensed attorney
Pathway 3	High school diploma or its equivalent	5 hours of approved CLEs in legal ethics and professional responsibility	4,000 hours of substantive legal work in any of the permitted case types, or as a general litigation paralegal under the supervision of a licensed attorney
Pathway 4	Certification or accreditation by: • Paralegal Association • National Association of Legal Assistants • National Federation of Paralegal Associations • Association for Legal Professionals	X	X

	• American Alliance of Paralegals • Other national or state competency examination		
Pathway 5	Juris Doctor	X	X

MINNESOTA

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Associate's or bachelor's degree in paralegal studies	• Obtain the Minnesota Certified Paralegal credentials from the Minnesota Paralegal Association, or • 10 CLE credits, including 2 credit hours in ethics within 2 years prior to seeking certification	X
Pathway 2	Associate's or bachelor's degree in any field with a paralegal certificate	• Obtain the Minnesota Certified Paralegal credentials from the Minnesota Paralegal Association, or • 10 CLE credits, including 2 credit hours in ethics within 2 years prior to seeking certification	X
Pathway 3	Juris Doctor	• Obtain the Minnesota Certified Paralegal credentials from the Minnesota Paralegal Association, or • 10 CLE credits, including 2 credit hours in ethics within 2 years prior to seeking certification	X
Pathway 4	High school diploma	• Obtain the Minnesota Certified Paralegal credentials from the Minnesota Paralegal Association, or • 10 CLE credits, including 2 credit hours in ethics within 2 years prior to seeking certification	5 years of substantive paralegal experience

NEW HAMPSHIRE

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Bachelor's degree in any field	X	2 years of work experience in a law-related setting with attorney supervision
Pathway 2	Associate's degree in a law-related field	X	2 years of work experience in a law-related setting with attorney supervision

NORTH CAROLINA

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Juris Doctor	X	X
Pathway 2	Associate degree in paralegal or legal studies	X	1,500 hours of substantive law-related experience as a paralegal supervised by a lawyer, acquired no more than 3 years prior to passing the practice area exam
Pathway 3	Bachelor's degree in paralegal or legal studies	X	1,500 hours of substantive law-related experience as a paralegal supervised by a lawyer, acquired no more than 3 years prior to passing the practice area exam
Pathway 4	Associate or bachelor's degree in any subject	• Paralegal certificate; or • 15 credit hours of paralegal studies covering: o Civil procedure o Contracts o Interviewing and investigation techniques o Introduction to law and legal process o Law office procedures and technology o Legal research, writing, and analysis o Professional responsibility	1,500 hours of substantive law-related experience as a paralegal supervised by a lawyer, acquired no more than 3 years prior to passing the practice area exam
Waiver	X	X	10+ years of experience, including at least 9,600 hours of substantive law-related experience

OREGON

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	• Associate's degree or higher in paralegal studies, or • Associate's degree in any subject plus a paralegal certificate, or • Bachelor's degree or higher in any subject	20 hours of designated pre-licensure coursework: • 2 hours on legal ethics for paralegals • 1 hour on IOLTA account administration • 2 hours on Oregon Rules of Civil Procedure • 1 hour on identifying scope-of-license issues and practical identification of mandatory referral scenarios • 1 hour on limited scope law practice management skills for newly licensed paraprofessionals • 1 hour on mental health/substance abuse in the legal profession	1,500 hours of substantive experience in the last 3 years • 500 hours in family law for endorsement • 250 hours in landlord-tenant law for endorsement
Pathway 2	Juris Doctor	20 hours of designated pre-licensure coursework: • 2 hours on legal ethics for paralegals • 1 hour on IOLTA account administration • 2 hours on Oregon Rules of Civil Procedure • 1 hour on identifying scope-of-license issues and practical identification of mandatory referral scenarios • 1 hour on limited scope law practice management skills for newly licensed paraprofessionals • 1 hour on mental health/substance abuse in the legal profession	6 months or 750 hours of substantive experience • 500 hours in family law for endorsement • 250 hours in landlord-tenant law for endorsement
Pathway 3	• Paralegal credentials from a nationally-recognized	20 hours of designated pre-licensure coursework: • 2 hours on legal ethics for paralegals	1,500 hours of substantive experience in the last 3 years

	paralegal association, or • Military paralegal experience, or • Equivalent licensure in another jurisdiction	• 1 hour on IOLTA account administration • 2 hours on Oregon Rules of Civil Procedure • 1 hour on identifying scope-of-license issues and practical identification of mandatory referral scenarios • 1 hour on limited scope law practice management skills for newly licensed paraprofessionals • 1 hour on mental health/substance abuse in the legal profession	• 500 hours in family law for endorsement • 250 hours in landlord-tenant law for endorsement
Waiver	X	20 hours of designated pre-licensure coursework: • 2 hours on legal ethics for paralegals • 1 hour on IOLTA account administration • 2 hours on Oregon Rules of Civil Procedure • 1 hour on identifying scope-of-license issues and practical identification of mandatory referral scenarios • 1 hour on limited scope law practice management skills for newly licensed paraprofessionals • 1 hour on mental health/substance abuse in the legal profession	5 years or 7,500 hours of substantive experience • At least 1,500 hours in the last 3 years • 500 hours in family law for endorsement • 250 hours in landlord-tenant law for endorsement

SOUTH CAROLINA

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Certified Paralegal by: • National Association of Legal Assistants • National Federation of Paralegal Associations	X	While the quantity is not yet determined, ALPs will need additional up-front practical training and CLE credit hours

UTAH

Pathways	Foundational Education	Additional/Specialty Education	Practical Training
Pathway 1	Juris Doctor	Ethics course	X

Pathway 2	Associate's degree in paralegal studies	• Course based on area of specialty:
		  ○ Debt collection
		  ○ Family law
		  ○ Landlord-tenant
		• Ethics course
			1,500 hours of substantive law-related experience within 3 years prior to the application
			• 500 hours in family law for endorsement
			• 100 hours in debt collection or forcible entry for endorsement

Pathway 3	Bachelor's degree in paralegal studies	• Course based on area of specialty:
		  ○ Debt collection
		  ○ Family law
		  ○ Landlord-tenant
		• Ethics course
			1,500 hours of substantive law-related experience within 3 years prior to the application
			• 500 hours in family law for endorsement
			• 100 hours in debt collection or forcible entry for endorsement

Pathway 4	MLS (Master of Legal Studies)	• Course based on area of specialty:
		  ○ Debt collection
		  ○ Family law
		  ○ Landlord-tenant
		• Ethics course
			1,500 hours of substantive law-related experience within 3 years prior to the application
			• 500 hours in family law for endorsement
			• 100 hours in debt collection or forcible entry for endorsement

Pathway 5	Certified Paralegal, Professional Paralegal, or Registered Paralegal credential from authorized agencies	• Course based on area of specialty:
		  ○ Debt collection
		  ○ Family law
		  ○ Landlord-tenant
		• Ethics course
			1,500 hours of substantive law-related experience within 3 years prior to the application
			• 500 hours in family law for endorsement

			• 100 hours in debt collection or forcible entry for endorsement
Waiver	X	X	7 years full-time substantive paralegal experience

WASHINGTON

Pathways	Foundational Education	Additional/Specialty Education	Practical Training

Pathway 1	Associate degree or higher	• 45 hours of core curriculum instruction:
		  ○ 8 credit hours in civil procedure
		  ○ 3 credit hours in contracts
		  ○ 3 credit hours in interviewing and investigating techniques
		  ○ 3 credit hours in the introduction to law and legal process
		  ○ 3 credit hours in law office procedures and technology
		  ○ 8 credit hours in legal research, writing, and analysis
		  ○ 3 credit hours in professional responsibility
		• For Domestic relations:
		  ○ 5 credit hours in basic domestic relations subjects
		  ○ 10 credit hours in advanced and Washington-specific domestic relations subjects.
			1,500 hours of substantive law-related work experience as a paralegal or legal assistant supervised by a lawyer, acquired no more than 3 years prior to passing the LLLT Practice Area exam

Waiver	X	X	10 years of work experience in the past 15 years

Appendix B: Examinations

ARIZONA

Applicants must pass two examinations:

1. Core examination, which includes the topics of legal terminology, substantive law, client communication, data gathering, document preparation, the ethical responsibilities of legal paraprofessionals, and professional and administrative responsibilities pertaining to the provision of legal services
2. Substantive law examination, with one exam for each of the areas of practice in which the applicant seeks to be licensed

CALIFORNIA

Applications must pass two examinations:

1. Subject matter-specific examination, with one exam for each of the areas of practice in which the applicant seeks to be licensed
2. Professional Responsibility Exam, modeled after the attorney exam

COLORADO

Applications must pass two examinations:

1. The Colorado LLP Family Law Examination
2. The Colorado LLP Professional Ethics Examination

ILLINOIS

Applications must pass one examination:

1. Multi-State Professional Ethics Exam

MINNESOTA

No examination is required since Minnesota's program is in a pilot test phase.

NEW HAMPSHIRE

No examination is required.

NORTH CAROLINA

Applications must pass two examinations:

1. Subject matter-specific examination, potentially modeled after the North Carolina State Bar Board Certified Specialist Exams
2. Professional Responsibility examination

OREGON

Oregon is unique compared to other states because it requires applicants to submit a portfolio prior to taking the examination. Once applicants have completed the necessary education, applicants must then submit a portfolio of work product completed exclusively by the applicant for the applicant's education or employment. All portfolio work product must have been completed within three years immediately preceding the date of the application, and it must demonstrate that the applicant has the necessary qualities, skills, learning, and abilities.

In addition to submitting a portfolio, applicants must prove they have the necessary knowledge of the professional responsibilities of a Licensed Paralegal. This can be satisfied by taking a course on the Rules of Professional Conduct, passing a bar-conducted professional responsibility exam, or passing the Multistate Professional Responsibility Examination. Once these requirements have been met, applicants must pass one additional examination:

1. Entry examination, which tests an applicant’s learning and ability to retain and apply the rules and laws related to the scope of practice for, and the referral obligations applicable to, Licensed Paralegals in the State of Oregon

SOUTH CAROLINA

Applicants must pass the examinations required by the National Association of Legal Assistants or the National Federation of Paralegal Associations to become a South Carolina Certified Paralegal prior to becoming an ALP.

UTAH

Applicants must pass two examinations:

1. Licensed Paralegal Practitioner examination for each practice area for which the applicant seeks to practice
2. Professional ethics examination

WASHINGTON

Applicants must pass three examinations:

1. LLLT Board Approved Paralegal Exam, which includes the National Federal of Paralegal Associations Paralegal Core Competency Exam
2. Practice area exam
3. Washington State Bar Association Professional Responsibility exam

Appendix C: Regulatory Requirements

	Trust Account	Liability/ Malpractice Insurance	Pay into state's client security fund	Pro Bono Requirement	CLE
Arizona	✓	✓			15 hours every year
California		✓	✓		36 hours every 3 years: • 28 hours on specific practice areas • 4 hours on legal ethics • 1 hour on competence issues • 1 hour on recognition and elimination of bias in the legal profession and society • 1 hour on trauma-informed practice
Colorado		✓			30 hours every 3 years: • 5 hours of professional responsibility
Illinois			✓		7 hours every 2 years: • 5 hours in practice area • 2 hours of professional ethics
Minnesota	✓	✓	✓		No ongoing requirement due to pilot status
North Carolina	✓	✓		✓	12 credit hours: • Professional responsibility • Trauma-informed legal advocacy • Technology
Oregon	✓	✓	✓		40 hours every 3 years
South Carolina	✓	✓			The number of hours has not yet been discussed
Utah	✓				12 hours every 2 years
Washington	✓	✓	✓		30 hours every year

4

Regulatory Sandboxes for the Legal Industry
2Civility

JAYNE REARDON | LEGAL ETHICS | AUGUST 7, 2019

Regulatory Sandboxes for the Legal Industry

Change doesn't come rapidly in law. That's a good thing. The rule of law is predicated on predictability and consistency with precedent. However, if the rapid pace of change in technology and globalization leaves law behind and out of the equation, that's a problem. Here's where the idea of regulatory sandboxes may help.

What's a regulatory sandbox?

"Regulatory sandbox" refers to a way for companies and regulators to experiment with new types of services and technologies to best determine how to regulate them. According to a paper written by Jorge Gabriel Jiménez, a fellow in Stanford Law School's Legal Design Lab, and Margaret Hagan, director of the Legal Design Lab, a regulatory sandbox is:

> "a safe playground in which to experiment, collect experiences, and play without having to face the strict rules of the real world. The private sector can innovate without worrying about fines or liability, the regulatory agency can test regulations to see what works before going through the long process of creating new rules, and consumers have access to these services in a controlled environment. The goal is to relax or change existing regulation in a controlled and evaluated space to run real-world experiments. These experiences can be collected and inform evidence-based regulatory schemes."

The figure below (from "The Use and Regulation of Technology in the Legal Sector Beyond England and Wales" by Alison Hook, co-founder of the research and consulting house Hook Tangaza) describes how sandboxes work:

Rather than one-size-fits all, regulatory sandboxes operate on a case-by-case basis. Individual firms propose regulations for their innovation proposals and bear the burden of setting a new and improved regulatory environment for their vision. They test this vision while agreeing to abide by the regulator's principles and limitations. This includes regular evaluations, prescribed time period, customer communication and so on.

A timeline approach to sandboxes advanced by Jimenez and Hagan.

Where did regulatory sandboxes come from?

The concept of regulatory sandboxes first appeared in the financial services sector. Since the 2007-08 financial crisis, both regulation of the financial sector and investment in financial technology (fintech) have taken off.

The United Kingdom's Financial Conduct Authority launched the sandbox concept in 2015 in response to the idea that the financial services industry needed to be able to conduct its own equivalent of drug trials.

According to Hook's paper, the sandbox's objectives are to:

- Enable firms to test products and services in a controlled environment
- Reduce the time it takes to develop new services at potentially lower cost
- Ensure that appropriate consumer protection safeguards are built into new products and services
- Provide better access to finance for innovative types of services

Fintech sandboxes have also been sponsored in Singapore, Abu Dhabi, Australia, Mauritius, the Netherlands, Canada, Thailand, Denmark and Switzerland. In 2018, Arizona launched a fintech regulatory sandbox to promote entrepreneurship and investment in blockchain, cryptocurrencies and other emerging technologies.

Levels of investment in fintech have risen from less than $3 billion in 2011 to over $100 billion in 2018, according to Hook Tangaza. Flexibility in regulation is credited as one of the reasons behind increased investment.

Where legal stands

It's no secret that legal tech, or technology at the intersection of law, is growing. Venture capitalists invested over $1 billion in legal tech businesses in 2018. Stanford University compiled an international catalogue of 1,200 legal tech businesses—the largest and best known index in the field.

However, much legal tech activity is aimed at cultivating efficiencies in law firms and corporate legal departments, rather than at improving the delivery of legal services themselves. For example, Evolve the Law's directory of U.S. legal tech businesses includes 58 organizations that target "BigLaw" or corporate legal departments and only five that are consumer facing.

Developments designed to create greater efficiencies within law firms are less likely to raise regulatory red flags compared to those entering the murkier waters of consumer–facing technologies. Unsurprisingly, most firms report regulatory and legislative hurdles as the most important barriers to innovation.

According to some experts, modifying how the legal profession is regulated could improve innovation, spur new businesses and increase access to justice.

As I've written before, William Henderson, professor at Indiana University's Maurer School of Law, says the existing ethical rules should be changed to allow greater collaboration across law and other disciplines. This, in turn, could drive down costs, improve access to justice, aid the growth of new businesses and elevate the reputation of the legal profession.

Similarly, Jimenez and Hagan argue that proper regulation can play a crucial role in overcoming the legal profession's "access to justice crisis and widespread dissatisfaction among legal buyers." In can also "promote competition, encourage innovation, and ensure appropriate safeguards for consumers."

Fintech as a model for legal

Fintech regulation is ahead of legal in many ways. While, such regulation is grappling with transparency and accountability with respect to digital banking, AI and data security, regulators realize they must react to the digital revolution. In fact, the Competitive Enterprise Institute has stated that the Consumer Financial Protection Bureau's "failure to promote innovation and competition as part of a consumer protection framework is an explicit violation of the Bureau's objectives."

The anticipated developments in fintech regulation that Hook's paper outlines could serve as a model for legal tech. These include:

- A growth in sophistication of the use of sandboxes. Technologies with a more mature and better-defined scope will have shorter approval processes and defined criteria for graduation. Less mature technologies with a more uncertain balance of consumer benefits and risks might follow a slower or different path.
- A projected increase in cross–border cooperation with the prospect of multilateral "fintech bridges." Some authorities have signed cooperation agreements that pave the way for regional or multi-lateral experimentation with regulation.
- A push for industry certification both within and across jurisdictions. These will be particularly in demand for areas that require specialized knowledge, such as robo-advice for investment, cryptography in blockchain applications and credit–scoring models in alternative lending.

The legal regulatory sandbox

A regulatory sandbox for the legal industry would allow experimentation with new approaches to business models and legal technology. The sandbox would enable a safe environment for businesses to test services and products without the risk of being sued for the unauthorized practice of law.

In return, regulators could require participants to incorporate appropriate safeguards to protect the public interest, collect and share data, and support competitive innovation in the legal market. Regulators could assess proposed regulatory approaches without adopting them full-scale. It might be a win for all.

5

Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis, 132 YALE L.J.F. 228 (Oct. 19, 2022)

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Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis

Ralph Baxter

ABSTRACT. America has an access-to-justice crisis. At a time when law is more prominent in every facet of American life and commerce than ever before, most of our people and small businesses have no access to legal service. The consequences are dire.

America has ample resources to provide everyone the legal service they need. We have the lawyers, the technology, the know-how, and the capital. Our failure to enable those resources to meet the needs of our people is a disgrace.

This Essay addresses one of most obvious causes of the access-to-justice crisis: rules created and enforced by lawyer-led state bars that arbitrarily restrict who can help Americans with their legal issues and handcuff legal-service firms' ability to draw on modern technology and business techniques to get Americans the service they need.

The Essay details how the rules have caused the crisis and lays out a common-sense approach state bars can pursue to assess and remedy it. State bars made the rules that caused the crisis. It is their duty to fix them. Failure to do so is a dereliction of duty.

INTRODUCTION

State bars have the authority and responsibility to govern their justice systems in a way that makes legal service available to everyone who needs it.[1] Yet no state in America achieves that outcome today. In a country based on the rule of law and blessed with talent and technology able to help everyone, most people and most small businesses cannot access legal service at all.

1. I will use the term "state bar" in this Essay to refer to the entities in each state that have been delegated the authority to regulate legal service, whoever they are and however they are denominated. In most states, that is a "state bar" or "state bar association" supervised by the state supreme court. In many states, it is principally the state supreme court. In operation, it is normally some combination of a lawyer-based entity and the state supreme court. Whatever the model, I am addressing the organizations and people who have been delegated the authority and, I believe, the duty to make legal service work in their states.

The system our state bars created in the nineteenth century does not work in the twenty-first. It unduly restricts the supply of legal-service resources and compels a law-firm business model that impedes the resources that do exist. As stewards of the American legal system, state bars have a duty to fix it.[2] And yet, only a few state bars have taken meaningful action to remedy the crisis.[3] The inaction of others is a dereliction of duty.

In this Essay, I contend that state bars have a duty to reform their rules to alleviate the failure of our justice system. In Part I, I detail the access-to-justice crisis in America. In Part II, I set out the comprehensive authority state bars have over our legal system and their consequent duty to remedy the crisis that has arisen on their watch. In Part III, I suggest a process for states to follow to address the crisis. In Part IV, I offer my view of the changes they should make.[4]

I. AMERICA HAS AN ACCESS-TO-JUSTICE CRISIS

For most Americans, "justice for all" is a slogan, not a reality. At a time when law intersects with their lives more than ever before, most people and small businesses cannot find anyone to help them understand their rights and obligations, make their legal decisions, or represent them in court.

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2. This Essay will address three state-bar rules, the revision of which have the greatest potential for increasing access to justice. Many other regulatory issues warrant examination, including the sufficiency of legal education, the ability of the traditional bar exam to evaluate qualification, and the adequacy of continuing legal education (CLE) requirements to assure that licensed lawyers keep their knowledge and skills where they need to be.

