

**ACCESS TO JUSTICE REQUIRES  
ACCESS TO ATTORNEYS:  
RESTRICTIONS ON THE PRACTICE  
OF LAW SERVE A SOCIETAL PURPOSE**

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INTRODUCTION

Attorneys serve a gatekeeper function in society by interpreting the laws to provide advice and counsel about clients' legal rights or responsibilities.<sup>1</sup> Hiring an attorney provides some generally accepted level of quality and ethical assurances. At a minimum, for example, clients can rely on a level of legal competence because of an attorney's legal training and bar passage, as evidenced by the valid license that the attorney possesses. Clients are also protected by the rules of professional ethical conduct that bind all licensed attorneys. Fiduciary obligations, including undivided loyalty, the duties of competence and diligence, and the protection of client confidences, attach when a client retains an attorney. Moreover, potential clients in many jurisdictions can contact a centralized reporting authority to determine whether there have been any disciplinary actions taken and, in some instances, complaints leveled against the attorney prior to retaining the attorney.<sup>2</sup>

Almost all states have laws that limit the practice of law to those who are licensed by the state and admitted to practice by that state's licensing body after meeting certain requirements relating to education, character and fitness, and examination. Attorneys who assist nonattorneys in the practice of law in these states may face disciplinary sanctions under ethical rules, while nonattorneys may face liability (sometimes criminal) for their unauthorized practice of law (UPL).<sup>3</sup> Typically, nonattorneys are

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1. See L. RAY PATTERSON & ELLIOT E. CHEATHAM, *THE PROFESSION OF LAW* 63 (1971) ("The lawyer is necessary to interpret law to give it meaning for the individual, to apply law to give the individual its benefits . . . . Law is thus both a restraining and an enabling instrument of society.").

2. See Appendix A.

3. See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT app. A (2003), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model\\_def\\_statutes.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.pdf).

proscribed from providing services in three primary areas: (1) representing another person in a judicial or administrative proceeding; (2) preparing legal instruments that affect the legal rights of another person; and (3) advising another person regarding that person's legal rights and obligations.<sup>4</sup>

State rules that define the "practice of law" and the American Bar Association's (ABA) rules that prohibit the unauthorized practice of law (UPL restrictions) are regularly targeted by those who would like to create a "free market" for legal services.<sup>5</sup> These critics seek to repeal or limit the reach of ABA UPL restrictions (and therefore the state laws modeled thereunder).<sup>6</sup> They attack the counterargument that the purpose of the UPL restrictions is to "protect[] the public against rendition of legal services by unqualified persons"<sup>7</sup> as both spurious and monopolistic.<sup>8</sup> Some critics have argued that consumers are no more protected by hiring an attorney over a nonattorney when it comes to assurances of competent legal services.<sup>9</sup>

It is worth noting that clients who retain attorneys have a right of recourse if an attorney fails to maintain the level of competence and fidelity that the bar requires. The ABA and state bar committees exist to regulate

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4. See *id.* A majority of states, following the 2002 definition proposed by the ABA Task Force on the Model Definition of the Practice of Law, broadly define the practice of law. See *id.*; see also Appendix B.

5. See, e.g., Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 142–45, 147, 151–53 (2000); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 775 (2001) (noting that the middle class may lack access to legal services as a result of being ineligible for publicly funded legal services); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531 (2013) [hereinafter Rhode, *Access to Justice*]; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) [hereinafter Rhode, *Professional Monopoly*]; see also George C. Leef, *Lawyer Fees Too High?: The Case for Repealing Unauthorized Practice of Law Statutes*, REGULATION: CATO REV. BUS. & GOV'T, Winter 1997, at 33, available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/reg20n1c.html> (suggesting that requiring bar licensing for the practice of law unfairly restricts consumer choice).

6. See Harris & Foran, *supra* note 5; Rhode, *Access to Justice*, *supra* note 5; Rhode, *Professional Monopoly*, *supra* note 5; see also Leef, *supra* note 5.

7. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2013).

8. See Harris & Foran, *supra* note 5; Rhode, *Access to Justice*, *supra* note 5; Rhode, *Professional Monopoly*, *supra* note 5; see also Leef, *supra* note 5.