3. Some have begun the process but have been unable to achieve significant change. At least one state has approved a limited liability legal technician role. Others have made minor adjustments to their unauthorized practice of law (UPL) statutes to address specific situations. Only Utah, Arizona, and the District of Columbia have adopted reforms that have a truly significant prospect of materially increasing access to justice.

4. A personal note: I wrote this Essay at the request of the *Yale Law Journal*, and because I believe we can and should enable our legal system to work better for everyone. I know how law works, having been a lawyer nearly half a century—with half of that time spent presiding over a large law firm. I also know something about how state bars and the American Bar Association (ABA) work. I have great respect and affection for American lawyers and believe in the goodwill of our state bars. My objective here is not to criticize. Rather, I write to observe some fundamental realities and encourage those who govern our legal system to revise their rules to enable their most overarching objective: *justice for all*. I am pleased to compare outlooks with Stephen P. Younger and grateful to the *Yale Law Journal* for creating a forum for this exchange. We need more public attention to the issues addressed by our Essays.

More than one hundred million Americans experience civil justice issues every year.[5] The vast majority, however, do not receive legal assistance. For example, a 2014 survey by the American Bar Foundation found that 66% of American adults experienced at least one civil legal issue during an eighteen-month period.[6] While some Americans reported more than one legal issue, the researchers randomly selected one per respondent for further investigation and found that just 16% were addressed with assistance from a lawyer.[7] Similarly, in 76% of all state-court civil cases, at least one party appears in court without a lawyer.[8] In some categories of cases,[9] that number rises to well over 90%.[10] The problem is particularly acute for lower-income Americans and small businesses. In its latest Justice Gap Report, the Legal Services Corporation found that low-income Americans receive little or no civil legal service for 93% of problems that substantially impact them.[11] Moreover, 60% of small business owners with significant legal issues do not have a lawyer to help them deal with them.[12] All in all, the United States ranks 126th out of 139 countries in access to justice and legal-service affordability.[13] As former Colorado Supreme Court Justice Rebecca Love

5. Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 223 (Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., 2012).

6. Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, AM. BAR FOUND. 7 (Aug. 8, 2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf [https://perma.cc/FR3M-DFWD] (surveying Americans' "experience with situations involving money, debt, rented and owned housing, insurance, employment, government benefits, children's education, clinical negligence, personal injury, and relationship breakdown and its aftermath").

7. *Id.* at 5, 14.

8. Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR STATE CTS. at iv (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/93HT-2T2Z].

9. Examples include debt collection, family law, and landlord-tenant cases.

10. *Report to the Chief Judge of the State of New York*, TASK FORCE TO EXPAND ACCESS TO CIV. LEGAL SERVS. IN N.Y. 1 (Nov. 2010), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf [https://perma.cc/L9RW-6H4Q].

11. *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 48 (Apr. 2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgioemp3myz1 [https://perma.cc/M7CU-GDQC].

12. *The Legal Needs of Small Business: A Research Study Conducted by Decision Analyst*, LEGALSHIELD 4 (2013), https://coruralhealth-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/Small-Business-White-Paper.pdf [https://perma.cc/9JY3-DRD3].

13. *WJP Rule of Law Index, Country Insights: United States*, WORLD JUST. PROJECT (2021), https://worldjusticeproject.org/rule-of-law-index/country/2021/United%20States/Civil%20Justice [https://perma.cc/KWG5-Q57S].

Kourlis and U.S. Supreme Court Justice Neil M. Gorsuch observed in a 2020 op-ed: "The rule of law in the United States is the envy of the world. But our system of justice is too often inaccessible for the ordinary American."[14]

Many facets of our legal system work well, of course. We have more than 1.3 million well-educated, dedicated, and ethical lawyers.[15] We have a well-developed system of laws and courts to administer them. Legal service is readily available for large corporations and wealthy individuals. Large law firms and corporate legal departments offer financially rewarding careers to the graduates of America's law schools.

Articulating the elements that do work creates a revealing context for the elements that do not. Our system has become one that works well for the minority—those with the most money and the best education. For everyone else, access to justice is largely an illusion.

This crisis imposes great harm on our people and our society. Assessing that harm begins with this reality: moderate-to-low-income individuals and small-business proprietors are far more vulnerable to legal risk than high-income individuals and large businesses. They have less experience with the law, less understanding of their rights and obligations, and less preparation to navigate the legal system. While leading their lives or trying to make a go of their businesses, they inevitably encounter legal issues. They may not even realize when a problem is legal in nature and are highly unlikely to know what to do about it. Without help, their chances of a negative outcome are high.[16]

The direct harm to the unrepresented is real and commonly severe. Start with individuals. Without representation, people lose custody of their children. They are evicted from their homes. Their assets or wages are seized. They are deported. Their lives are disrupted with significant financial and emotional impact. "The human costs are often staggering, with domestic violence, illness and serious economic hardships among them."[17]

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14. Rebecca Love Kourlis & Neil M. Gorsuch, Opinion, *Legal Advice Is Often Unaffordable. Here's How More People Can Get Help: Kourlis and Gorsuch*, USA TODAY (Sept. 17, 2020, 3:15 AM ET), https://www.usatoday.com/story/opinion/2020/09/17/lawyers-expensive-competition-innovation-increase-access-gorsuch-column/5817467002 [https://perma.cc/52L6-EKZM].

15. *New ABA Data Reveals Rise in Number of US Lawyers, 15 Percent Increase Since 2008*, AM. BAR ASS'N (May 11, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals [https://perma.cc/4PNM-SV42].

16. *See* LEGAL SERVS. CORP., *supra* note 11, at 48.

17. Jason Solomon, Deborah Rhode & Annie Wanless, *How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice*, STAN. CTR. ON THE LEGAL PRO. 1 (Apr. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf [https://perma.cc/E2PJ-GG3B].

For small businesses, the absence of legal service makes an already challenging situation harder, if not impossible. With the enormous increase in regulation, mushrooming amount of data,[18] and complexity of engaging our courts and bureaucracies, businesses without representation are at a great disadvantage. They lose necessary licenses. They cannot get necessary approvals. They cannot enforce their contracts. They are fined. They cannot defend themselves against claims, even baseless ones. They are outmaneuvered by larger businesses that know how to work the system. All of these obstacles significantly decrease their ability to succeed.

The access-to-justice crisis compounds itself by producing the flood of unrepresented litigants noted above. Pro se litigants cause substantial delays and otherwise undermine the effectiveness of our already overburdened and underresourced judicial system.[19]

More broadly, the crisis undermines society's trust and confidence in our justice system.[20] With confidence in our government at historic lows,[21] the day-to-day perception among people and small businesses that the judicial system only works for banks, insurance companies, and landlords reduces even further their belief that "justice for all" is a reality in America.[22]

II. IT IS UP TO STATE BARS TO REMEDY THIS CRISIS

Great authority comes with great responsibility.[23]

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18. In the information age, disputes that once would have been relatively simple no longer are because of the massive data sets that now are implicated in asserting or defending claims. Inexperienced litigants will find this burden much more challenging.

19. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009).

20. For example, only 28% of low-income Americans believe they are treated fairly by the legal system. LEGAL SERVS. CORP., *supra* note 11, at 51.

21. *See Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022 [https://perma.cc/ZV26-KPPY]; Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx [https://perma.cc/GQQ5-6YMQ].

22. Jim Harbaugh & Ken Frazier, Opinion, *Intimidating, Unfair Legal System Makes It Hard for People to Get the Help They Need*, PHILA. INQUIRER (May 23, 2022), https://www.inquirer.com/opinion/commentary/community-legal-services-funding-20220523.html [https://perma.cc/3GFT-TR6P].

23. "[P]ower must be linked with responsibility, and obliged to defend and justify itself within the framework of the general good." Franklin D. Roosevelt, President of the United States, State of the Union Address (Jan. 6, 1945), https://www.presidency.ucsb.edu/documents/state-the-union-address [https://perma.cc/KN7R-2K2A].

A. State Bars Determine How Much and What Kind of Legal Service Is Available in America

No organization is more responsible for how our justice system works than our state bars.[24] Beginning in the late nineteenth century,[25] America adopted a system in which each state bar was delegated virtually total authority to govern the way legal service is delivered.

Each state operates independently, making and administering its own rules, guided by a framework of "model rules" established by the American Bar Association (ABA).[26] The law is perhaps the pinnacle of self-regulated professions. The state bars are governed by lawyers elected from within their ranks. They are overseen by state supreme courts, which are also governed by lawyers.

The regulatory model that has emerged also does more than regulate lawyers. It determines how much and what kind of legal service is available to those who need it. The regulatory model begins with the broadest possible prohibition on anyone other than licensed lawyers engaging in the expansively construed "practice of law."[27] Anyone who violates the prohibition commits a crime.[28] This prohibition severely limits the number of people available to deliver legal service.

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24. As noted, *see supra* note 1, I use the term "state bar" to refer to the entities of each state, however configured, that have the authority I discuss in this Essay. The models vary, but each state has delegated this authority to some combination of an association of lawyers and its state supreme court. For reasons not known to me, Younger takes issue with my use of this shorthand. *See* Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J.F. 259, 260 n.6 (2022). Whatever the arrangement, in each state a combination of self-regulated, lawyer-led entities has virtually total control over the rules governing legal service.

25. Our current regulatory model began with the formation of the ABA in 1878. *ABA Timeline*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/timeline [https://perma.cc/E55M-DNAR].

26. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR. ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [https://perma.cc/HGY7-UXYJ] (listing states that have adopted the ABA's Model Rules).

27. Every state prohibits the "unauthorized practice of law" by statute, bar rule, or both. The scope of the ban is expressed in broad and general terms, which are commonly circular in nature. *See, e.g.*, Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 431-32 (2016); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45 (1981) [hereinafter Rhode, *Policing the Professional Monopoly*].

28. *See, e.g.*, CAL. BUS. & PROF. CODE § 6125 (West 2019) (punishable by fine and imprisonment for up to one year).

The model then prescribes how lawyers may deliver legal service. Much of the model's prescription is familiar, such as the lawyer's duty not to disclose confidential client information.[29] But some of it is counterintuitive, such as prescribing that only lawyers can share in the financial success of law firms.[30]

Together, these prohibitions and prescriptions limit the number of people *who* can deliver legal service and *how* they can deliver it. More than a century under these rules has led to the crisis of justice we face today.

B. State Bars' Broad Authority Implies a Duty to Ensure that Legal Service Is Available to All

All state bars recognize that protecting the public is their fundamental mission. This is axiomatic for state supreme courts, and it is explicit in the mission statement of every state bar association. For example, the California bar, of which I have been a member since 1974, begins its mission statement: "The State Bar of California's mission is to protect the public . . . ."[31] The mission statement of West Virginia, my home state, begins: "The objects of the West Virginia State Bar shall be to protect the interests of the public . . . ."[32]

Protecting the public is more than a good idea. It is a solemn duty that includes ensuring access to needed legal service for every person and organization. When an American child begins her day pledging allegiance to our flag, she concludes with the phrase: "justice for all." Those in charge of our legal system have a duty to keep faith with the pledge we teach our children to recite.

This duty requires state bars to reexamine their rules. The rules have created and perpetuated systems that fail to serve most of their people and small businesses. Three central elements of the rules stand out as contributing significantly to the shortfall of legal service in America: restricting who can deliver legal service, prohibiting employee sharing in profits and equity appreciation, and limiting access to capital.

First, the cornerstone of state-bar rules is a blanket prohibition against anyone delivering legal service unless they have gone to law school and been licensed as a lawyer, commonly called the "UPL" ban.[33] It would be hard to imagine a greater barrier to entry or a more effective constriction of resources available to

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29. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020).

30. *Id.* r. 5.4.

31. *Our Mission: What We Do*, STATE BAR CAL., https://calbar.ca.gov/About-Us/Our-Mission [https://perma.cc/PM7T-R6G5].

32. *About Us*, W. VA. STATE BAR, https://wvbar.org/about-us [https://perma.cc/C355-EBDT].

33. These prohibitions are most commonly expressed as a ban on "the unauthorized practice of law." UPL has become the shorthand.

deliver legal service. Second, every state has adopted a form of ABA Model Rule of Professional Conduct 5.4, which prohibits lawyers or their firms from sharing the fees they earn or a stake in their ownership equity with "non-lawyers."[34] This restriction prevents firms from attracting and incentivizing people with diverse skills to help them create service models that can reach and serve individuals and small businesses. Third, Model Rule 5.4 also prohibits firms from raising equity capital from anyone who is not a lawyer.[35] This prohibition hinders firms' ability to innovate and grow, especially those that are trying to develop service and financial models that enable them to serve individuals and small businesses.

State bars exercised their power to set the rules. The rules have resulted in an access-to-justice crisis. It is their duty to fix them.

III. WHAT STATE BARS SHOULD DO

State bars should reexamine the impact of their rules on access to justice *sincerely*, *thoroughly*, *courageously*, and *effectively*.[36] It is not enough to be *open* to rule change or to create a commission that writes a report only to conclude with inaction.[37] State bars need to get something done. I propose that each state bar

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34. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2020); *see, e.g.*, ILL. S. CT. RULES, r. 5.4 (2022); N.Y. RULES OF PRO. CONDUCT, r. 5.4 (2022).

35. *See supra* note 30 and accompanying text.

36. Achieving consensus-based reform has proven to be very difficult. To succeed, states must *sincerely* and *thoroughly* examine how and why so many do not have access to justice. A passing nod to an ill-defined policy issue will not do. The facts need to be determined and the impact of the rules identified. It will take *courage*: it likely will require facing up to inconvenient truths and questioning longstanding assumptions and norms; it will cause intense and organized opposition from within the state-bar membership. And the states must pursue this work *effectively*: gathering the data, doing the analysis, assembling the committees, and building consensus all must be done with great skill and care. The sequence I propose will help with all of this. If the process begins with a separate examination of the problem, it will create a natural, principled foundation for the succeeding steps. If it then proceeds with a separate refresh of the bar's regulatory objectives, it will create a second sound pillar for the final step. It appears to me that states often start the process with a proposed rule change, leading to outcome-oriented advocacy and obscuring the vital details of the access-to-justice crisis and the vital consideration of the objectives of the rules.

37. Younger provides a vivid portrayal of how state efforts such as those in Florida and California have fared. If state bars sincerely want to reform their rules to enable greater access to justice, they must get something done. Among other challenges, as Younger warns, that means they must "overcome strong lawyer opposition," which his essay forecasts is unlikely "to subside." *See* Younger, *supra* note 24, at 265-67, 273-74. On August 9, 2022, Younger praised the most recent example of lawyers resisting efforts to reform Model Rule 5.4 to enable greater access to justice. Sam Skolnik, *ABA Sides Against Opening Law Firms up to New Competition*, BLOOMBERG L. (Aug. 9, 2022, 5:36 PM), https://news.bloomberglaw.com/business-and-

pursue a three-step process: (1) assess the problem; (2) articulate the overarching mission of the rules; and (3) examine possible rule revisions.

As I will discuss, the process of deciding on specific rule changes is certain to be contentious.[38] The first two steps are essential preparation to oversee the battle.

A. Assess the Problem

State bars should start by taking a hard look at how well their state's legal system is working. In particular, state bars must ask: How well does our system meet the needs of all people and businesses? Who is not being served? In what circumstances? What kinds of life and business issues are going unmet? What kinds of legal issues? How well does the system enable people to achieve the objectives that cause them to need legal service? What are the practical reasons for access challenges? How well does the system enable the infrastructure necessary to deliver legal service to everyone?

The answers to these questions must be based on hard evidence. State bars should take the time and devote the resources to look closely at their systems' actual performance. The specifics will inform the nature of the services that need to be delivered, the qualifications required to deliver them, and what rule changes or other actions are necessary to enable them.

B. Articulate the Overarching Mission of the Rules

In the second step, state bars should refresh and renew their understanding of the fundamental objectives of their regulatory models. States bars should ask themselves: Why do we have these rules? What are we solving for? What does success look like?[39] Beyond the platitude of serving the "public interest," states should dig deeper and be more specific about what they want their rules to accomplish. The assessment should start with the overarching mission of the rules as a whole, followed by consideration of the objectives of individual rules that appear to be contributing to the access-to-justice crisis. At both levels, nearly all

practice/aba-sides-against-opening-law-firms-up-to-new-competition [https://perma.cc/JUV2-46MZ].

38. Skolnik, *supra* note 37.

39. Many scholars have examined these questions over the years. State bars would benefit from consulting their work. *See, e.g.*, Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1192-1203 (2016); Rhode, *Policing the Professional Monopoly*, *supra* note 27, at 3-11; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 801-18, 873-87 (1992).

states would benefit from a fresh look in light of how much the world has changed since they adopted their systems and their rules.[40]

As a framework for this exercise, it will be helpful to consider three possible objectives articulated in discussions of potential regulatory reform: protecting consumers, protecting the lawyer monopoly, and enabling legal service for all.

Protecting consumers is the most commonly suggested rationale for the rules—particularly by those resisting change. It posits that the rules are designed to assure that the legal service clients receive is ethical, competent, and otherwise in their best interest. This objective is certainly laudable. Unfortunately, however, most people and small businesses across the country have no legal service at all. The system quite clearly does not protect consumers.[41]

Another, more controversial rationale suggested for the rules is *protecting lawyers' monopoly over legal service*. This rationale is more commonly identified and criticized by those who advocate change. As Gillian K. Hadfield documented in an illuminating article in 2006,[42] the justification for state bars' exclusive control of legal service has drawn "withering critiques" for decades.[43] While the criticism targets an array of issues, a central concern throughout is the orientation of the self-regulated bar to create rules for their own benefit without adequate concern for the impact on the public.[44] Critics assert that the breadth of the ban on others participating in legal service, the arduous and expensive prerequisites to acquire a license, and the prescriptive business models that create unnecessary complexity and excessive lawyer fees all stem from bars "us[ing] the rubric of consumer protection . . . to justify rigorous protection of the legal services monopoly enjoyed by lawyers."[45]

The approach Younger takes in his essay is subject to this criticism. He justifies Rule 5.4 in the very first paragraph of his essay by disapproving the

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40. The rules have their origins in the late nineteenth and early twentieth centuries. In the ensuing century, law has become a much more common part of life and business, and new service models, business models, and technologies have developed. The need for legal service has increased dramatically, along with the tools available to deliver it. Our rules should permit contemporary tools to help meet the contemporary need for legal service.

41. As discussed previously, under the current rules, most consumers and small businesses end up with no legal service at all. *See supra* Part I.

42. *See* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV 1689 (2008) (providing an informative summary of research and analysis of the operation of bar rules, their expressed justifications, and their actual impact).

43. *Id.* at 1690.

44. *See id.* at 1690-95.

45. *Id.* at 1694.

participation of "nonlawyers" in legal service.[46] As though any reader would readily see the logic, Younger states that the purpose of Rule 5.4 is "to prevent nonlawyers from interfering with the lawyer's independent judgment." Why would one suspect that everyone who is not a lawyer would seek to interfere with lawyers' judgment? I will talk about this more below,[47] but it sounds like a very broad and unwarranted indictment of 99.6% of the population[48] that conveniently reserves the market exclusively to the lawyers. More significantly, Younger chronicles in detail lawyers' record of fending off reforms that would open the legal system to competition.[49] He describes case after case in which the ABA, or a state bar association, or a state supreme court launched an effort to improve

46. Younger, *supra* note 24, at 259-60. I find the term "nonlawyer," itself, demeaning to other professionals who work in legal service. I believe it reflects an unwarranted sense of superiority of lawyers compared to others. No one in a medical office is called a "nondoctor." I will only use the term in this Essay where I am referring to what others have said and adopting their terminology.

47. *See infra* Section IV.B.2.