9. See Deborah L. Rhode, *Lawyers As Citizens*, 50 WM. & MARY L. REV. 1323, 1328 (2009) ("Despite recent improvements, the profession's oversight practices still leave much to be desired. For example, fewer than 4 percent of public complaints to the disciplinary process result in public sanctions, and few state bars provide consumers with readily accessible sources of information about lawyer performance."); see also Soha F. Turfler, Note, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1925–27 (2004) (noting arguments that legal education and bar examinations serve merely as a "screening device" to detect "knowledge of basic legal principles" and that some "professional irresponsibility" often goes unpunished).

members of the legal profession, “to ensure that lawyers will not only represent clients competently and faithfully but also uphold the law.”<sup>10</sup> In most jurisdictions, state-run, court-administered client protection funds may reimburse clients for losses caused by an attorney’s dishonest conduct in the practice of law.<sup>11</sup> Civil litigation liability exposure provides another measurable level of protection for clients. While nonattorneys also may be subject to civil litigation, the basis upon which to sue attorneys is much broader than breach of contract.<sup>12</sup> Advocates of a free market for legal services have found strong support in the Federal Trade Commission (FTC),<sup>13</sup> which has continually asserted that “non-attorneys should be permitted to compete with attorneys,” particularly in areas “where no specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers.”<sup>14</sup> Together, they chiefly argue that a restriction of the legal services market to attorneys has an adverse effect on competition and impacts consumers who currently do not have access to affordable legal services to meet their legal needs.<sup>15</sup> Stated differently, limited enforcement of UPL restrictions or a narrower definition of what it means to practice law<sup>16</sup> purportedly will break the so-called “legal

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10. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6–7 (1988).

11. See, e.g., *Our Mission*, LAW. FUND FOR CLIENT PROTECTION ST. N.Y., <http://www.nylawfund.org/index.html> (last visited Apr. 26, 2014) (stating the fund’s mission “to protect legal consumers from dishonest conduct in the practice of law, to preserve the integrity of the bar, to safeguard the good name of lawyers for their honesty in handling client money, to promote public confidence in the administration of justice in the Empire State”); see also KY. SUP. CT. R. 3.820(1)(a) (“The purpose of the Clients’ Security Fund is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this State occurring in the course or arising out of a lawyer-client relationship between the lawyer and the claimant.”); *Client Assistance Fund of the Nebraska State Bar Association*, NEB. ST. B. ASS’N, [http://www.nebar.com/associations/8143/files/CAF\\_Rules.pdf](http://www.nebar.com/associations/8143/files/CAF_Rules.pdf) (last visited Apr. 26, 2014); *Client Security Fund*, ST. B. CAL., <http://www.calbar.ca.gov/Attorneys/LawyerRegulation/ClientSecurityFund.aspx> (last visited Apr. 26, 2014); *Client Security Fund Mandatory Assessment*, ALA. ST. B., <http://www.alabar.org/newmember/client-security-fundrule.cfm> (last visited Apr. 26, 2014).

12. See *infra* Part III.

13. For more than a decade, “the FTC has urged several states, the American Bar Association, and many state bar associations to reject or narrow such restrictions on competition between attorneys and non-attorneys.” See Letter from the Fed. Trade Comm’n Office of Policy Planning to the Rules Comm. of the Superior Court 2 (May 17, 2007) [hereinafter 2007 FTC Letter], available at [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-mr.carl-e.testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-mr.carl-e.testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf).

14. *Id.* (commenting on Connecticut’s proposed rule change, Proposed Section 2-44A of the Rules of the Superior Court, entitled “Definition of the Practice of Law”).

15. See Harris & Foran, *supra* note 5; Rhode, *Access to Justice*, *supra* note 5; Rhode, *Professional Monopoly*, *supra* note 5; see also Leef, *supra* note 5.