48. Jay Reeves, *There's One Lawyer for Every 240 US Residents*, LAWS. MUT. LIAB. INS. CO. OF N.C. (Sept. 16, 2020) https://www.lawyersmutualnc.com/blog/theres-one-lawyer-for-every-240-us-residents [https://perma.cc/KF3D-KFQT]. The current rules exclude 99.6% of the U.S. population from sharing in the profits or ownership of law firms on the sole ground (according to Younger) that they might adversely influence lawyers' judgments. Confronted with this objective reality in my Essay, Younger says it is "nonsense" to characterize it as an "indictment" of people he calls "nonlawyers." Younger, *supra* note 24, at 287 n.154. Instead, he says it is merely a recognition that "nonlawyers" might "prioritize profits over client interests" and, as a result, cause the lawyers to violate their ethical obligations. *Id.* We can trust the lawyers, he contends, because they have spent hours learning the ethical rules, promised not to violate them, and face consequences if they do. *See id.* at 268. If the rule did not reflect a negative view of nonlawyers, it could require a similar set of training, promises, and sanctions of those who share in the success of the firm. But to take the extreme step of excluding all "nonlawyers," no matter what, reflects an unmistakable assumption that they cannot be trusted. That is an indictment.

49. *See* Younger, *supra* note 24, at 269-74. Younger incorrectly says that most lawyers oppose changes to Rule 5.4. *See, e.g.*, *id.* at 273-74. In my experience, most lawyers do not have a strong view one way or the other. Very few people participate in public-comment opportunities when state bars consider regulatory reform. Jim Sandman, longtime President of the Legal Services Corporation, now on the faculty at the University of Pennsylvania Carey Law School, has assembled data from public comment on proposed reforms in California, Utah, and Arizona. While the data are unpublished, I have been authorized to discuss them in this Essay, and they are on file with Sandman. The data show overall low participation, with comments from state-bar members ranging from 0.24% to 1.2% of the membership. The data do show that the majority of lawyers who elected to participate opposed reforms; it also shows that the majority of the public that chose to participate *supported* reform. With such a small number of participants, all of whom are self-selected, we cannot draw meaningful conclusions, and we certainly cannot conclude what the view of the majority of all lawyers is. I do not think anyone speaks for the majority of lawyers, nor for the public on these issues. This debate needs to be expanded to a larger audience.

our justice system by opening things up. In most cases, a task force of trusted experts was empaneled, and a report recommending reform was prepared. And each time, lawyers rose up and vanquished the efforts at the final stage. As Younger observes, these experiences reflect that the bar has, "for the last two decades, *successfully* opposed most attempts to revise Rule 5.4."[50] Put another way, in decades that saw the need for legal service rise and access to legal service plummet, the bar has "successfully" excluded anyone who was not a lawyer from participating.

Younger recently put an exclamation point on this issue by publicly celebrating the ABA House of Delegates action to discourage states from regulatory reform designed to address the access-to-justice crisis. He called the action "a huge victory for all lawyers."[51] Not a victory for consumers, not a victory for access to justice. A victory for the lawyers.

I suggest state bars do some institutional soul-searching on this very important issue. To what extent is the bar permitting its members to ward off much-needed new entrants to the marketplace because it threatens their success? Self-serving decision-making often happens in member-governed organizations. It is not hard to wonder whether this is occurring in state-bar rulemaking. Indeed, it is hard to imagine it is not.

Finally, consider the objective of *enabling legal service for all*. This rationale is not commonly suggested—but it should be. In the context of twenty-first-century realities, our regulatory models should seek to enable every person and organization to have access to the legal service they need. Such an affirmative[52] mission comports with our national vision of the rule of law.[53] In contemporary America, law is in every person's life and every business's business. Accordingly,

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50. Younger, *supra* note 24, at 274 (emphasis added).

51. Skolnik, *supra* note 37. Younger now contends that he was actually complimenting action by the ABA that would "preserve the independence of the legal profession, which in turn helps to protect consumers." Younger, *supra* note 24, at 272 n.74. If Younger intended to laud the ABA, he would have said so. If he thought this was about "independence" or "consumers," he would have ascribed the victory to one or both of those. Instead, Younger said, in public, who he thought was the "victor" in the ABA action: the lawyers. He may not have intended to be so revealing, but he was.

52. The first two objectives are negative: (1) protecting against mistreatment of the consumer and (2) protecting against erosion of the lawyer monopoly over the provision of legal service.

53. "Justice for all" is an idea at the very heart of the American ethos. One of the first objectives named in the preamble to the U.S. Constitution is to "establish justice." U.S. CONST. pmbl. The final words of the Pledge of Allegiance are "justice for all." 4 U.S.C. § 4 (2018). We cannot have justice for all, especially in the complex reality of the twenty-first century, unless all of our people and businesses have access to the legal service they need to understand and interact with the law. Without such legal service, everyone is *subject to the law*, but they do not have the ability to acquire justice *under the law*.

state bars should enact rules with a goal of enabling legal service, not restricting it.

Whatever state bars decide, this second step identifies the tenets of public policy to which they commit to remain faithful as they examine possible rule changes. It is, essentially, confirming the ground rules before playing the game. If done sincerely, the policy-review process will be therapeutic, leading to a heightened consciousness of why the state bar has rules to begin with.

Before discussing the third and final step, I want to reinforce the importance of sequence. Once state bars begin the process of reexamining the rules, they will be met with stiff and often vitriolic opposition.[54] Those who benefit from the status quo will come out of the woodwork and vigorously resist change.[55]

Younger confirms that this will be so. His essay describes the record of lawyers rising up to resist reform in Florida, California, and nationwide through the ABA.[56] Younger reports how lawyers dashed the recommendation of the ABA Commission on Multidisciplinary Practice in 2000, the suggestion by the State Bar of California's Board of Trustees for innovations in legal services in 2019, and the recommendations of a special committee of the Florida Supreme Court to adopt a regulatory sandbox in 2021.[57] Indeed, Younger says states will only be able to achieve reforms like those adopted in Utah and Arizona "if they can overcome strong lawyer opposition."[58]

For state bars to evaluate this resistance in the way duty requires, they need to have a solid foundation on the crisis they seek to address and the policy objectives they seek to serve. If they are not on firm footing before the battle begins, it will be nearly impossible to get there through the din of advocacy.[59]

Moreover, even if they are fully prepared, doing their duty will require leadership in the face of fierce resistance. This is where the courage I mentioned earlier comes in.[60] Some excellent role models of courage in this setting are former ABA presidents William Hubbard and Judy Perry Martinez, who led the ABA

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54. It will often involve scapegoating or fear mongering. Younger, for example, cites the recent opposition to reform in California which expressed "concerns" about "unscrupulous actors" who seek to "do business in the legal field." Younger, *supra* note 24, at 265. These "concerns" are almost always evidence-free. Tort and criminal law protect the public from "unscrupulous actors," as do the ethical duties of lawyers with whom they associate.

55. *See* Reeves, *supra* note 48.

56. *See* Younger, *supra* note 24, at 269-74.

57. *See id.*

58. *Id.* at 265.

59. *See supra* note 36.

60. *See supra* note 36 and accompanying text.

Commission on the Future of Legal Services in 2016;[61] former Utah Supreme Court Justice Deno Himonas and former Utah State Bar President John Lund, who led Utah's reexamination of their rules in 2020;[62] Arizona Supreme Court Vice Chief Justice Ann Timmer, who led Arizona's reexamination in 2020;[63] and Michigan Supreme Court Chief Justice Bridget Mary McCormack, who has led all of us, including judges, in facing up to the flaws in our legal system and helping fix them.[64]

C. Examine Possible Rule Revisions

With a firm grip on the problem to be solved and the public policy to be addressed, state bars should proceed to the third step: examining possible rule changes. Which state rules appear to be contributing to the problems the state has identified? How might they be modified to avoid unintended consequences while remaining faithful to regulatory objectives? If we open the system to new participants, what new requirements and oversight should we establish?

There will be no silver bullets, no surefire solutions, no risk-free ideas. Anyone who suggests otherwise underestimates the complexity of the challenge. What state bars must look for are changes that reasonably give their systems a *better chance* to achieve their goals, with potential for benefit that outweighs potential costs. Which rules to change, and in what way, will be up to each state given its particular circumstances and norms. But it is each state's *duty* to consider what changes need to be made and to *make them*.

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61. *See* Comm'n on the Future of Legal Services, *Report on the Future of Legal Services in the United States*, AM. BAR ASS'N 1 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [https://perma.cc/3S82-4RPY].

62. *See What We Do*, OFF. LEGAL SERVS. INNOVATION, https://www.utahinnovationoffice.org/about/what-we-do [https://perma.cc/XH7D-E6JX].

63. *See* Maddie Hosack, *Arizona Carries Regulatory Reform Momentum Forward with Historic Vote*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Sept. 22, 2020), https://iaals.du.edu/blog/arizona-carries-regulatory-reform-momentum-forward-historic-vote [https://perma.cc/9SGC-YQ72].

64. Commenting on the ethical duty of judges to contribute to making the legal system work better, Chief Justice McCormack wrote in this publication's pages last October:

> Our justice system bestows upon us the awesome responsibility of sitting in judgment over matters that affect every dimension of people's lives. Our capacity to do justice in that role is determined by the quality of the system in which we operate. We do not have the luxury of sitting back, passively observing, recognizing problems, and doing nothing. That approach does not make us impartial; it makes us complicit.

Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J.F. 175, 188 (2021).

IV. MY RECOMMENDATIONS

Having said it is up to the state bars, I do have opinions. This Part outlines my recommendations.

At the very minimum, state bars should tailor their overbroad UPL bans, modify Rule 5.4 to permit sharing in financial success and access to equity capital, and adopt a "regulatory sandbox" like the one Utah approved in 2020. I discuss each recommendation below.

A. Replace the UPL Ban with a Tailored Statement of the Legal-Service Roles Requiring a Law License

At a time when we desperately need more people to deliver legal service to individuals and small businesses, the foundational rule of our legal system tells anyone who is not a lawyer: "Don't you dare lend a hand." By its vague terms,[65] its criminal penalty, and enforcement actions by state bars and lawyers resisting competition,[66] the UPL ban strikes fear in the hearts of all who consider doing work that might be considered the "practice of law." It is hard to tell what service is prohibited, you might go to jail if you get it wrong, and the state bar and competing lawyers will come after you if you try.

1. The UPL Ban's Overbreadth

The breadth of this prohibition is the clearest test of the mission of the rules that govern our legal system. If it is to protect the lawyer monopoly, it works like a charm. If it is to ensure justice for all, it is a disaster.[67]

In America's first century, law practice was not reserved for lawyers.[68] In the latter part of the nineteenth century, states began to restrict who could appear in

65. *See supra* note 27.

66. Almost all UPL claims are filed by state bars or competing lawyers; they are rarely filed by consumers. *See* BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 134 (2017); Rhode, *Policing the Professional Monopoly*, *supra* note 27, at 18-20.

67. At best, this cornerstone of legal regulation is based on two policy assumptions, neither of which is sound: that the system will (1) assure that all lawyers are well qualified to serve all clients on matters of all kinds and (2) generate enough lawyers to serve all clients on all matters. I do not believe that our current legal-education and bar-exam system do the first and the data conclusively establish that the system does not do the second.

68. *See generally* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors – Or Even Good Sense?*, 1980 AM. BAR FOUND. RSCH. J. 159 (chronicling the historical development of laws restricting the practice of law by nonlawyers); Matthew

court.[69] By the end of the nineteenth century, as professional bar associations gained popularity and prominence, states began to adopt broader restrictions.[70] Over time, state by state, the restriction evolved to its current expansive form and gained criminal penalties for transgressors.

Whatever may have justified this restriction in the nineteenth century, as it has expanded and as it is applied in the twenty-first, UPL rules across the country are unacceptably broad as a matter of common sense, public policy, and law.

i. Common Sense

The UPL statutes effectively treat all elements of service that implicate the law as the "*practice of law*,"[71] as though every single task associated with delivering legal service requires a law degree. Every lawyer knows that is not true (as does, for that matter, anyone who ever watched an episode of *Perry Mason*). Many a first-year associate has had the experience of being assigned to a task they could have done in high school and feeling surprised that a client was willing to pay their high hourly rate to do it.[72] In truth, legal service requires a set of tasks ranging from the most basic to the most challenging. Some require significant legal training and significant experience. But many, if not most, do not. Even the most complex legal matters involve tasks that do not require a law degree. And the simplest legal matters may not require a law degree at all.

Common sense tells us that in some cases, hands-on experience is more important than law-school education. As Judge Crotty observed in finding the New

Longobardi, *Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043 (2014) (same).

69. Longobardi, *supra* note 68, at 2047.

70. Christensen, *supra* note 68, at 176.

71. The UPL statutes and rules, *see supra* note 27, are vague and circular. Many of them define the practice of law by reference to "what lawyers do." Since no lines are drawn between those functions that are, standing alone, the "practice of law" and those that are not, it is all treated the same. In the context of a large corporate law firm, this has no meaningful significance because no one is inspecting closely who does what. The issue becomes important for new entrants into legal service seeking to provide some of the services people need. In that context, it is easy for lawyers resisting competition to establish the new service provider to be engaged in "the practice of law." After all, they are providing a service lawyers also provide.

72. I had that experience as a first-year associate forty-eight years ago. In connection with a municipal-bond financing, documents needed to be filed with a county clerk's office. Doing so entailed driving from San Francisco to Contra Costa County, finding the clerk's office, presenting the document and a copy, waiting for the copy to be stamped as received, and driving back to the office in San Francisco. All in my capacity as a lawyer. I could have done that when I was a junior in high school—my three years of law school did nothing to prepare me for the assignment.

York UPL ban unenforceable, "[T]here is some common-sense truth to the notion that a non-lawyer 'who has handled 50 debt collection matters, for example, would likely provide better representation than a patent lawyer who has never set foot in small claims court . . . .'"[73] In "common-sense truth," there are countless meaningful ways people who do not have law degrees can help people with legal issues. It makes no sense to erect a barrier in our legal system that bans them from doing so — particularly when most of our people and small businesses cannot get legal service at all.

ii. Public Policy

As a matter of public policy, we should welcome all the help we can get to participate, in appropriate ways, in getting legal service to those who need it. While we should establish standards for roles that actually require a law degree, there is no reason to require such expertise for every role across the entire spectrum of tasks associated with the law. No sensible theory or empirical proof of potential harm to consumers could warrant such a broad prohibition. In fact, there are no empirical data on harm to consumers by virtue of UPL in the United States.[74]

There are data from more open jurisdictions which do not show harm to consumers from legal service by others.[75] Indeed, they show that consumers often fare better. A study in the United Kingdom, for example, found that lawyers were outperformed by others measured by concrete results and client satisfaction in a variety of matters.[76] There are similar findings from other jurisdictions.[77] Commonly, experience with the matter at hand is more important than formal

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73. Upsolve, Inc. v. James, No. 22-cv-627, 2022 WL 1639554, at *15 n.13 (S.D.N.Y. May 24, 2022) (quoting *Amicus* Brief of Professor Rebecca L. Sandefur in Support of Plaintiffs' Motion for a Preliminary Injunction at 16, *Upsolve*, 2022 WL 1639554 (No. 22-cv-627)); *see also* Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT'L & COMP. L. REV. 111, 115 (2016) ("Extensive formal training is less critical than daily experience for effective advocacy."); Richard Moorhead, Alan Paterson & Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 795 (2003) ("[I]t is specialization, not professional status, which appears to be the best predictor of quality.").

74. *See* BARTON & BIBAS, *supra* note 66, at 104-07; Susan D. Hoppock, Note, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 725-26 (2007) (noting that "critics argue there is little proof that UPL harms the public to justify its prohibition").

75. Moorhead et al., *supra* note 73, at 785-87.

76. *Id.*

77. *See, e.g.*, Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629, 1634-36 (2011).

training.[78] It thus makes little sense as a public-policy matter to issue a blanket criminal prohibition on anyone other than a licensed lawyer participating in any kind of legal service.

iii. Questionable Legality

There are also meaningful and increasing questions about the legality of the overbroad UPL rules under the Sherman Act and the First Amendment.

State UPL statutes arguably violate the Sherman Act as a restraint of trade. In *Goldfarb v. Virginia State Bar*, the Supreme Court established that the Sherman Act applies to lawyers and state bars.[79] Their actions are only immune if the state has clearly approved the anticompetitive conduct and actively supervises it.[80] The Court found that the Virginia State Bar did not meet that standard in a case involving the prescription of mandatory minimum fees.[81] In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the Supreme Court held that a dental association did not qualify for immunity for its ban on the "unauthorized practice of dentistry" when it prohibited others from engaging in teeth whitening.[82] In the wake of that decision, the North Carolina State Bar settled its litigation with LegalZoom and revised its UPL ban to permit certain online and automated document services.[83]

Both the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have also long contended that state UPL statutes are overbroad and advised states to narrow them.[84] With the evident and serious harm experienced by American consumers and businesses from the anticompetitive effect of overbroad UPL statutes, it is increasingly hard to justify them under the Sherman Act.

UPL bans are also vulnerable to challenges based on the First Amendment. In *Upsolve, Inc. v. James*, the U.S. District Court for the Southern District of New

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78. *See* sources cited *supra* note 73.

79. 421 U.S. 773, 793 (1975) (holding that "certain anticompetitive conduct by lawyers is within the reach of the Sherman Act").

80. *Id.* at 790-91.

81. *Id.* at 791-92.

82. 574 U.S. 494, 504 (2015).

83. LegalZoom.com, Inc. v. N.C. State Bar, No. 111 CVS 15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. Oct. 22, 2015) (consent judgment).

84. *See, e.g.*, Letter from U.S. Dep't of Just. and Fed. Trade Comm'n to Task Force on the Model Definition of the Practice of Law, Am. Bar Ass'n (Dec. 20, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf [https://perma.cc/2BBB-KATF].

York held the New York UPL statute unenforceable due to its breadth.[85] The case involved an organization that trained and deployed "non-lawyers" to advise low-income New Yorkers facing debt-collection actions.[86] The court found their legal advice was "speech" and, under the First Amendment, the UPL statute could not withstand strict scrutiny having neither a compelling interest nor being narrowly tailored.[87] As the court observed, "[T]he UPL rules could hardly be broader."[88]

I believe there will be more cases like *Upsolve, Inc.* and that many will prevail.

2. *Substitute a Sensibly Tailored Statement of Roles that Require a Law License for the Overbroad UPL Ban*

For all these reasons, I believe it is time to reform overbroad UPL bans that unjustifiably limit the supply of legal service.

State bars should replace UPL bans with tailored statements of the roles in which only licensed lawyers may engage. They should draw on their collective experience with the law and identify the roles that *actually* require a law-school education and limit who can do those.[89] Beyond those roles, state bars should welcome assistance. State bars cannot protect the public if they foreclose the help they need. Their rules should encourage participation, not discourage it.

In my view, it would be sufficient to articulate two roles that require a law degree: (1) advocating on behalf of another in state- or in federal-court proceedings and (2) advising another regarding rights and obligations conferred by law. This approach encompasses the roles that require deep legal education and avoids sweeping in services that do not. Beyond that, I believe states can reasonably trust consumers to inform themselves, count on market forces to generate information from providers and evaluators, and rely on standards of care in tort law and prohibitions in the criminal law to enable a more open system to operate safely.

If a state bar concludes that some other legal-service roles, while not requiring a law degree, nonetheless require a particular level of training and experience,

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85. Upsolve, Inc. v. James, No. 22-cv-627, 2022 WL 1639554, at *16-17 (S.D.N.Y. May 24, 2022) (granting preliminary injunction).

86. *Id.* at *1.

87. *Id.* at *14-17.

88. *Id.* at *16.

89. While state bars are reexamining their rules, I believe they would be well advised to take a look at the current licensing criteria for lawyers. In my view, the legal-education curriculum, the bar exam, and CLE administration are all out of date and need material overhauls to assure the public that those who are licensed as lawyers have all the skills and knowledge they need and remain up to date in our rapidly changing world.

then that state bar can specify necessary prerequisites and processes for those roles, as other states have considered.[90]

State bars will not find it easy to convert from their current blunt instrument approach to a more refined and appropriate structure. The UPL ban is long established—there will be a range of views among the members of the governing entities and spirited argument from advocates for and against change. If state bars have identified their access-to-justice issues and refreshed their understanding of the purpose of their rules, as I have recommended, the task will be easier. But whatever the degree of difficulty, the stakes warrant the effort.

State bars have a few models from which to learn as they consider this issue. A more conservative approach than the one I suggest was developed by a task force empaneled by the ABA in 2002.[91] It developed a definition of "the practice of law" under the existing UPL structure as "the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law."[92] Although somewhat tautological, this definition is a step in the right direction. The 2002 ABA task force also enumerated four settings that would be presumed to be "the practice of law":

> (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
>
> (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
>
> (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
>
> (4) Negotiating legal rights and responsibilities on behalf of a person.[93]

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90. *See* Zachariah DeMeola & Michael Houlberg, *To Close the Justice Gap, We Must Look Beyond Lawyers*, INST. ADVANCEMENT AM. LEGAL. SYS. (Nov. 4, 2021), https://iaals.du.edu/blog/close-justice-gap-we-must-look-beyond-lawyers [https://perma.cc/G2SW-WNK7].

91. Task Force on the Model Definition of the Prac. of L., *Definition of the Practice of Law Draft*, AM. BAR ASS'N (Sept. 18, 2002), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition [https://perma.cc/8LVR-EYPA].

92. *Id.*

93. *Id.*

While I think this list includes tasks that do not require a lawyer,[94] it provides more guidance than the current UPL ban on conduct that is restricted to licensed lawyers.

DOJ and FTC have also developed guidance for defining the "practice of law."[95] State bars can also look to the experience of the United Kingdom and other more open jurisdictions for guidance. However they get there, state bars should restructure their rules to spell out the specific roles requiring a law license and otherwise welcome and encourage others to participate.

B. Repeal the Ban on Profit and Equity Sharing

Rule 5.4's ban on nonlawyers sharing in a law firm's financial success impedes the ability of lawyers and law firms to attract and retain the talent they need to deliver the best possible service to their clients. Any justification for this ban is outweighed by the harm it causes. It should be repealed.

1. Twenty-First-Century Law Firms Need Diverse Expertise

The modern law firm needs more than lawyers to deliver optimal service to its clients. It needs people who can apply the best of contemporary ideas and tools.

Law firms are simultaneously professional-service organizations and businesses. Beyond expertise in law, they need expertise in the disciplines that enable modern business operations and client service, including process design, technology, finance, strategy, and marketing. While this is true for all law firms,[96] it

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94. The first and third elements are similar to my recommendations, although broader. I disagree with the second element that document drafting is a role requiring a lawyer: twenty-first-century technology can draft most documents as well or better than a lawyer. More fundamentally, the lawyering is in helping decide the substance to be expressed in the documents, not the documents themselves. I also disagree with the fourth element: negotiating for legal rights and responsibilities does not require a lawyer any more than negotiating for a major-league baseball player requires a center fielder.

95. *See, e.g.*, Letter from R. Hewitt Pate, Acting Assistant Att'y Gen., Dep't of Just., Jessica. N. Butler-Arkow, Att'y, Dep't of Just., Timonthy J. Muris, Chairman, Fed. Trade Comm'n, Ted Cruz, Dir. of Pol'y Plan., Fed. Trade Comm'n, to Task Force on the Model Definition of the Practice of Law, Am. Bar Ass'n (Dec. 20, 2002), https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law [https://perma.cc/R24Q-45JP].

96. This Essay addresses rule changes that will promote access to justice. These changes will also benefit other stakeholders in the legal ecosystem. They will improve service for all clients (making it faster, simpler, more responsive, and less expensive), improve careers of lawyers (more opportunities requiring less time to deliver more value, relieving them of tasks they find tedious, and likely making more income), and improve the business models of law firms

is *mission critical* for firms that seek to serve the needs of consumers and small businesses. The economics and business challenges of consumer- and small-business-serving firms are distinct from corporate law firms. Firms that serve consumers and small businesses share the high cost of employing lawyers, but their revenue models are lower and less consistent than those of corporate law firms. Consumer and small-business client matters generally involve lower financial stakes and warrant lower fees.[97] The matters are also more episodic, which makes repeat business uneven and unpredictable. These differences make building a business that can reach consumers and small businesses while serving them at a fee level they can afford much more challenging.

One of the reasons we have inadequate legal service to meet the needs of this part of the legal market is, without a doubt, the difficulty of making the business model work. Given the high cost of preparing to be a lawyer and the financial challenges of serving this market, not enough firms have been able to make it. And newly educated lawyers seem reluctant to try.[98] Meeting this challenge requires new ideas for how to market to clients not accustomed to using lawyers, how to deliver quality service at much lower fee structures while still making a viable income, and how to leverage technology[99] to make all this happen. This calls for new process design, new service models, new operating models, new financial models, new software, and new marketing strategies.[100]

(higher quality of service delivered, greater workforce stability, greater client loyalty, and likely more income).

97. Lawyer fees should always be reasonable in the context of the value delivered. *See* MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2020). The lower the amount at stake in an engagement, the less the lawyer should charge. *See id.* r. 1.5(a)(4). And, of course, the lower the stakes, the less the client will be willing and able to pay.

98. A substantial percentage of law school graduates are unable to find legal-service jobs. *See, e.g.*, Debra Cassens Weiss, *As Fewer Law Grads Become Lawyers, the Profession Shows Its Age*, AM. BAR ASS'N (Oct. 22, 2014, 6:15 AM CDT), https://www.abajournal.com/news/article/as_fewer_law_grads_become_lawyers_the_profession_shows_its_age [https://perma.cc/N4NP-HWQZ]. Meanwhile, there are millions of consumers and small businesses who cannot find legal service. I doubt we would have this stark paradox of graduates who cannot connect to clients and clients who cannot connect to legal service if our rules were not so restrictive and prescriptive.

99. Technology offers enormous opportunities to enable firms to serve underserved populations. Natural language processing, artificial intelligence, and the proliferation of legal software can enable legal service that is better, more cost effective, and more responsive than ever before. This is particularly true for the types of legal issues consumers and small businesses most commonly face. Making the most of these opportunities will require technology professionals working hand in hand with legal-service professionals.

100. To be clear, I am not saying that firms that have these capabilities will *automatically* increase access to justice. Rather, I am saying these capabilities will enable firms to address the challenges of serving this market better. It will remain for the firms to deploy the capabilities

To do all of this requires personnel who have the requisite skills and experience. Law firms that market services to consumers and small businesses commonly lack the level and regularity of cash flow to afford to meet the market compensation for such personnel with salary alone.[101] These firms would benefit from the ability to offer their people *incentive compensation*. If they all work together and make the firm successful, they will all share in the financial rewards. They will receive a share of the profits, and they will receive a share in the equity of the firm. This incentive system has been an indispensable tool in building many of the great modern American businesses. Yet Rule 5.4 prohibits it for law firms.

2. A Ban Without Justification

As the ABA Commission on the Future of Legal Services found in 2016, "[T]he traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services."[102] Rule 5.4 prescribes that model by banning profit- or equity-based incentive compensation systems.[103] If you are not a lawyer, you may not share in the profits or

successfully. Nor am I saying that no firms are able to serve consumers and small businesses under the current rules. Many American individuals and small businesses are able to access legal service; the challenge is that most are not. Younger points out that the contingent-fee model works for personal-injury cases. Younger, *supra* note 24, at 280 & n.118. That model only works for clients asserting claims for money damages, and only then in cases where the nature of the dispute and the amount of the potential damages recovery warrant law firms taking the risk of working without fees unless there is a recovery; it is part of the reason at least the minority of consumers and small businesses are served. It does not help clients with legal issues that do not involve a dollar claim large enough to incentive a lawyer to take the case on a contingent basis to be litigated in court. As important as the legal issues are to the clients, most do not involve claims to be paid a lot of money. For more information on how contingent-fee arrangements work, see *Fees and Expenses*, AM. BAR ASS'N (Dec. 3, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses [https://perma.cc/7QMU-STV9] (noting that contingency fees are used "most often in cases involving personal injury or workers' compensation").

101. The episodic nature of fees in consumer firms, particularly in their early days of building up a clientele and position in a market, is a particular challenge. Firms just do not have much money to pay anyone. It is one thing for the lawyer-owner to count on future earnings during slow times, but firms cannot expect employees with no stake in future financial success to do so.

102. *Report on the Future of Legal Services in the United States*, COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N 5 (2016). https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [https://perma.cc/8EVX-F92E].

103. MODEL RULES OF PRO. CONDUCT r. 5.4(a), (d)(1) (AM. BAR ASS'N 2020).

equity of a law firm. What justifies this ban on incentive compensation? Nothing that serves the appropriate goals of the justice system.

The ban on sharing profits originated from a concern for corruption in the way clients were incentivized to choose one lawyer over another.[104] Over the years, it was gradually modified, ingrained, and practically consecrated[105]—all without any plausible justice-based justification.

The Arizona Supreme Court's 2019 Task Force on the Delivery of Legal Services examined the history, rationale, and current effect of Rule 5.4's ban on fee and equity sharing. As to history, the task force found that "the prohibition was not rooted in protecting the public but in economic protectionism."[106] As to the present, the task force concluded that "it no longer serves any purpose, and in fact may impede the legal profession's ability to innovate to fill the access-to-justice gap."[107]

Younger justifies Rule 5.4 on a single ground: "[T]o prevent nonlawyers from interfering with a lawyer's independent professional judgment."[108] His essay notes that a lawyer spends "hours"[109] completing a course in professional ethics and faces consequences for violating ethical rules. Sharing the financial rewards with nonlawyers, Younger argues, might lead to lawyers being persuaded by their nonlawyer colleagues to abandon their ethics.[110] That's it. No evidence of the moral depravity of nonlawyers, no evidence of such unethical influence in open systems, nothing. Just an assertion that it *might* happen.[111]

This argument proceeds from the arrogant assumption that only lawyers can be trusted to act ethically. There is no basis in real-world experience for that

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104. *See* Meguire v. Corwine, 101 U.S. 108, 111 (1879).

105. *See* Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 615-17 (2013). *See generally* Rhode, *Policing the Professional Monopoly*, *supra* note 27 (describing the evolution of unauthorized practice enforcement).

106. Task Force on the Delivery of Legal Servs., *Report and Recommendations*, ARIZ. SUP. CT. 15 (Oct. 4, 2019), https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf [https://perma.cc/P4EL-7849].

107. *Id.*

108. Younger, *supra* note 24, at 261. Readers not steeped in the lore of the law likely will find this assertion surprising. As discussed previously, there is no reason to assume 99.6% of the population represent a danger to lawyer ethics. *See supra* Part III.

109. Younger, *supra* note 24, at 268.

110. *Id.* at 268-69.

111. The absence of evidence of actual harm for such a sweeping prohibition as this reinforces arguments that it is, in reality, protectionism.

assumption.[112] While I do believe lawyers take their ethical duties seriously, I have no reason to believe that anyone else who engages in legal service cannot be trusted to do so, too. They may need to learn some new rules, but as Younger tells us, that takes only a matter of "hours."[113]

Younger also offers the example of a settlement decision to illustrate how an unethical nonlawyer might interfere with a lawyer's ethics.[114] The nonlawyer, being interested in sharing in the fee (presumably contingent in this example), might push to settle on suboptimal terms rather than hold out for something better. The lawyer, believing it is not in the client's interest to settle, nonetheless would advise settlement. But this story does not hold water. For starters, there is no reason to believe that ethical lawyers will staff their firms with people who do not embrace their ethical duties. If you assume lawyers take ethics seriously, they will expect their people to do the same. Moreover, even if a nonlawyer advocates settlement out of self-interest, there is no reason to believe the lawyer will abandon her ethics.

Indeed, Younger's essay seems grounded in the idea that lawyers answer to a higher calling when it comes to ethics. I have enough confidence in lawyers to be comfortable that they can withstand ill-advised pressure from "nonlawyers" regarding the advice they give their clients. Indeed, lawyers commonly face pressure to deviate from their ethics: a client that wants approval to do something they should not do or a law partner that elevates financial issues over client responsibilities. In my experience, lawyers have a good record of resisting such pressure. If I am wrong, then what ethical standard is Rule 5.4 protecting? Either we have confidence in lawyers' commitment to their ethics, or we do not. I do.

Moreover, if nonlawyers do cause lawyers to violate their ethics, the lawyers will still face consequences[115] even if Rule 5.4 is modified. The revised rules can also provide for sanctioning the nonlawyers and the firm for causing the improper conduct.

The argument for retaining Rule 5.4 really seems to boil down to preserving the lawyer monopoly. This was starkly evident in Younger's comments celebrating the ABA House of Delegates's most recent resistance to reform. He called it

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112. *See* Countrywide Home Loans, Inc. v. Ky. Bar Ass'n, 113 S.W.3d 105, 120 (Ky. 2003) ("[W]e take issue with the implications of Mistler's statement—that merely because he was able to successfully pursue a law degree and license he is by nature a more honest and ethical person than laypersons who have not made such a commitment.").

113. Younger, *supra* note 24, at 268.

114. *Id.* at 269.

115. Not only would the conduct violate the lawyer's duty to the client, relenting to such pressure from the "nonlawyer" colleague likely would violate Model Rules 1.7 and 1.8 as well. MODEL RULES OF PRO. CONDUCT rs. 1.7 & 1.8 (AM. BAR ASS'N 2020).

"a huge victory for all lawyers,"[116] with no reference to client welfare or ethical integrity. If the real motive here were either of those ideas, Younger would have celebrated them, rather than the lawyers Rule 5.4 shields from competition.

C. Repeal the Ban on Equity Capital

Building a successful law firm requires capital. Most businesses have three options to raise it: self-funding, debt financing, and equity financing. Law firms have only the first two because Rule 5.4 bans the third. Even though equity is the most attractive form of capital for many startup or cash-flow-challenged firms—earning its return by spreading the risk of the new or innovative business—law firms cannot use it. Rule 5.4's ban on access to equity capital thus further impedes the innovation our legal system needs, particularly the legal-service providers who serve consumer and small-business clients. As Justices Kourlis and Gorsuch put it: "This restriction on capital investment reduces the number of market participants, which in turn prevents competition from reducing costs."[117]

As discussed previously, one of the reasons for the inadequate supply of lawyers serving consumer and small-business clients is the challenge of building a business model that can serve a relatively low-revenue client base with unpredictable cash flow and a traditionally high cost of delivering service. To address the access-to-justice crisis, we need more law firms with creative new models to surmount this challenge. Such firms will need capital at the outset and as they develop to support their investments and navigate the ebbs and flows of their income statements. Our rules, therefore, should enable equity capital, not ban it.

Adherents claim that outside investors will infect lawyers with a profit motivation and cause them to disregard their ethical obligations. As Younger says, "[N]onlawyers . . . might prioritize profit over the duties the lawyer owes to clients."[118] This claim does not comport with reality. For starters, lawyers do not need outsiders to give them the profit virus. Partners in leading American law firms have organized their firms so that partners earn millions of dollars each year, with many firms *averaging* more than three million dollars in profits per partner and the highest-performing partners earning substantially more.[119] If

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116. Skolnik, *supra* note 37.

117. Kourlis & Gorsuch, *supra* note 14.

118. Younger, *supra* note 24, at 261-62.

119. *The 2022 Am Law 100: Ranked by Profits per Equity Partner*, LAW (Apr. 26, 2022, 10:03 AM), https://www.law.com/americanlawyer/2022/04/26/the-2022-am-law-100-ranked-by-profits-per-equity-partner [https://perma.cc/9KMU-B3F2].

lawyers were going to put profits ahead of ethics, it has already happened. But I do not think that is what lawyers do.

To the contrary, I think the record suggests the opposite. It shows that firms with the highest ethical standards can build very profitable businesses.[120] In legal service, profits and ethics can coexist. Every lawyer wants to make a living, and many would like to charge high fees. But lawyers, I contend, see themselves as true professionals first and businesspeople second. That is, in fact, at the heart of Younger's thesis. As I said previously, I am confident that lawyers can and will resist pressure to abandon their ethics as, if, and when it arises. And, if we cannot trust lawyers' so-called higher calling, they can be sanctioned—as can the investors who persuaded them to act unethically.

D. Create a Regulatory Sandbox

As an alternative or additional response to the access-to-justice crisis, state bars should consider creating regulatory "sandboxes" in their respective states to allow experimentation, invite innovation, and gather data on how effectively and safely new ways of delivering legal-service work.

Regulatory sandboxes have been used successfully in financial services and other settings.[121] A regulatory sandbox for legal service would normally involve several steps.[122] First, the state bar determines that it wants to encourage innovative approaches to delivering legal service, including ones that may not presently be permitted by its rules. It then creates a regulatory body to oversee the process. That regulatory body sets up processes and criteria for applicants to seek approval to deliver legal service in a particular way. Each proposal is evaluated and, if approved, is granted temporary permission during a trial period to deliver legal service according to their proposal. During the trial period, the entity's

120. The firms posting the highest levels of partner income represent some of the most sophisticated and fully informed clients in the world. Those firms are entrusted with highly confidential and proprietary information, and to advise and advocate concerning matters of enormous consequence. They would not be chosen by these clients for these engagements, year after year, engagement after engagement, without operating at the highest level of professional ethical standards.

121. *See, e.g.*, Alessandra Carolina Rossi Martins, *A Sandbox for the U.S. Financial System*, REGUL. REV. (Aug. 19, 2021), https://www.theregreview.org/2021/08/19/rossi-martins-sandbox-for-us-financial-system [https://perma.cc/AK4E-SPAU] (noting how the United Kingdom's "fintech regulatory sandbox . . . has been an inspiring success for other countries").

122. These are the elements adopted by Utah. *See* OFF. LEGAL SERVS. INNOVATION, *supra* note 62; *see also Innovation Office Manual*, OFF. LEGAL SERVS. INNOVATION 2-9 (Aug. 25, 2021), https://utahinnovationoffice.org/wp-content/uploads/2021/08/IO-Manual-Published-Aug.-25-2021.pdf [https://perma.cc/HQ6F-8XEG] (laying out the steps to apply to and participate in the sandbox in detail).

performance is monitored by the regulatory body. At the end of the trial period, the regulatory body evaluates the entity's performance and, if warranted by the evidence, issues permanent permission to pursue its new model. Throughout the sandbox process, the regulatory body assembles data on innovative ideas and the performance of all entities admitted to the sandbox.

The sandbox signals to all stakeholders that the state bar wants to foster innovation in the way legal service is delivered. In turn, it generates new processes and models that will inform us all. It also gathers invaluable data about how these models actually work. And it will do it all under the supervision of the regulatory body, ensuring safety.[123]

The state of Utah set the standard for others to follow in adopting a regulatory sandbox in 2020[124]—both in how it decided to adopt the sandbox and what it did. Utah decided to adopt a sandbox through collaboration between the state bar and the state supreme court. Both the Utah State Bar president, John Lund, and a Utah Supreme Court Justice, Deno Himonas, believed the regulatory model needed reform and that the sandbox was the best way to proceed.[125] Having these two leaders on board from the outset facilitated the process significantly.

The Utah sandbox is overseen by the Office of Legal Services Innovation, which John Lund agreed to head in its formative years.[126] As a companion action, Utah modified Rule 5.4 to permit fee sharing and equity ownership while requiring such arrangements to go through the sandbox process.[127] The sandbox also specifically contemplates proposals in which "nonlawyers" deliver legal service and reserves discretion to grant waivers for other innovations that applicants may propose.[128]

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123. The sandbox format permits the state bar to create as much supervision and as many limitations as are warranted. Utah, for example, monitors participants closely, requires monthly reports, and conducts audits. *See* OFF. LEGAL SERVS. INNOVATION, *supra* note 122, at 15-16.

124. *See* OFF. LEGAL SERVS. INNOVATION, *supra* note 62.

125. *See id.* In an interview I did with Justice Himonas and John Lund, together with Gillian K. Hadfield, on the *Law Technology Now* podcast in 2020, they describe the process they pursued to achieve adoption of the Utah sandbox. Law Technology Now, *Model for Change: Utah's Data-Driven Approach to Closing the Justice Gap*, LEGAL TALK NETWORK (Sept. 16, 2020), https://legaltalknetwork.com/podcasts/law-technology-now/2020/09/model-for-change-utahs-data-driven-approach-to-closing-the-justice-gap [https://perma.cc/87B3-JT5B]. It is worth a listen.

126. *See Board and Staff*, UTAH INNOVATION OFF., https://utahinnovationoffice.org/about/staff-list [https://perma.cc/K67T-AZCD].

127. OFF. LEGAL SERVS. INNOVATION, *supra* note 122, at 2, 60-61.

128. *Id.* at 2-3.

As it has proceeded with the sandbox, Utah has developed ways to categorize, measure, and monitor risks to consumers and is gathering data daily about how the innovative approaches it has approved have fared. To date, Utah has authorized forty-two entities to offer services in the sandbox yielding more than 24,000 legal services to 19,000 separate consumers.[129] These reforms have won widespread praise, including from Justices Kourlis and Gorsuch, who "encourage others to follow suit."[130]

E. Opportunities, Not Promises

Younger asserts that advocates for reform do not have "compelling evidence" that their proposals will fix the access-to-justice crisis.[131] I am not saying my recommendations are certain to work. I am saying this: if we open our system to permit it to benefit from people, models, and technology that are currently foreclosed, we are highly likely to do better. I propose that we stop prohibiting possibilities.

We cannot predict the future. The time it will take for reforms to play out, the sequence of events, and the eventual outcomes are not knowable in advance. But we have plenty of reason to be confident that it will be better than the status quo. Indeed, we *do* have "compelling evidence" of this: the current closed system leaves most of our people and small businesses without legal service.

Younger also claims that there is no evidence from the early results of more open systems that such systems are improving access to justice.[132] Not so. The data available on the Arizona and Utah websites show a significant number of firms participating, a healthy mixture of areas of law being offered by the approved participants, and thousands of people and businesses being served.[133] That is progress.

Younger also asserts that many of the firms approved for alternative business structures in Arizona and Utah's sandbox offer business-law services.[134] But small-business clients are a significant part of the crisis we need to solve.

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129. *Innovation Office Activity Report: Executive Summary July 2022*, OFF. LEGAL. SERVS. INNOVATION 1, 4 (Aug. 17, 2022), https://utahinnovationoffice.org/wp-content/uploads/2022/08/IO-Monthly-Public-Report-July-2022.pdf [https://perma.cc/4LTN-BV9N].

130. Kourlis & Gorsuch, *supra* note 14.

131. Younger, *supra* note 24, at 275.

132. *See id.* at 276-81.

133. OFF. LEGAL. SERVS. INNOVATION, *supra* note 129, at 1, 4-5; *Summaries of Alternative Business Structures in 2021*, ARIZ. SUP. CT., https://www.azcourts.gov/Portals/219/Images/Summaries/Approved%20ABS%20summaries.pdf [https://perma.cc/LVT4-59CN] (summarizing the services offered by every firm participating in Arizona's program).

134. Younger, *supra* note 24, at 278.

Moreover, most of the firms that Younger labels business-oriented also offer services to individuals—specifically divorce, custody, debt-collection, eviction, estate-planning, and immigration legal services.

Younger criticizes some of these entities for deviating from the traditional model in ownership and service. But that is the point. The traditional model does not reach most of our people and small businesses. We need new ways. The traditional model is failing us.

Most important, however, is this: the Arizona and Utah models are just getting going. It is far too early to have enough data to evaluate the impact they will have.[135] It will take time for people and organizations to react to the new opportunities Arizona and Utah have created.

Younger says that lawyers are innovative and that it would be wrong to claim that there can be no innovation without "nonlawyer ownership."[136] I agree. But it is irresponsible to deny law firms access to resources that could make them more innovative and effective than they otherwise would be.

Finally, Younger lauds lawyer pro bono activities and innovative programs "promoted by members of the bar to expand access to legal services."[137] I commend these activities too and hope law firms will continue to give generously to this important cause. But pro bono efforts will never be enough to meet the needs of the underserved. The scale of the challenge is too massive. In 2016, scholars calculated that it would cost forty billion dollars to deliver one hour of pro bono work to each person in America who could not access legal service.[138] One hour will not accomplish much, and rates have gone up—at twenty hours per person and modestly higher rates, the tab exceeds one trillion dollars.

We need to unleash the potential of private enterprise. While the size of the underserved population makes the lack of access to legal service a social crisis, it also creates an enormous market opportunity. We need to permit people with a diverse set of skills to work with lawyers to create new models that can address it. Not all will succeed, but, over time, many will. That is our best realistic hope to close the justice gap.

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135. Younger claims that there is no evidence of progress in access in the United Kingdom or Australia. *Id.* at 267 & n.88 (citing *Under New Management: Early Regulatory Reform in the United Kingdom and Australia*, PRACTICE (Jan./Feb. 21), https://thepractice.law.harvard.edu/article/under-new-management [https://perma.cc/SBC2-SDTQ]). The article actually reports that there has been progress and that there is reason for optimism, but there is not yet enough data to form definitive conclusions.

136. Younger, *supra* note 24, at 284-87.

137. *Id.* at 284-85.

138. Hadfield & Rhode, *supra* note 39, at 1193.

CONCLUSION

America's access-to-justice crisis requires all state bars to take action. It is truly unacceptable that most of our people and small businesses do not have access to the legal service they need. Whatever the history and purpose of the rules, state bars have created a reality at odds with America's dedication to justice for all. Their rules must be reformed.

This will require state bars to lead: to face up to their reality, to pursue their core mission, and to inspire their lawyers to embrace new approaches. Reform will not be easy. Success will not be assured.

But failure to act is a *dereliction of duty*.

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The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms

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The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms

Stephen P. Younger

ABSTRACT. Whether nonlawyers should have ownership roles in law firms has been and remains a hotly debated topic. The debate concerns potential reforms to Rule 5.4 of the American Bar Association's Model Rules of Professional Conduct, which sets guidelines for maintaining the professional independence of lawyers, as well as the impact of those revisions on the legal profession. Although advocates for such reform argue that nonlawyers must be allowed ownership roles in law firms in order to foster innovation and increase access to legal services, many lawyers have raised significant concerns about the impact that nonlawyer ownership would have on the independence of lawyers. Lawyers have concerns about allowing nonlawyers—who have not sworn to uphold the ethical obligations that attorneys promise to uphold when becoming members of the bar—to have decision-making authority in the day-to-day practice of law. There is also no evidence that nonlawyer ownership actually improves access to justice for the needy. This Essay argues against rewriting Rule 5.4 to allow nonlawyer ownership of law firms. It concludes that nonlawyer ownership not only fails to solve the problems that advocates of reform promise it will address but in fact creates meaningful risks for the legal profession.

INTRODUCTION

Nonlawyer ownership of law firms (NLO) has been a hotly debated issue in the legal profession for years. The debate concerns potential reforms to Rule 5.4 of the American Bar Association's (ABA) Model Rules of Professional Conduct, which sets guidelines for maintaining the professional independence of lawyers. One of Rule 5.4's key provisions prohibits lawyers from forming business entities with nonlawyers in order to practice law and forbids entities owned or controlled by nonlawyers from having ownership stakes in law firms.[1] Rule 5.4 also forbids lawyers from sharing fees with nonlawyers.[2] Rule 5.4 has long served as

1. MODEL RULES OF PRO. CONDUCT r. 5.4(d) (AM. BAR ASS'N 2020).

2. *Id.* r. 5.4(a).

an effective method of preventing ethical concerns about the professional independence of members of the bar, and its continued vitality was recently reaffirmed by the ABA's House of Delegates.[3]

Nonetheless, some individuals and businesses—although not many lawyers—are seeking to revise Rule 5.4 to allow for increased possibilities for NLO. Advocates for such reform, such as Ralph Baxter,[4] claim that reforming Rule 5.4 and similar restrictions on nonlawyer involvement in the practice of law is the only viable option for increasing access to justice and fostering innovation in the legal field.[5] Baxter goes further and asserts that by refusing to reform Rule 5.4, lawyers have ignored their duty to solve the access-to-justice crisis in the United States, arguing that the profession has some undefined duty to ensure "legal service for all."[6] As discussed below, these assertions are unpersuasive, and NLO has not proven to be effective in addressing the access-to-justice crisis.

This Essay argues against rewriting Rule 5.4 to allow nonlawyer ownership of law firms. It concludes that NLO not only fails to solve the problems that advocates of reform promise it will address, but in fact creates meaningful risks for the legal profession. Part I provides a brief overview of Rule 5.4 and the current state of the NLO debate. Part II discusses the bar's historical opposition to reforming Rule 5.4 and explains the concerns raised about nonlawyers increasing their involvement in the legal profession. Part III responds to arguments raised

3. *See* Sam Skolnik, *ABA Sides Against Opening Law Firms Up to New Competition (1)*, BLOOMBERG L. (Aug. 9, 2022, 5:36 PM), https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition [https://perma.cc/D87L-BDPS].

4. Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J.F. 228 (2022).

5. Baxter does acknowledge that it is not "certain" that nonlawyer ownership (NLO) will work to improve access to justice. Baxter, *supra* note 4, at 256.

6. Baxter, *supra* note 4, at 239. Baxter also misleadingly defines the "state bar" as "the entities in each state that have been delegated the authority to regulate legal service." *Id.* at 228 n.1. In many states, the state bar association has no such authority. Rather, it is the state's highest court that is empowered to regulate lawyers. It is only in mandatory bar states (about sixty percent of the country's states) that the state bar has the power to regulate lawyers. By using this definition, Baxter's essay unfairly targets all lawyers, asserting that all "organizations and people who have . . . the authority . . . to make legal service work in their states," including but not limited to state bar associations and the state supreme courts, have failed to make any effort to improve access to justice. *Id.* Baxter's definition is exceedingly broad and misleads the reader into believing that lawyers and those that regulate the legal field have done nothing to improve access to legal services for those who need it. As explained in this Essay, that is simply not the case. This Essay will not use Baxter's definition of state bars but rather uses "state bar" to refer to bar associations in the various states, which is the conventional use of that term.

by Baxter and others in favor of easing Rule 5.4's restrictions, including the failure of NLO to increase access to justice and the myth that NLO is required to foster innovation in the legal profession.

I. THE CURRENT STATE OF THE NLO DEBATE

A. Overview of Rule 5.4

The Model Rules of Professional Conduct are a set of model legal-ethics rules promulgated by the ABA that states typically follow, with modifications made to reflect local practice in each state.[7] Model Rule 5.4 addresses the professional independence of lawyers.[8] Rule 5.4, which has been adopted in some form by virtually every state, prohibits lawyers from forming a partnership with nonlawyers if any of the partnership's activities consist of the practice of law and limits the circumstances under which a lawyer may form a professional corporation or association authorized to practice law for profit.[9] Rule 5.4 also generally prohibits lawyers from sharing legal fees with nonlawyers.[10]

The purpose of Rule 5.4—which the Comments to the Rule expressly state—is to prevent nonlawyers from interfering with lawyers' independent professional judgment and to uphold the obligation of lawyers to maintain their independent professional judgment.[11] The restrictions imposed by the Rule aim to address the concern that if nonlawyers, who are not bound by the Rules of Pro-

7. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

8. *Id.* r. 5.4.

9. MODEL RULES OF PRO. CONDUCT rs. 5.4(b) & 5.4(d) (AM. BAR ASS'N 2020); *see* CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct - Rule 5.4*, AM. BAR ASS'N (Feb. 22, 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-5-4.pdf [https://perma.cc/72GM-QSZT].

10. MODEL RULES OF PRO. CONDUCT r. 5.4(a) (AM. BAR ASS'N 2020).

11. *Id.* r. 5.4 cmts. 1 & 2. Restrictions on fee sharing and bans on nonlawyer partners appeared in ethics rules nearly a century ago and were thereafter continued with the adoption of the Model Rules of Professional Conduct. Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers?*, 42 CAP. U. L. REV. 907, 911-12 (2014). Baxter relies on a single sentence in the 2019 Report of the Arizona Supreme Court's Task Force on the Delivery of Legal Services in claiming that this is not the case and that the ban on fee sharing "was not rooted in protecting the public but in economic protectionism." Baxter, *supra* note 4, at 251 (quoting Task Force on the Delivery of Legal Servs., *Report and Recommendations*, ARIZ. SUP. CT. 15 (Oct. 4, 2019), https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf [https://perma.cc/P4EL-7849]). As described above, this is expressly contradicted by the history and language of Rule 5.4 itself.

fessional Conduct, have a financial interest in a lawyer's profits, they might prioritize profit over the duties the lawyer owes to clients and adversely influence a lawyer's conduct.

B. What is NLO?

NLO — sometimes also called "alternative business structures" (ABS) — refers to potential reforms of Rule 5.4 that would permit nonlawyers to have greater financial interest and decision-making authority in the legal profession.[12] Currently, the ABA Model Rules do not prohibit all nonlawyer involvement in the practice of law. For example, contrary to the impression left by Baxter, Model Rule 5.4(a)(3) already allows nonlawyers to have management roles in firms and share in the firm's overall profits — although not on the basis of the profitability of individual cases.[13] Nonetheless, advocates for increased NLO and the growth of ABS seek additional reforms.

Advocates for authorizing NLO claim the primary reason for such changes is to address access-to-justice concerns through increased access to legal services.[14] In practice, however, most ABS entities (that is, entities created with nonlawyers in jurisdictions that have reformed their rules to permit NLO) that have been approved so far are run by individuals or businesses from outside the legal profession who are merely focused on expanding their businesses and profits by partnering with lawyers. They are not focused on tackling the access-to-justice divide. Existing ABS entities include wealth-management firms, accounting firms, litigation-finance companies, hedge funds, private-equity firms, other financial institutions, and alternative legal-service providers that offer customers the ability to create legal documents without hiring a lawyer.[15] For example, alternative legal-service providers like LegalZoom (a licensed ABS entity in Arizona) and Rocket Lawyer (an ABS entity in Utah's regulatory sandbox) are also looking to expand their provision of legal documents to consumers in those states. Likewise, multinational accounting firms such as Deloitte and Ernst & Young are exploring opportunities to partner with law firms to expand their

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12. In this Essay, I will use the phrase "nonlawyer ownership" or "NLO" to refer broadly to the movement to reform Rule 5.4 and its state corollaries. Baxter also references rules regarding the unauthorized practice of law in his essay. Baxter, *supra* note 4, at 242-48. I do not address those rules here.

13. MODEL RULES OF PRO. CONDUCT r. 5.4(a)(3) (AM. BAR ASS'N 2020); N.Y. RULES OF PRO. CONDUCT r. 5.4(a)(3) cmt. 1B (N.Y. STATE BAR ASS'N 2021) (adopting the principles of ABA Model Rule 5.4(a) and making clear that profit sharing must be based on the total profitability of the law firm or a department therein and may not be based on fees generated by a single case).

14. *See, e.g.*, Baxter, *supra* note 4, at 229-35.

15. *See infra* Part II.

scope of services.[16] As described below, advocates for NLO have not explained how these ABS entities will improve access to justice, and there is no evidence indicating that they have done so yet or will do so in the future.

C. Recent Reforms Embracing NLO

Two states and several countries outside the United States have reformed Rule 5.4 (or the international equivalent) to allow for increased opportunities for NLO.[17]

1. Foreign Jurisdictions

Outside the United States, Australia and the United Kingdom were early adopters of legislation allowing limited forms of NLO.

In 2001, New South Wales, Australia passed legislation allowing lawyers to share fees and provide legal services with nonlawyers, thereby becoming the first common-law jurisdiction to allow fee sharing and NLO.[18] This legislation contains provisions aimed at trying to make sure that lawyers maintain their professional and ethical obligations when working with nonlawyers.[19]

In the United Kingdom, the 2007 Legal Services Act allowed for NLO in England and Wales. The Act also established a regulatory framework that mandates a fitness test for nonlawyers who seek to become owners of law firms and a law-firm management structure that requires the appointment of persons responsible for ensuring compliance with lawyers' professional obligations.[20]

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16. Roger E. Barton, *Changing the Stakes: How Evolving Law Firm Ownership Rules Could (or Could Not) Re-Shape the Legal Industry*, REUTERS (Aug. 19, 2021, 11:07 AM), https://www.reuters.com/legal/legalindustry/changing-stakes-how-evolving-law-firm-ownership-rules-could-or-could-not-re-2021-08-19 [https://perma.cc/U2LS-DJ72]; *Rule 5.4 and the Future of Your Law Firm*, CRISP, https://crisp.co/rule-5-4-and-the-future-of-your-law-firm [https://perma.cc/JW2M-NZJK].

17. See *infra* Part III for my discussion of these reforms.

18. Barton, *supra* note 16.

19. These include: (1) a requirement that legal practices appoint at least one director who is an Australian legal practitioner and holds an unrestricted practicing certificate; and (2) a mandate that all incorporated law firms establish and maintain appropriate management systems to enable the provision of legal services in accordance with the professional obligations of lawyers. Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 505-06 (2009). As discussed herein, these restrictions are not sufficient to overcome concerns about NLO.

20. Legal Services Act 2007, c. 29 (UK), https://www.legislation.gov.uk/ukpga/2007/29 [https://perma.cc/8CUU-R6TR]. These restrictions are also insufficient to overcome concerns regarding NLO.

2. *State-Level Changes in the United States*

Although the vast majority of American states still prohibit NLO, the concept of nonlawyers sharing ownership of law firms with lawyers has gained some traction recently. Two states—Arizona and Utah—have embraced NLO and granted ABS licenses to a variety of entities. Arizona abolished Rule 5.4 entirely, while Utah instituted a regulatory sandbox to license ABSs in which lawyers and nonlawyers partner to provide legal services.[21]

In 2020, Arizona became the first state to abolish Rule 5.4 and allow nonlawyer ownership of legal-services entities.[22] Arizona approved its first ABS in 2021, and as of August 2022, the state had licensed twenty-five such entities.[23] Many of these ABS entities provide transactional, business, and financial services. For example, Elevate Next provides legal services in "general corporate matters," while Radix Law provides "business law" services.[24] Trajan Estate LLC offers legal services for estate planning.[25] Other ABS entities, such as Boss Advisors, provide investment, tax, and accounting services for high-net-worth individuals.[26]

Also in 2020, the Utah Supreme Court approved an experimental regulatory sandbox for ABS entities, which now runs through August 2027.[27] A regulatory sandbox is a policy tool through which a government or regulatory body—in Utah's case, the state's supreme court—oversees an experiment that permits the limited relaxation of rules in order to allow sandbox participants to develop and

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21. *See Alternative Business Structures (ABS) Questions & Answers*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs [https://perma.cc/H83B-U7SJ]; *Utah Supreme Court Standing Order 15*, UTAH SUP. CT. (2020), https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf [https://perma.cc/GZ8K-HLPS].

22. ARIZ. JUD. BRANCH, *supra* note 21; Bob Ambrogi, *Arizona Is First State to Eliminate Ban on Nonlawyer Ownership of Law Firms*, LAWSITES (Aug. 31, 2020), https://www.lawnext.com/2020/08/arizona-is-first-state-to-eliminate-ban-on-nonlawyer-ownership-of-law-firms.html [https://perma.cc/R99M-G7TE].

23. *ABS Directory 8-31-2022*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/Portals/26/ABS/Directory/ABS%20Directory%208-31-2022.pdf [https://perma.cc/KC88-AR48].

24. *Summaries of Alternative Business Structures in 2021*, ARIZ. JUD. BRANCH [5, 13], https://www.azcourts.gov/Portals/26/Approved%20ABS%20summaries.pdf [https://perma.cc/9MNB-4CKR].

25. *Id.* at [1].

26. *Id.* at [2]. As discussed further below, these entities are not likely to benefit those most in need of access to justice.

27. *Utah Supreme Court to Extend Regulatory Sandbox to Seven Years*, OFF. LEGAL SERVS. INNOVATION (Apr. 30, 2021), https://utahinnovationoffice.org/2021/04/30/utah-supreme-court-to-extend-regulatory-sandbox-to-seven-years [https://perma.cc/Y4RZ-S6W5].

test innovative business models, products, or services.[28] Utah's regulatory sandbox permits entities owned by nonlawyer investors and managers along with entities in which nonlawyers have ownership interests to provide legal services (including offering legal advice).[29] Utah's May 2022 Sandbox Activity Report identified forty-one active ABS entities.[30] Like in Arizona, many of the entities that have been approved provide legal-technology services such as creating legal forms online without the help of an attorney (for example, Rocket Lawyer and LawPal) or offer business services (for example, Firmly, LLC).[31] Utah has also opened law-firm ownership to nonlawyers.[32] The first entity to take advantage of this was Law on Call—the first U.S. law firm that is wholly owned by nonlawyers.[33] Law on Call provides registered-agent and corporate-filing services, including free legal forms and assistance with setting up LLCs, in all fifty states.[34]

Other states might follow in the footsteps of Arizona and Utah if they can overcome strong lawyer opposition. In the last two years, state bars in several states, including California and Florida, have explored adopting NLO.[35] Despite vocal opposition from many members of the bar about the loss of professionalism that would result from a regulatory sandbox that had been proposed in 2019, the California State Bar began exploring the issue again in 2020. This resulted in a recommendation from a state bar task force to broaden Rule 5.4 to allow for more fee sharing between lawyers and nonlawyers.[36] To date, the state bar has not implemented that recommendation. In fact, given concerns over protecting individuals from "unscrupulous actors" in the legal field, California recently enacted a law that prohibits the state bar from spending money on any new programs that would allow ownership of law firms by nonlawyers or fee sharing

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28. *What We Do*, OFF. LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/about/what-we-do [https://perma.cc/24M4-VVWC].

29. *Id.*

30. *Innovation Office Activity Report: Executive Summary*, OFF. LEGAL SERVS. INNOVATION 1 (May 2022), https://utahinnovationoffice.org/wp-content/uploads/2022/06/IO-Monthly-Public-Report-May-2022.pdf [https://perma.cc/Q2XB-SZPD].

31. *Authorized Entities*, OFF. LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/authorized-entities [https://perma.cc/5UD3-TD7V].

32. Larry Teitelbaum, *Civil Injustice*, PENN L.J., Spring 2022, at 23, 25, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1121&context=plj [https://perma.cc/V43X-2ECJ].

33. *Id.*

34. *Id.*

35. *Id.* at 26-27. Although a number of other states have explored regulatory reforms related to Rule 5.4, none have embraced NLO in their states to date. *See id.*

36. *Final Report and Recommendations*, STATE BAR OF CAL. TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS. 4, 17-19, 31-42 (Mar. 6, 2020), https://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf [https://perma.cc/6BYV-4J5M].

with nonlawyers.[37] Moreover, in August 2022, the California Lawyers Association, California's voluntary bar association, commended the ABA's decision, as described below,[38] to pass Resolution 402 and reaffirm the notion that the "sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession."[39]

In 2019, the Florida state supreme court directed a special committee to study how legal services for consumers could be improved by ensuring that lawyers play a "proper and prominent role in the provision of these services" involving nonlawyers.[40] The committee was instructed to look at various issues including referral fees, fee sharing, regulation of lawyers, regulation of online legal-service providers, and nonlawyer providers of limited legal services.[41] In 2021, the committee issued a report that recommended establishing a regulatory sandbox modeled after Utah's in order to test NLO and fee sharing with nonlawyers.[42] Later that year, however, after Florida lawyers voiced numerous objections to the report's recommendations, the Florida Bar's Board of Governors unanimously rejected proposals to allow nonlawyers to own law firms and share in legal fees.[43] In March 2022, the Florida Supreme Court agreed with the state bar and declined

37. Act of Sept. 18, 2022, ch. 419, 2022 Cal. Legis. Serv. (West).; *see also* Cheryl Miller, *Revised Bill Poses New Roadblocks to State Bars for Nonlawyers*, LAW.COM (June 16, 2022, 7:39 PM), https://www.law.com/2022/06/16/revised-bill-poses-new-roadblocks-to-state-bars-plans-for-nonlawyers [https://perma.cc/S25N-74L2] (describing the law's restrictions on the state bar); Joyce E. Cutler, *California Restrains State Bar from Expanding Nonlawyer Practice*, BLOOMBERG L. (Sept. 19, 2022), https://news.bloomberglaw.com/business-and-practice/california-restrains-state-bar-from-expanding-nonlawyer-practice [https://perma.cc/7VYL-NSZX] (same).

38. *See infra* Part II.

39. *CLA Commends ABA Resolution for Reconfirming Core Values in Law Firm Ownership*, CAL. LAWS. ASS'N (Aug. 15, 2022) https://calawyers.org/california-lawyers-association/cla-commends-aba-resolution-for-reconfirming-core-values-in-law-firm-ownership [https://perma.cc/HT8N-4KYC].

40. John Stewart et al., *Final Report of the Special Committee to Improve the Delivery of Legal Services*, FLA. BAR 1 (June 28, 2021), https://www-media.floridabar.org/uploads/2021/06/FINAL-REPORT-OF-THE-SPECIAL-COMMITTEE-TO-IMPROVE-THE-DELIVERY-OF-LEGAL-SERVICES.pdf [https://perma.cc/GDK4-H8XU].

41. *Id.*

42. *Id.* at 5-10, 17-21.

43. Gary Blankenship, *Board of Governors Unanimously Opposes Non-Lawyer Firm Ownership, Fee Splitting Ideas*, FLA. BAR (Nov. 10, 2021), https://www.floridabar.org/the-florida-bar-news/board-of-governors-unanimously-opposes-non-lawyer-firm-ownership-fee-splitting-ideas [https://perma.cc/A7YE-9H7F]; Letter from Michael G. Tanner, Pres., Fla. Bar, to Hon. Charles T. Canady, C.J., Sup. Ct. of Fla. (Dec. 29, 2021); https://www-media.floridabar.org/uploads/2021/12/Tanner-letter-to-CJ-re-final-report-12-29-2021-Signed.pdf [https://perma.cc/VHC6-FDN4].

to adopt the recommendations of the special committee (i.e., declined to adopt proposals related to NLO, fee sharing, and expanding the work that paralegals are allowed to perform).[44]

In 2020, Washington, D.C. also began considering loosening its NLO rules.[45] Although Washington, D.C. has had a modified version of Rule 5.4 since 1991, its current rule allows NLO in certain limited circumstances but does not permit corporations or investment banks to own interests in law partnerships or law practices.[46] That proposal has not yet been advanced towards approval.

Several other states have considered regulatory reforms related to Rule 5.4, but to date, none has embraced NLO in their states at the level seen in Arizona and Utah.[47]

II. THE BAR'S LONGSTANDING OPPOSITION TO NLO

Despite the recent prominence of the debate over reforming Rule 5.4, most lawyers have long opposed loosening Rule 5.4 and embracing NLO. While there are a variety of compelling reasons for this opposition, the primary concern expressed by lawyers does not, as Baxter argues, come from a self-serving desire to protect lawyers' profits.[48] Rather, lawyers' opposition to NLO stems principally from a steadfast commitment to professionalism and the ethical practice of law that leads many lawyers to draw the line at forbidding nonlawyers, who may

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44. Letter from John A. Tomasino, Clerk of Ct., Sup. Ct. of Fla., to Joshua E. Doyle, Exec. Dir., Fla. Bar (Mar. 3, 2022), https://www.abajournal.com/files/Florida_Supreme_Court_letter.pdf [https://perma.cc/L73D-HTHL]. The court has given the state bar until December 30, 2022 to provide alternative proposals for "how the rules governing the practice of law in Florida may be revised to improve the delivery of legal services to Florida's consumers and to assure Florida lawyers play a proper and prominent role in the provision of these services." *Id.* at 1-2 (quoting Stewart et al., *supra* note 40); *see* Mark D. Killian, *Supreme Court Declines to Adopt Recommendations on Nonlawyer Ownership, Fee Splitting, and Expanded Paralegal Work*, FLA. BAR (Mar. 8, 2022), https://www.floridabar.org/the-florida-bar-news/supreme-court-declines-to-adopt-recommendations-on-nonlawyer-ownership-fee-splitting-and-expanded-paralegal-work [https://perma.cc/V8AH-4NV7].

45. Sam Skolnik, *D.C. Bar Law Firm Ownership Rules May Be in for More Changes*, BLOOMBERG L. (Sept. 3, 2020, 3:21 PM), https://news.bloomberglaw.com/business-and-practice/d-c-bar-law-firm-ownership-rules-may-be-in-for-more-changes [https://perma.cc/CW8J-9WGH].

46. D.C. RULES OF PRO. CONDUCT r. 5.4(b) & cmt. 8 (D.C. Bar Ass'n 2007).

47. Sam Skolnik, *N.Y., Others Mull Moves to Allow Companies to Co-Own Law Firms*, BLOOMBERG L. (Nov. 23, 2020, 4:45 PM), https://news.bloomberglaw.com/business-and-practice/n-y-others-mull-moves-to-allow-companies-to-co-own-law-firms [https://perma.cc/Z7JS-T7ZZ].

48. *See, e.g.*, Baxter, *supra* note 4, at 251-54.

have interests that are at odds with their clients, from owning or running legal practices.[49]

In order to be admitted to the bar, lawyers must spend many hours completing courses in professional ethics that impress upon them the duty they owe clients in providing independent advice and avoiding conflicts of interest. Lawyers must pass rigorous admission exams and take an oath to uphold their ethical duties. Indeed, law-school graduates in nearly every U.S. jurisdiction cannot become members of the bar without passing the Multistate Professional Responsibility Exam — a two-hour exam focused exclusively on professional ethics in the practice of law.[50] Lawyers face serious consequences for violating these rules, including suspension or disbarment.[51] Although nonlawyers may, of course, have their own ethical codes, they do not face the same consequences for ethical violations (for example, they cannot be disbarred), making it difficult to ensure that nonlawyers would uphold the same ethical duties if they were allowed to be involved in providing legal services. More importantly, however, most lawyers hold sacrosanct their ethical duties to their clients and the legal profession, and they fear that reforming Rule 5.4 would weaken their ability to preserve those standards.[52]

It is unclear how legal-ethics standards will be enforced when nonlawyers — and in some cases, not even live persons — are providing legal advice. For example, 1Law, an ABS in Utah's regulatory sandbox, describes itself as a "[l]aw firm with nonlawyer investment offering services via chatbot, nonlawyer assistants, and lawyer employees across a range of consumer services."[53] Even assuming

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49. *See, e.g.*, Sam Skolnik, *California Bar Swamped by Comments Opposing Ethics Rule Changes*, BLOOMBERG L. (Aug. 6 2019, 6:11 PM), https://news.bloomberglaw.com/us-law-week/california-bar-swamped-by-comments-opposing-ethics-rule-changes [https://perma.cc/AJZ7-SWW5] (quoting an immigration lawyer from California stating that the rule change "would empower and allow non-lawyers to take advantage of vulnerable populations needing legal representation"); Letter from Michael G. Tanner to Hon. Charles T. Canady, *supra* note 43, at 3 ("Board members expressed concern that allowing nonlawyers to own interests in law firms inevitably would compromise the independence of the self-regulated legal profession by creating an inherent conflict of interest between lawyer-owners of firms, who must adhere to ethical obligations and advance principles of public service, and unregulated nonlawyer-owners, whose primary goal would be to increase firm profitability.").

50. *Multistate Professional Responsibility Exam*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mpre [https://perma.cc/VG4C-BB3C].

51. *See* MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020); MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2020).

52. Baxter also recognizes the sense of duty and professionalism to which lawyers adhere, noting, "[L]awyers, I contend, see themselves as true professionals first and businesspeople second." Baxter, *supra* note 4, at 254.

53. OFF. LEGAL SERVS. INNOVATION, *supra* note 31. A chatbot is software that simulates human-like conversations, typically through text messages.

that 1Law intends to use chatbots only to answer the simplest of legal questions, 1Law cannot: (1) prevent consumers from asking a chatbot a complex legal question (and expecting a complex answer); (2) ensure that customers will understand that the chatbot is not operated by a lawyer; or (3) teach a chatbot to respond to the nuances embedded in a consumer's legal question, even one that is seemingly simple. For example, if a consumer asked, "Do I need a lawyer to get a divorce?" the chatbot might simply explain that a person is permitted to proceed through divorce litigation without a lawyer. In contrast, a lawyer would answer—as they are often mocked for doing—"it depends" and consider the context of whether that individual's divorce merits engaging a lawyer. Legal-technology firms like Rocket Lawyer and LawPal also emphasize the fact that their services are primarily provided by software that is only *assisted* by lawyers. LawPal, for example, describes itself as providing "[s]oftware-facilitated legal document assistance."[54] Here, again, lawyers have recognized the risk that consumers—particularly those least familiar with the legal system—will not be equipped to properly utilize this sort of software and will lack the information needed to adequately evaluate their legal needs such that the resulting legal documents may not be suited to the person's circumstances.

An overriding concern relates to fee sharing, which lawyers worry will lead to less control over their practices, particularly when it comes to decisions about settling contested litigation. For example, nonlawyer owners of law firms, who are not bound by legal-ethics rules, may be incentivized to push for a settlement in which they have an interest in sharing fees rather than continuing litigation to obtain the best result for the client. Other concerns include advertising for legal services in a way that violates the Rules of Professional Conduct,[55] the unauthorized practice of law,[56] conflicts of interest arising from the lawyer's connection with nonlawyers,[57] and the preservation of client confidences through attorney-client privilege.[58]

Opposition to reforming Rule 5.4 initially came to prominence in 2000 when the ABA rejected the June 8, 1999 Report and Recommendations of the ABA Commission on Multidisciplinary Practice.[59] That Commission had proposed,

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54. *Id.*

55. *See* MODEL RULES OF PRO. CONDUCT rs. 7.1, 7.2 & 7.3 (AM. BAR ASS'N 2020).

56. *See id.* r. 5.5.

57. *See id.* rs. 1.7, 1.8 & 1.9.

58. *See id.* r. 1.6.

59. Comm'n on Multidisciplinary Prac., *Report to the House of Delegates*, AM. BAR. ASS'N (June 8, 1999), https://web.archive.org/web/20000510230706/http:/www.abanet.org/cpr/mdprecommendation.html [https://perma.cc/C7SA-R3NH]; *see* Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, *in* MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS 2-1, 2-4 (Stephen J. McGarry ed., 2002).

among other things, that lawyers be permitted to form business relationships with nonlawyers and to allow entities owned or controlled by nonlawyers to engage in multidisciplinary practice.[60] In 2000, the New York State Bar Association (NYSBA) issued the MacCrate Report, a "seminal and expansive" report which encouraged the ABA to reject allowing nonlawyers to engage in multidisciplinary practice.[61] In terms of nonlawyer investment in law firms, the report concluded that the arguments in favor of investment were not convincing because "[t]he type of law firm most likely to benefit from outside investment—*i.e.*, smaller firms and firms facing shortfalls in revenues—'are not likely candidates for outside equity investment.'"[62] As to NLO, the report reiterated that lawyers may work with nonlawyer professionals so long as lawyers retain ultimate control over the services provided to clients.[63] In July 2000, following the MacCrate Report, the ABA House of Delegates soundly rejected the Multidisciplinary Practice Commission's recommendations to revise Rule 5.4 by a margin of three-to-one.[64] The ABA concluded that sharing legal fees with nonlawyers and the ownership and control of law firms by nonlawyers were inconsistent with the core values of the legal profession.[65]

Over the next two decades, despite pressure to revise Rule 5.4 and increasing public interest in the debate over NLO, the ABA repeatedly rejected attempts to ease Rule 5.4's restrictions. For example, in 2002, the ABA's Ethics 2000 Commission recommended no significant change to Model Rule 5.4.[66] In 2012, the ABA Commission on Ethics 20/20 again declined to propose changes to ABA

60. Comm'n on Multidisciplinary Prac., *supra* note 59, at ¶¶ 1-2; *see* Terry, *supra* note 59, at 2-13 to -18.

61. *Report of the Task Force on Nonlawyer Ownership*, N.Y. STATE BAR ASS'N 3 (Nov. 17, 2012), https://nysba.org/app/uploads/2020/02/NLOReportFinal.pdf [https://perma.cc/AQX4-VUWT]; Report of the Special Comm. on the L. Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*, N.Y. STATE BAR ASS'N (April 2000), https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=26673 [https://perma.cc/48AM-ZLAY] [hereinafter MacCrate Report].

62. N.Y. STATE BAR ASS'N, *supra* note 61, at 8 (quoting MacCrate Report, *supra* note 61, at 378); *see* MacCrate Report, *supra* note 61, at 377-79.

63. N.Y. STATE BAR ASS'N, *supra* note 61, at 10.

64. *Id.* at 15; Terry, *supra* note 59, at 2-5.

65. Terry, *supra* note 59, at 2-5 to -6.

66. Comm. on Eval. of the Rules of Pro. Conduct, *Report on ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (2002), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.pdf [https://perma.cc/D43Z-M2XW].

policy prohibiting nonlawyer ownership of law firms.[67] In 2020, the ABA House of Delegates maintained its position that no revisions should be made to Rule 5.4, even while approving Resolution 115 calling on states to consider innovative approaches to solving the access-to-justice crisis.[68] Resolution 115 aimed to address the crisis of access to civil justice by encouraging states "to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public."[69] Although the report accompanying Resolution 115 originally contemplated the possibility of changes to Rule 5.4, after vigorous debate,[70] the final Resolution explicitly stated that "*nothing* in this Resolution should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject."[71] The resolution that was adopted recognized that "regulatory innovations that are emerging around the US are designed to spur new models for competent and cost-effective legal-services delivery, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with public protection."[72] Ultimately, all the resolution called for was data collection and a study of what was happening in states like Arizona and Utah that had already adopted NLO.[73]

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67. Press Release, Am. Bar Ass'n, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.pdf [https://perma.cc/Q3C6-CAJC].

68. *See* Matt Reynolds, *To Increase Access to Justice, Regulatory Innovation Should Be Considered, ABA House Says*, ABA J. (Feb. 17, 2020, 5:40 PM CST), https://www.abajournal.com/news/article/resolution-115 [https://perma.cc/GPC9-GQS3].

69. *Resolution 115: Encouraging Regulatory Innovation*, AM. BAR ASS'N (Feb. 17, 2020), https://www.americanbar.org/groups/centers_commissions/center-for-innovation/Resolution115 [https://perma.cc/3ZFS-8G22].

70. *See* Reynolds, *supra* note 68.

71. AM. BAR ASS'N, *supra* note 69 (emphasis added).

72. Don Bivens, *Report to the House of Delegates: Revised Report*, AM. BAR ASS'N CTR. FOR INNOVATION 3 (Feb. 2020), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/r115resandreport.pdf [https://perma.cc/U2ZA-2Z52]. Substantial revisions were made to this Report before this resolution was approved by the ABA House, including eliminating language relating to nonlawyer partnerships and nonlicensed attorneys. *See* Reynolds, *supra* note 68.

73. Bivens, *supra* note 72.

Most recently, at the ABA's annual meeting in 2022, the ABA House of Delegates overwhelmingly passed Resolution 402, which reaffirmed the ABA's commitment to existing ethical values and its steadfast opposition to NLO.[74] The Resolution restated the ABA's commitment to two key principles and values: (1) "sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession;" and (2) prohibitions against lawyers "sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised."[75] The report accompanying the Resolution emphasized that one of the primary reasons for reaffirming the ABA's opposition to rule changes related to concerns about the ethics and accountability of lawyers:

> Lawyers are subject to the highest ethical standards and are accountable when they do not meet them. These requirements are not true of non-lawyers. Courts have repeatedly held that Rules of Professional Conduct not only control the conduct of bar members, but also express an important public policy protective of society. . . . Among other things, these rules oblige a lawyer to use supervisory authority over non-lawyers in the law firm to assure compliance with ethical constraints because bar authorities have no jurisdiction over non-lawyers. Where the non-lawyers are not subject to a lawyer's management authority but share in the fee, there is no way to assure that the twin pillars of confidentiality and conflicts of interest are observed by the non-lawyer. Any state rules of professional conduct will not have the salutary effect of protecting the public to the extent they are inapplicable to a participant in the provision of legal services not required to follow them.[76]

Resolution 402 did indicate that nothing in that resolution was meant to override Resolution 115,[77] which had called on states to keep data on any efforts

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74. Skolnik, *supra* note 3. Baxter criticizes comments made by the author of this Essay that passage of this resolution was a "victory for all lawyers." Baxter, *supra* note 4, at 239. Contrary to Baxter's suggestion, this comment was not anticonsumer but rather a recognition that the ABA had acted to preserve the independence of the legal profession, which in turn helps to protect consumers.

75. *Resolution 402*, AM. BAR ASS'N (Aug. 8-9, 2022), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/402-annual-2022.pdf [https://perma.cc/NFB8-22P4].

76. Rory T. Weiler et al., *Resolution 402: Report*, ILL. STATE BAR ASS'N ET AL. 5 (Aug. 2022), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/402-annual-2022.pdf [https://perma.cc/NFB8-22P4].

77. AM. BAR ASS'N, *supra* note 75.

at regulatory reform.[78] Nonetheless, it is believed that the passage of Resolution 402 will help the fight against NLO in other states that consider embracing it.[79] Moreover, the landslide vote in favor of Resolution 402 provides further evidence that lawyers across the country are strongly opposed to NLO.[80]

The ABA's continued rejection of NLO and its repeated focus on ethical concerns mirror longstanding and significant opposition by state bars to such reforms. For example, in 2012, a NYSBA Task Force on NLO surveyed New York lawyers working in a variety of settings, including small-firm practitioners, large-firm practitioners, and corporate counsel.[81] The survey results were clear: lawyers opposed NLO across the board. 78.4% of all respondents opposed NLO, and 77.1% of lawyers reported they would not consider granting ownership interests to nonlawyers (in the case of law firms) or would not consider it beneficial (in the case of in-house counsel).[82] Many lawyers, especially those in small firms or solo practices, commented on the burden that NLO would impose on them, particularly in regards to conflicts of interest.[83]

The State Bar of California's Board of Trustees received similar negative reactions in 2019 when it invited comments on potential reforms, including a regulatory sandbox.[84] Approximately 73% of the commenters opposed one or more of the state bar's proposals, which included expanding NLO.[85] Comments from legal professionals opposing NLO reflected similar concerns to those raised by

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78. AM. BAR ASS'N, *supra* note 69.

79. For example, the California Lawyers Association commended the ABA's decision to pass Resolution 402 and reaffirm the notion that the "sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession." CAL. LAWS. ASS'N, *supra* note 39.

80. *See* Matt Reynolds, *Sharing Fees with Nonlawyers Is Inconsistent with Profession's 'Core Values,' ABA House Says*, ABA J. (Aug. 9, 2022, 2:43 PM CDT), https://www.abajournal.com/web/article/resolution-402-aba-house-of-delegates-position-on-sharing-of-legal-fees-with-nonlawyers [https://perma.cc/SQQ7-KT9C] (noting that Resolution 402 "passed overwhelmingly").

81. N.Y. STATE BAR ASS'N, *supra* note 61, at 39-43.

82. *Id.* at 43-44, 48. The survey received over 1,200 responses. *Id.* at 39-40.

83. *Id.* at 49-50.

84. *See* Cheryl Miller, *California Lawyers Slam Proposals for Fee-Sharing, Nonattorney Ownership*, LAW.COM (Sept. 23, 2019, 10:25 PM), https://www.law.com/therecorder/2019/09/23/california-lawyers-slam-bar-proposals-for-fee-sharing-non-attorney-ownership [https://perma.cc/XBK8-H44T]; Skolnik, *supra* note 49 (quoting a comment from a California lawyer arguing that the rule changes "would empower and allow non-lawyers to take advantage of vulnerable populations needing legal representation").

85. *State Bar of California Task Force on Access Through Innovation of Legal Services: Final Report and Recommendations*, STATE BAR OF CAL. TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS. 13 (Mar. 6, 2020), https://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf [https://perma.cc/GVV9-54PJ].

the New York survey respondents, including: concerns regarding clashes between the motivation for profit and the best interests of clients and the potential for unqualified nonlawyers to flood the market; a lack of regulation of the provision of legal services by nonlawyers; and a preference for "less radical initiatives for improving access to justice," such as more funding for legal services programs, that commenters felt were "not being adequately explored."[86]

Similarly, in Florida, a proposal to allow NLO and fee sharing with nonlawyers was unanimously opposed by the Florida Bar's Board of Governors in 2021 and by many Florida lawyers who commented on the proposal. Members of the state's Board of Governors expressed their substantial concerns over the proposal at its November 2021 meeting.[87] These included "profound conflicts of interest . . . between lawyers and their ethical obligations and nonlawyers that the court can't regulate who are entirely driven by profits," "no real evidence that the proposal will improve access to justice," threats to the independent judgment of lawyers, and significant opposition from members of the bar.[88] The Florida Bar also reported receiving comments on the proposal from hundreds of lawyers, with the vast majority opposing the special committee's main proposals.[89] Opponents included four bar sections, various local bar associations, and twenty former bar presidents.[90] The Board voted unanimously to reject any amendment to the rules prohibiting NLO.[91]

It is thus evident that lawyers—who are uniquely well equipped to assess the ethical implications of legal reforms—have long harbored significant concerns about the dangers posed by NLO and have, for the last two decades, successfully opposed most attempts to revise Rule 5.4.[92] There is no indication that this opposition is likely to subside despite increased interest by certain groups in easing the rules that prohibit nonlawyers from holding financial stakes in law firms.

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86. *Id.*

87. Gary Blankenship, *Board of Governors Unanimously Opposes Non-Lawyer Firm Ownership, Fee Splitting Ideas*, FLA. BAR NEWS (Nov. 10, 2021), https://www.floridabar.org/the-florida-bar-news/board-of-governors-unanimously-opposes-non-lawyer-firm-ownership-fee-splitting-ideas [https://perma.cc/A7YE-9H7F].

88. *Id.*

89. Gary Blankenship, *Hundreds of Bar Members Oppose Special Committee Proposals*, FLA. BAR NEWS (Nov. 4, 2021), https://www.floridabar.org/the-florida-bar-news/hundreds-of-bar-members-oppose-special-committee-proposals [https://perma.cc/TA5A-2FN9].

90. *Id.*

91. *Regular Minutes: Nov. 8, 2021*, FLA. BAR BD. OF GOVERNORS 3, https://www-media.floridabar.org/uploads/2021/12/Regular-Minutes-November-8-2021-meeting.pdf [https://perma.cc/3WAQ-SP33].

92. Baxter views this commitment to preserving lawyers' ethical obligations as a failure by lawyers to take "meaningful action to remedy the [access to justice] crisis." Baxter, *supra* note 4, at 229. This unfair and unsupported view is debunked below. *See* discussion *infra* Section III.A. In

III. DEBUNKING THE ARGUMENTS IN FAVOR OF NLO

Proponents for loosening restrictions against NLO, including Baxter, typically raise two connected arguments in favor of their proposed changes: (1) that nonlawyers will increase innovation in the practice of law and delivery of legal services; and (2) that this innovation will increase access to justice by expanding the amount and availability of low-cost legal services that will be available to indigent populations. Baxter takes this a step further and insists that reforming Rule 5.4 is the *only way* to improve access to justice and that lawyers who oppose NLO are actively seeking to prevent the expansion of legal services.[93]

These arguments are unpersuasive and unsupported by data that would justify such a significant change in a longstanding rule of professional conduct. There is no dispute that a disturbing access-to-justice gap exists in the United States – one that most state bars have been fighting vigorously to ameliorate.[94] However, there is no evidence that NLO has made or will make a dent in this crisis. Nor is there any proof that involving nonlawyers is necessary to promote innovation in the legal profession. Moreover, unlike proponents of loosening Rule 5.4's restrictions – who insist on looking for ways to outsource the provision of legal services to those without the necessary training – many lawyers are devising and implementing innovative ways to increase the provision of legal services *by lawyers* without risk of undermining their ethical obligations. As this Part describes, advocates of NLO have presented only theoretical arguments about *possible* benefits that changes to the Rule *might* produce. Thus, Baxter and other advocates for expanding NLO fail to present a compelling case that such reform is actually needed.

A. Access to Justice

Advocates of NLO have not presented any compelling evidence that NLO will improve access to justice in a meaningful way. Rather, the benefits of NLO are generally oversold and potentially divert attention from more promising strategies.

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fact, lawyers have played crucial roles in: (1) enforcing ethical rules and doing so in a manner that promotes meaningful access to legal services; (2) providing substantial pro bono services to the needy; and (3) advocating for government funding of indigent legal services.

93. Baxter, *supra* note 4, at 248.

94. *See Justice for All: A Roadmap for 100% Civil Access to Justice*, NAT'L CTR. FOR STATE CTS. 1 https://www.ncsc.org/__data/assets/pdf_file/0031/64975/5-year-report.pdf [https://perma.cc/T6TC-LBU6] (noting that more than seventy percent of low-income households face legal problems each year and in three out of four cases people are unrepresented).

As a threshold issue, it is important to define what I mean by "access to justice." It seems Baxter and some who share his views on NLO are referring to *any* provision of legal work to *any client*.[95] This is not the mainstream view in the legal profession where "access to justice" typically refers to providing low cost or free legal services to indigent persons, particularly those who need representation in court cases.[96] But using such a broad definition of "access to justice" as mere access to an increased amount of legal services is the only way that Baxter and those who agree with him can argue that NLO effectively increases access to justice. When one looks to access to civil legal services for the poor, it is clear that NLO has not narrowed the justice gap.

The fact that NLO has failed to improve access to justice is evident in jurisdictions that have expanded NLO. Despite being early adopters of NLO reform, there is no clear evidence that low- and moderate-income populations in the United Kingdom or Australia have received greater access to legal services.[97] Indeed, as one legal scholar has explained, since making their reforms, the primary "new types of actors provid[ing] legal services" in both countries are "law firms that are listed on stock exchanges, law firms owned by major insurance companies, and legal services offered by brands better known for their grocery stores."[98] Not surprisingly, despite these profit-focused entities entering the legal field, there has been no noticeable reduction in either country's justice gap.[99]

Similarly, in Utah and Arizona, where Rule 5.4 has been relaxed or abrogated, most approved entities are not tackling access-to-justice issues. Instead, those

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95. *See* Baxter, *supra* note 4, at 248-49.

96. *See, e.g.*, NAT'L CTR. FOR STATE CTS., *supra* note 94, at 1 ("[C]ivil legal problems often include evictions, mortgage foreclosures, domestic violence, wage theft, child custody, child support, and debt collection.").

97. *See Under New Management: Early Regulatory Reform in the United Kingdom and Australia*, PRACTICE (Jan./Feb. 2021), https://thepractice.law.harvard.edu/article/under-new-management [https://perma.cc/SBC2-SDTQ].

98. Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 5 (2016).

99. *See, e.g.*, Karen E. Rubin, *Non-Lawyer Ownership of Law Firms is Trending—But Is It a Good Idea?*, OHIO BAR (Mar. 22, 2021), https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2021-ohio-lawyer/non-lawyer-ownership-of-law-firms-is-trending--but-is-it-a-good-idea [https://perma.cc/TA4A-FGDC] ("At least one scholar, drawing on case studies and quantitative data derived from the U.K. and Australian experiences, has argued that 'the access[-to-justice] benefits of non-lawyer ownership are generally oversold, potentially diverting attention from more promising access strategies.'" (quoting Robinson, *supra* note 98, at 1) (alteration original)).

states have merely allowed nonlawyers to profit from providing legal services.[100] For example, legal-technology entities such as Savvi Technologies put the onus on consumers—who lack legal training—to manage their legal needs themselves. According to Utah's Office of Legal Services Innovation, Savvi Technologies is "[a] legal technology company with a platform that assists in the formation of documents and then allows the consumer to manage their organizational needs ongoing."[101] Advocates of NLO have not explained how it improves access to justice to provide consumers with just half of what they need—that is, legal forms without a lawyer to explain or help complete them. Similarly, Hello Divorce targets "[c]onsumers wishing to manage their divorce themselves," most likely individuals who cannot afford a divorce attorney.[102] While Hello Divorce may save these individuals money, it deprives them of the sound legal advice they may need to navigate the dissolution of a marriage. LawHQ, another Utah sandbox ABS, offers software-development services to block spam telephone calls.[103] Software to block spam calls might be useful, but blocking telemarketers is certainly not the top priority for most people seeking affordable or free legal services.

The blurred line between nonlawyers offering legal services and using legal services merely to augment their existing profit-making business is exemplified by Trajan Estate, LLC, an estate-planning firm in Arizona that is run by an individual who also owns a financial-planning firm.[104] This ABS entity therefore caters to wealthy individuals who can afford an array of estate-planning legal services. Moreover, Trajan Estate's application for approval as an ABS structure notes that "estate planning clients of the ABS will be encouraged also to address

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100. It is worth noting that in his analysis, Baxter refers to "legal service"—a term usually reserved for legal aid and similar services to the indigent—as including *all* legal services that are provided by ABS entities. Baxter, *supra* note 4, at 248-56. This does little to show that ABS entities have increased access to justice to the needy.

101. OFF. LEGAL SERVS. INNOVATION, *supra* note 31.

102. Off. Legal Servs. Innovation, *Recommendation to the Court App No. 0044—Hello Divorce, Inc.*, UTAH SUP. CT. 1 (Apr. 22, 2021), https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Hello-Divorce.pdf [https://perma.cc/6H2U-48FM].

103. OFF. LEGAL SERVS. INNOVATION, *supra* note 31.

104. *See* Comm. on Alternative Bus. Structures, *Meeting Agenda—Tuesday, March 9, 2021*, ARIZ. SUP. CT. (Ariz. 2021), https://www.azcourts.gov/LinkClick.aspx?fileticket=BaGkF1Svu9c%3D&portalid=0 [https://perma.cc/XW3M-FKB5] (recommending Trajan Estate for ABS licensure in Arizona); Trajan Wealth, *Trajan Estate Is Approved by Arizona Supreme Court as the First Alternative Business Structure*, CISION PR NEWSWIRE (Mar. 24, 2021, 6:14 PM ET), https://www.prnewswire.com/news-releases/trajan-estate-is-approved-by-arizona-supreme-court-as-the-first-alternative-business-structure-301255377.html [https://perma.cc/5KZ4-CWJB].

their financial planning."[105] Since nonlawyers are not bound by the same ethical rules as lawyers, there is no safeguard in place to prevent clients seeking legal assistance for their estate planning needs from Trajan Estate from also being "encouraged" in unethical ways to use and pay for the services of the financial advisory firm that is connected with that ABS. Moreover, the lawyers at Trajan Estate have every financial incentive to steer their clients to the affiliated investment advisor—whether it benefits their clients or not.

Arizona has approved many other ABS entities that provide primarily business and financial services, including Arete Financial, LLC (tax and accounting services) and BOSS Advisors (tax, accounting, and business services such as entity formation and dissolution, "key performance indicator analysis," due diligence, and business-plan analysis).[106] Although each of these entities claims they can improve access to affordable legal services, none offers the sorts of legal services that are typically in high demand among individuals seeking free or reduced-cost legal services, such as assistance with family-law disputes, housing issues, benefits advice, criminal legal issues, and immigration.[107] Moreover, their target clients are individuals and businesses with means, not the indigent.

Another area where ABS growth has been significant in Arizona and Utah is online legal-technology companies. These entities, like Rocket Lawyer in Utah, offer individuals and small-to-medium-sized businesses online legal services primarily by providing software that helps them complete legal forms and provides answers to discrete legal questions.[108] At core, these services leave it up to the client, typically without the input of a lawyer, to prepare legal documents. Although these entities have lawyers available to assist customers with issues that go beyond the capabilities of the software, it remains unclear whether these on-call attorneys can ensure that the ethical standards imposed on lawyers are met. Nothing about Rocket Lawyer's promise that getting legal advice will be "quick and easy[]" indicates that there will be time and consideration given to abiding by ethical standards.[109]

It is unsurprising that these profit-driven ABS entities are unlikely to cure access-to-justice issues in this county. The widest gap in access to justice is for legal services for low- and middle-income Americans, and the legal services they

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105. Application for Initial License of Alternative Business Structure, ARIZ. SUP. CT. (Dec. 30, 2020) (Trajan Estate, LLC application for ABS approval) (on file with author).

106. ARIZ. JUD. BRANCH, *supra* note 24.

107. ABA Standing Comm. on Pro Bono and Pub. Serv., *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers*, AM. BAR ASS'N 14 fig.10 (Apr. 2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [https://perma.cc/TR8X-84HT].

108. *See* ROCKET LAWYER, INC., https://www.rocketlawyer.com [https://perma.cc/3JZM-P7NH].

109. *Id.*

need are typically not the profitable areas of law to which nonlawyers are attracted.[110] Areas with the greatest need include family law, debt-collection cases, landlord-tenant suits, and mortgage foreclosures.[111] ABSs in Arizona and Utah do not focus on providing attorneys to defend these types of litigations, and the vast majority of them do not even assist with court litigation at all.[112]

With regard to a few ABS entities that, at least on paper, appear to provide services that could improve access to justice—such as the Utah ABS, Trajector Legal, which offers legal services to veterans who have suffered personal injuries—it is unclear whether lawyers or nonlawyers control the delivery and quality of the legal services provided by that entity.[113] Trajector Legal plans to structure its ABS with fifty percent or more nonlawyer ownership through a holding company.[114] While Utah has an Innovation Office that oversees its ABS sandbox, the Innovation Office cannot dictate or monitor how these entities provide legal services to the public. Because nonlawyers are not bound by the same rules of professional conduct as lawyers, this modest increase in access to legal services through ABS entities likely risks trading lower prices for unacceptably low quality. But legal services are not commodities for which it is acceptable to have a price/quality spectrum that increases access with a lower quality product. Significantly, in the case of Trajector Legal, there is already an abundance of lawyers who handle personal-injury cases on contingency-fee arrangements. As a result,

110. C. Thea Pitzen, *Can Nonlawyers Close the Legal Services Gap?*, AM. BAR ASS'N (Apr. 21, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/april-2022/can-nonlawyers-close-legal-services-gap-two-states-remove-ban-fee-sharing-partnerships-nonlawyers [https://perma.cc/AF9Z-TYKQ].

111. *See* ABA Standing Comm. on Pro Bono and Pub. Serv., *supra* note 107, at 13-14; Lewis Creekmore, Ronké Hughes, Lynn Jennings, Sarah John, Janet LaBella, C. Arturo Manjarrez, Michelle Oh, Zoe Osterman & Marta Woldu, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 22 (June 2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/M3R5-DFEK].

112. *See* ARIZ. JUD. BRANCH, *supra* note 24, https://www.azcourts.gov/Portals/26/Approved%20ABS%20summaries.pdf [https://perma.cc/9MNB-4CKR]; OFF. LEGAL SERVS. INNOVATION, *supra* note 31.

113. OFF. LEGAL SERVS. INNOVATION, *supra* note 31; *see* Off. Legal Servs. Innovation, *Sandbox Authorization Packet: Legal Claims Benefits*, UTAH SUP. CT. [3-4] (Mar. 22, 2021), https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Legal-Claims-Benefits.pdf [https://perma.cc/2ANN-MUCN] (approving Trajector Legal under its former business name "Legal Claims Benefits, LLC").

114. Off. Legal Servs. Innovation, *supra* note 113, at [3].

this is not the sort of area in which those with deserving cases lack access to counsel.[115]

Baxter claims that "most people and small businesses cannot find anyone to help them understand their rights and obligations, make their legal decisions, or represent them in court" and that they "have less experience with the law, less understanding of their rights and obligations, and less preparation to navigate the legal system."[116] He then bemoans "the flood of unrepresented litigants" in the courts and opines that at a time when "confidence in our government [is] at historic lows, the day-to-day perception among people and small businesses that the judicial system only works for the banks, insurance companies, and landlords reduces even further their belief that 'justice for all' is a reality in America."[117]

Critically, Baxter provides *no support* for his proposition that NLO will help solve any of the problems he describes. Although it is undisputed that a huge gap in access to legal services exists in the United States, none of the inequities Baxter cites have been shown to be solved by increasing the availability of NLO. As noted above, the vast majority of ABS entities licensed in Arizona or Utah do not offer to represent indigent clients *in court*. Only a few offer any type of courtroom representation, and those that do are primarily focused on personal-injury and mass-tort litigation, which are areas of law that are already well served by lawyers in private practice, often with contingency-fee arrangements that do not require clients to pay any legal fees unless and until they win money damages.[118] Thus, increasing NLO will not decrease the number of unrepresented individuals in court—where the access-to-justice gap is widest.[119] The software programs

115. Similarly, it was recently announced that the plaintiffs' personal-injury firm, Scout Law Group, had formed an ABS with a Miami-based investment firm to expand the firm's personal-injury and mass-tort practice, a field that is already highly concentrated by lawyers offering contingency-fee options to clients. Kevin Penton, *Ariz. Law Firm Partly Owned by Investment Firm Launches*, LAW360 (Sept. 21, 2022, 4:02 PM), https://www.law360.com/pulse/articles/1532573 [https://perma.cc/WKU6-UAGB].

116. Baxter, *supra* note 4, at 229, 231.

117. *Id.* at 232 (footnote omitted).

118. *See e.g.*, William R. Towns, *U.S. Contingency Fees: A Level Playing Field?*, WORLD INTELL. PROP. ORG. (Feb. 2010), https://www.wipo.int/wipo_magazine/en/2010/01/article_0002.html [https://perma.cc/PUQ4-9RAC] (contingency-fee arrangements are "[o]ften used in personal injury, medical malpractice and commercial collection cases"); Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON., 213, 213 (1983) ("Contingent fees are the dominant form of payment for plaintiff attorneys in personal injury litigation in the United States.").

119. One recent study found that at least one party was self-represented in the majority of civil matters in U.S. courts. Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR STATE CTS. iv (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx [https://perma.cc/88DP-VHYS].

or financial managers that consumers hire through an ABS entity do not possess the skills and qualifications to represent them in court in underrepresented cases; indeed, they do not even hold themselves out as such.

Baxter is correct that individuals and businesses with less experience in the law face a higher hurdle to understanding their rights and obligations under the law and how to navigate the legal system. However, he ignores the most logical solution to this problem: providing a lawyer who is well versed in legal practice and rules to advise them. These clients do not need an investment manager or a software system that requires them to fill in the critical terms of their own legal documents—such as what the ABS entities approved in Utah and Arizona commonly do.

It is also difficult to comprehend how involving more "banks, insurance companies," and other profit-driven entities in providing legal services, as Baxter advocates, would foster trust in the legal system among more Americans. If anything, turning the keys to law firms over to financial institutions that are not bound by the same ethical constraints as lawyers will increase public mistrust of the legal process—not reduce it.

Further, contrary to Baxter's notion that lawyers are doing little to improve access to justice, lawyers already provide enormous amounts of pro bono work and continue to look for ways to provide legal services to indigent clients for free. According to a 2018 ABA report, eighty-one percent of attorneys have provided pro bono services at some point in their careers.[120] Moreover, about eighty percent of the attorneys surveyed stated that they believed that providing pro bono services was somewhat or very important to their practice, and most attorneys in private practice who provided pro bono services were motivated to do so by their ethical obligations and professional duties.[121] This support for doing pro bono work is codified in Model Rule 6.1, which states, in part, that every lawyer "has a responsibility to provide legal services to those unable to pay."[122] Almost all states have adopted some version of this rule and encourage lawyers to complete at least fifty hours of pro bono work per year.[123] Law firms, law schools, corporate-counsel offices, and government law offices have worked toward integrating pro bono functions and policies into their day-to-day practice.

Local governments have also worked to adopt programs to foster lawyer involvement in legal work for the indigent. For example, NYSBA has "supported the New York City Council's 'Right to Counsel' legislation that provides free legal representation in eviction cases—a move that increased representation in

120. ABA Standing Comm. on Pro Bono and Pub. Serv., *supra* note 107, at 6.

121. *Id.* at 18, 34.

122. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2020).

123. ABA Standing Comm. on Pro Bono and Pub. Serv., *supra* note 107, at 3.

Housing Court from 1 percent to 40 percent."[124] In Massachusetts, lawyers can provide pro bono legal advice from their offices or homes by volunteering with Massachusetts Legal Answers Online, a project coordinated with the ABA.[125] Unlike proposals to expand NLO by revising Rule 5.4, these programs increase access to justice in concrete and specific ways that are targeted to those in need. One certainly would not expect for-profit entities such as Rocket Lawyer or Legal Zoom to provide their services for free to the indigent, and there is no evidence that they do so.

Baxter also places the onus of solving the access-to-justice problem exclusively on the shoulders of lawyers, positing that it is the duty of the profession to provide "legal service for all."[126] As Baxter would have it, lawyers need to adjust their practices to provide much-needed legal services, rather than considering other, potentially more effective alternatives to solve this societal problem. Although he asserts that it is the duty of state bars to ensure that every person has access to legal services, no other profession is tasked with such an expansive and expensive charge. Doctors are not held accountable for ensuring that every sick person has medical care; nor are accountants charged with ensuring that everyone has help filing their taxes; nor are real-estate developers tasked with ensuring that everyone has a home. That is because these are societal problems that require action on a much broader scale and are, thus, the responsibility of federal, state, and local governments. Baxter and others who advocate for reforming Rule 5.4 fail to acknowledge this key notion. Instead, looking to adopt and expand programs of the type described in Section III.B below is the best avenue for closing the access-to-justice gap.

In addition to ignoring solutions for legal services for the indigent outside of NLO, Baxter ignores the other existing avenues for legal assistance beyond pro bono services that would serve individuals and small businesses simply looking to obtain more affordable legal advice. The truth is that affordable options for legal assistance already exist in our country. For example, fee arrangements allow for flexibility in how a client pays for legal services.[127] For instance, the contingency-fee structure allows many Americans to obtain legal assistance with a wide array of legal matters without the financial burden of paying an hourly rate for

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124. Teitelbaum, *supra* note 32, at 27.

125. *Massachusetts: Free Legal Answers*, AM. BAR ASS'N, https://mass.freelegalanswers.org/Attorneys/Account/Agreement [https://perma.cc/8XK9-TSB8].

126. Baxter, *supra* note 4, at 239.

127. *See Alternative Fee Arrangements*, AM. BAR ASS'N, https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees [https://perma.cc/YVF7-V9XP] (noting that alternative fee arrangements provide resources to help lawyers make their "services more affordable, accessible and transparent to low-and moderate-income clients").

legal services.[128] Additionally, lawyers who represent clients in house closings or prepare routine wills are able to do so relatively inexpensively and often at a flat fee.[129]

The United Kingdom's experience with ABS provides a helpful example here. ABS firms licensed in the United Kingdom have been disproportionately concentrated in certain sectors, particularly the personal-injury field, where—between 2012 and 2013—ABS firms accounted for 33.5% of the market share.[130] Although the rush of ABS-licensed firms into the U.K. personal-injury market (which does not explicitly embrace contingency-fee arrangements) brought in new types of investors, it did almost nothing to increase access to personal-injury lawyers for those who could not afford an attorney. Before ABS entities were licensed in the United Kingdom, "[79%] of those who brought a personal injury matter in England and Wales reported they did not pay for their solicitor because the solicitor was compensated by their insurance company, was contracted under a no win no fee arrangement, or was provided through legal aid, a trade union, or some other source."[131] Because the United Kingdom has embraced a variety of options for expanding access to lawyers for affordable or free legal services, ABS has made little difference in addressing access to justice there. The same would likely be true in the United States, should the United States adopt more of the reforms advocated herein that are targeted at improving access to justice, rather than jumping to allow for-profit NLOs to enter the legal market.

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128. *See, e.g.*, *Fees and Expenses*, AM. BAR ASS'N (Dec. 3, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses [https://perma.cc/8AEV-DNRB] (noting that contingency fees are used "most often in cases involving personal injury or workers' compensation"); Towns, *supra* note 118 (noting that contingency-fee arrangements have become "a standard practice in the U.S. for financing certain types of civil lawsuits"); Danzon, *supra* note 118, at 213 ("Contingent fees are the dominant form of payment for plaintiff attorneys in personal injury litigation in the United States.").

129. Mary Randolph, *How Much Will a Lawyer Charge to Write Your Will?*, NOLO, https://www.nolo.com/legal-encyclopedia/how-much-will-lawyer-charge-write-your-will.html [https://perma.cc/TX8F-F6KS] ("It's very common for a lawyer to charge a flat fee to write a will and other basic estate planning documents. The low end for a simple lawyer-drafted will is around $300."); Gina Freeman, *Average Closing Costs in 2022: Complete List of Closing Costs*, MORTGAGE REPORTS (Jan. 21, 2022), https://themortgagereports.com/35800/guide-to-mortgage-closing-costs-what-average-mortgage-costs-are-and-how-to-keep-yours-low [https://perma.cc/7RC4-MFPS] (stating that attorney fees for house closings are "400+").

130. Robinson, *supra* note 98, at 20.

131. *Id.* at 25-26.

B. Lawyers Are Innovative

Advocates of expanding NLO also cannot show that nonlawyers need to be allowed to own law firms in order for the innovation to occur that they claim is required to improve access to justice. In fact, lawyers and nonlawyers are already working together — under existing ethics rules — to innovate legal services.

Moreover, as the ABA recognized in 2020 when passing Resolution 115,[132] innovation can and should occur *without* changing Rule 5.4. In its report, the ABA identified a number of innovative programs that are being promoted by members of the bar to expand access to legal services. Examples include online dispute resolution, new tools and forms of assistance for pro se litigants, expanded virtual court services, streamlined litigation processes, technology to facilitate pro bono work, and technology and innovation to help lawyers deliver their services more efficiently.[133] For instance, New York's Navigator Project allows nonlawyers to help unrepresented persons navigate the court system with support from members of the New York bar.[134] The Navigator Program does not send nonlawyers into the courtroom or ask them to provide legal advice; rather, it utilizes nonlawyer volunteers to answer questions about how the court system works and where to find certain information.[135] Alaska and Hawaii — states with large rural populations — have also instituted similar legal-navigator programs offering assistance in navigating family-law and housing problems, such as divorce, child custody and eviction.[136] Virtual legal-advice clinics, like Massachusetts Legal Answers Online and the ABA's Free Legal Answers website, broaden the involvement of attorneys in providing high-quality legal assistance.[137] The ABA's Free Legal Answers program, for example, allows users to post civil legal questions that are answered by pro bono attorneys licensed in the poster's state. Topics covered include those most commonly requested by pro bono clients: family, divorce, custody, housing, eviction, homelessness, consumer-rights, financial-assistance, employment, unemployment, health-and-disability, civil-rights, income-maintenance, juvenile, and education law.[138] Additionally, New York's Legal Information for Families Today program provides legal forms in

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132. AM. BAR ASS'N, *supra* note 69.

133. Bivens, *supra* note 72.

134. N.Y.C. Hous. Ct., *Court Navigator Program*, NYCOURTS, https://nycourts.gov/courts/nyc/housing/rap_prospective.shtml [https://perma.cc/3WB3-PAZM].

135. *Id.*

136. Teitelbaum, *supra* note 32, at 28.

137. *Free Legal Answers*, AM. BAR ASS'N, https://abafreelegalanswers.org [https://perma.cc/HG2C-PB2S].

138. *Id.*

numerous languages to litigants in family court and offers live chat hotlines to answer questions.[139] Unlike for-profit ABS entities such as Rocket Lawyer and Law Pal, which seek to use technology to eliminate a lawyer's role in providing legal services, these innovative programs seek to use technology to improve services for litigants who otherwise could not afford a lawyer.

In addition to these innovative methods of providing needed legal services to those who otherwise lack access to such services, law firms have been developing internal tech incubators to improve their delivery of services. Indeed, one report indicates that alternative legal-services providers formed by law firms are fast-growing participants in the market.[140] For example, in June 2022, Cleary Gottlieb Steen & Hamilton LLP announced the launch of an internal entity called ClearyX, described as a new platform "designed to reimagine how legal services can be delivered using innovative combinations of people, process and project-management discipline, augmented by a range of technologies."[141] ClearyX aims "to explore the use of existing and emerging legal technologies and act as an incubator for new products, processes and services that can improve client experiences and increase efficiency through flexible business models and pricing."[142] The availability of these innovative programs to increase access to legal assistance shows that, contrary to Baxter's thesis, lawyers are quite capable of implementing "new process design, new service models, new operating models, new financial models, new software, and new marketing strategies" as well as generating "new ideas for how to market to clients not accustomed to using lawyers, how to deliver quality service at much lower fee structures while still making a viable income, and how to leverage technology to make all this happen."[143] As lawyers gain experience with programs like ClearyX, they will be able to apply this innovative technology to all aspects of their practice, including pro bono services.

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139. LIFT, https://www.liftonline.org/about/what-we-do [https://perma.cc/669J-H6MG]. This group recently rebranded itself as Family Legal Care.

140. Press Release, Thomson Reuters, Alternative Legal Service Providers Are Quickly Becoming Mainstream for Law Firms & Corporations, Creating a $14 Billion Market (Feb. 11, 2021), https://www.thomsonreuters.com/en/press-releases/2021/february/alternative-legal-service-providers-are-quickly-becoming-mainstream-for-law-firms-and-corporations-creating-a-14-billion-market.html [https://perma.cc/U4EN-L9RT].

141. *Cleary Gottlieb Launches ClearyX, A Platform for Highly Efficient, AI and Data-Driven Legal Services*, CLEARY GOTTLIEB (June 23, 2022), https://www.clearygottlieb.com/news-and-insights/news-listing/cleary-gottlieb-launches-clearyx [https://perma.cc/G3HH-Z7D5].

142. *Id*. Other global law firms are adopting similar approaches. Alex Heshmaty, *The Proliferation of Alternative Legal Services Providers*, LEXISNEXIS (Aug. 24, 2021), https://www.lexisnexis.co.uk/blog/future-of-law/the-proliferation-of-alternative-legal-service-providers [https://perma.cc/Y4AN-MWRP].

143. Baxter, *supra* note 4, at 249 (footnote omitted).

Moreover, Baxter is wrong in claiming that Rule 5.4 needs to be reformed because it supposedly "prohibits" providing "incentive compensation" to nonlawyers who have the "requisite skills and experience" needed to foster innovation in the legal industry.[144] Many law firms have nonlawyer executives, including chief operating officers or technology managers.[145] Under current ethics rules, law firms can already provide incentive compensation to and share overall profits with such nonlawyer managers.[146] Rule 5.4 prohibits sharing fees with nonlawyers on a case-specific basis, which makes sense—the motive to profit from individual cases should be limited to those who are trained in legal ethics and grasp the need for lawyer independence.[147] If nonlawyers are necessary to make firms more innovative, sharing in the firm's overall profits ought to sufficiently motivate them.

Baxter also argues that nonlawyers are unable to help clients due to fear of severe penalties for the unauthorized practice of law.[148] Again, Baxter ignores the flexibility already built into the current rules of professional conduct which allow nonlawyers to help lawyers provide legal services, albeit under the supervision of a qualified lawyer. For example, in the Comments to Model Rule 5.5, the ABA explains that

> 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.[149]

144. *Id.* at 250 (emphasis omitted).

145. *See, e.g.*, Jennifer Hill, *The Changing Role of Law Firm Leadership*, ALA WHITE PAPER 3 (2019), https://www.alanet.org/docs/default-source/whitepapers/ala-white-paper---september-2019.pdf [https://perma.cc/XH4H-R8SG] ("[T]he biggest change in law firm leadership over the past two decades—aside from the way that technology has changed the role—is from where leadership is sourced."); *id.* at 14 (nearly 30% of individuals who responded to a 2019 survey had worked with a nonattorney CEO of a law firm); Christopher Niesche, *The Culture of Law: Can Non-Lawyers Successfully Run Law Firms?*, LAW.COM (Mar. 29, 2021, 12:05 AM), https://www.law.com/international-edition/2021/03/29/the-culture-of-law-can-non-lawyers-successfully-run-law-firms [https://perma.cc/HKP7-3EV5].

146. MODEL RULES OF PRO. CONDUCT r. 5.4(a) (AM. BAR ASS'N 2020).

147. *Id.*

148. Baxter, *supra* note 4, at 242.

149. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2020).

Nor does the rule prohibit outsourcing support services, such as document review or due diligence.[150] The legal-navigator programs described above provide just one example of how this can work well to provide free or low-cost legal services to the needy. Moreover, in the business context, lawyers commonly utilize paralegals and legal assistants to provide more administrative services — such as preparing corporate filings — as a complement to the work being provided by attorneys.

C. Lack of Consumer Complaints Is a Red Herring

Another argument offered in favor of embracing NLO is that in jurisdictions where ABS and NLO have been expanded, very few consumer complaints have been reported about the legal services being provided to the public. For example, as of June 2022, Utah disclosed that there had been only eleven complaints reported to the Office of Legal Services Innovation, and even fewer were harm-related complaints.[151]

This argument is a red herring. Nearly all consumer complaints about legal services go unreported. In 2018, the most recent year for which the ABA published data on lawyer discipline, less than one-quarter of one percent of all practicing lawyers with active licenses in forty-five states and the District of Columbia had been publicly disciplined for attorney misconduct.[152] Moreover, as Baxter acknowledges, complaints are "[a]lmost all" filed by "state bars or competing lawyers; they are rarely filed by consumers."[153] Thus, the lack of major consumer complaints clearly does not mean that NLO services are unaffected by the inherent conflicts that they face.

D. Failure to Respond Sufficiently to Ethical Concerns

Finally, proponents of expanding Rule 5.4 have not satisfactorily responded to the many ethical concerns about NLO that have been raised by various members of the bar, including those concerns that are described in this Essay.[154]

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150. *See* ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 451 (2008).

151. Ctr. for Innovation, *Innovation Trends Report 2022*, AM. BAR ASS'N 37 (2022), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/aba-cfi-innovation-trends-report2022.pdf [https://perma.cc/2C44-LK3Y].

152. *Profile of the Legal Profession*, AM. BAR ASS'N 103 (2021), https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf [https://perma.cc/98WE-FCPA].

153. Baxter, *supra* note 4, at 242 n.66.

154. Baxter suggests that raising concerns about the prospect of nonlawyers — who are not bound by ethics rules — influencing lawyer judgments is an "indictment of 99.6% of the population."

The general attitude among advocates of NLO, including Baxter, is that lawyers are just another set of service providers with no special responsibilities to their clients. For example, Baxter suggests that "many, if not most," tasks that lawyers complete do not require legal training, and some could be performed by high-school students with no legal education.[155] While Baxter may have been an exceptional high-school student, his assertion is simply false. Baxter's examples of tasks that do not require legal training oversimplify the nuanced nature of the practice of law. While it may be true that a paralegal, legal assistant, or courier could deliver a document to a court—as Baxter suggests—that same individual is unlikely to be able to answer questions that may be raised by a court clerk or respond to other client needs that might come up during the filing.[156]

Moreover, proponents of NLO, like Baxter, seem to advocate for quantity over quality, insisting that more competition is needed to allow for lower-priced, more available legal services.[157] But this insistence on more supply does not address the "Walmart effect" that many lawyers reasonably fear. Their concern is that allowing NLO will result in large, well-funded ABS entities controlled by nonlawyers that will simply drive out of business smaller law firms that have well-trained lawyers, are often located in (and integral to) smaller or rural communities and are unable to compete with large corporations. Allowing this would leave markets with few lawyers who are integral participants in their communities.[158] Baxter's lack of concern about this well-grounded fear does not comfort those who oppose reforming Rule 5.4.

CONCLUSION

Lawyers have legitimate fears that allowing nonlawyers to own law firms will cross the ethical line and impair lawyers' independent legal judgments. Without

Id. at 238. This is nonsense. There is legitimate concern that those who have not been trained in legal ethics and do not have a law license to lose could prioritize profits over client interests. This is not an "indictment" of nonlawyers but simply a recognition that businesses prioritize profits. By definition, a profession (whether it be law, medicine, or accounting) excludes those who have not received specialized training, taken an admission exam, and agreed to follow a professional creed. *See, e.g.*, *Profession*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/profession [https://perma.cc/82XS-RXVE] (defining profession as "any type of work that needs special training or a particular skill" and "the people who do a particular type of work, considered as a group").

155. Baxter, *supra* note 4, at 243.

156. *See* MODEL RULES OF PRO. CONDUCT r. 5.1 (requiring lawyers to supervise their nonlawyer staff).

157. Baxter, *supra* note 4, at 253.

158. *See* Rubin, *supra* note 99 ("Will the 'Wal-Mart effect' simply drive smaller law firms, unable to compete on price, out of the market entirely?").

demonstrated proof that permitting nonlawyer ownership of law firms will improve access to justice or is necessary to promote innovation in the provision of legal services, there is no basis to ease the longstanding restrictions imposed by Rule 5.4. Rather, as shown by the ABA's recent reaffirmation of its policy against NLO, state bars ought to respect the concerns that the vast majority of lawyers have expressed about NLO compromising their independent legal judgments and should decline to change Rule 5.4's prohibition against NLO.

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