16. Essentially, the debate about the purported attorney monopoly in the provision of legal services centers on a discussion of how the states and the ABA should determine *who* can provide what legal services to the public. See, e.g., Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 436 (2001); Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business After Enron*, 44 ARIZ. L. REV. 717, 753 (2002); *id.* at 758 (“In general, most states have statutes or

monopoly” paradigm. This deregulated legal services market also will purportedly influence the price of legal services<sup>17</sup> and increase “access to justice” for low- to moderate-income individuals who have been pushed out of the market for affordable legal services.<sup>18</sup> These arguments are continually raised even though there is little collective data on why individuals are not seeking advice and counsel from attorneys beyond limited studies citing the perceived high costs of legal services.<sup>19</sup> Critics of the current paradigm also assert that the free market can protect consumers against low-quality legal services in the event that they purchase the services from nonattorney providers and, in any event, generally argue that only attorneys complain about the practice of law by nonattorneys and that the potential for harm to the public is minimal because the consumers, by and large, are content.<sup>20</sup>

The core principles of the legal profession require pro bono services. Measures need to be designed to maintain and strengthen these pro bono requirements to ensure adequate and equal access to attorney-provided legal services. State licensing bodies must join with their respective bar associations to develop a plan to strengthen the public’s access to legal services, but this new approach must include reliance on attorneys to provide that legal service. Expanding the role of nonattorney legal service providers inexplicably excuses attorneys from meeting their own professional obligations. Moreover, the proposed free-market system inadequately protects legal service consumers. The problem of information asymmetry, one that exists in all professions, is exacerbated in the market for legal services. Finally, definitional issues abound regarding what constitutes the “practice of law” as reflected in the ABA’s aborted attempt to develop a comprehensive definition, and the end-run around the ABA in state-by-state attempts to narrow the definition. These issues only intensify the difficulty in determining what “routine legal matters,” if any, should be relegated to nonattorney legal service providers.

Accordingly, the practice of law should be restricted to attorneys, whose training is regulated, intellect and moral qualifications investigated, and accountability readily enforced by the courts. The 2008 financial crisis has roundly illustrated how and why deregulation can be costly to society. A free market for legal services is similarly ill-equipped to protect the public

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rules that prohibit the ‘practice of law’ by persons not licensed to practice law.”); Turfler, *supra* note 9, at 1951–59 (proposing a definition of the practice of law that is neither broad nor narrow).

17. See John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 93 (2000) (noting that higher fees for legal services result from an anticompetitive environment).

18. See Rhode, *Access to Justice*, *supra* note 5, at 541 (“The limited data available suggest that many routine needs of low- and moderate-income individuals could be met by those with less expensive educational preparation.”).

19. See Rhode, *Professional Monopoly*, *supra* note 5, at 3–4.

20. See *id.* at 37–39; 2007 FTC Letter, *supra* note 13, at 5–6 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000)).

from nonattorney legal service providers, particularly those cloaked behind websites that offer legal advice and online document preparation services.<sup>21</sup> This Article briefly highlights the problem of unmet legal needs for low- and moderate-income individuals in Part I. In Part II, this Article demonstrates that market forces are ineffective to protect the public from inadequate or incompetent nonattorney legal service providers and that the proposed reforms only create a two-tiered market for legal services. The “absence of consumer harm or complaints” argument is analyzed in Part III, while Part IV sets forth proposed measures that, if employed, would lead to more meaningful access to attorneys, particularly in the areas where the need is the greatest.

### I. THE PROBLEM OF UNMET LEGAL NEEDS

The unmet legal needs of a large segment of the U.S. population have been well chronicled.<sup>22</sup> Although there are more than 1 million attorneys in America,<sup>23</sup> some 64 million citizens with civil legal problems do not have the means to hire one.<sup>24</sup> Many need legal assistance to avoid evictions, foreclosures, or loss of benefits and for other family law–related issues.<sup>25</sup>

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21. See *infra* Part II.

22. See, e.g., Gail Vaughn Ashworth, *No Access to Justice Is Justice Denied*, 46 TENN. B.J. 3, 11 (2010) (“Clients who qualify for services and who have a case that Legal Aid attorneys can handle do not get an attorney because the Legal Aid office does not have enough attorneys to handle the number of qualified clients.”); Robert A. Clifford, *A Legal Service Call to Action*, CBA REC., Oct. 2011, at 12, 12 (noting that in Chicago’s Cook County, an “estimated . . . 1 in 4 people, approximately 25% of the population, have incomes [qualifying them for LSC services.] In the Circuit Court of Cook County’s First Municipal District, often called the ‘people’s court,’ the majority of defendants in various actions from landlord/tenant, collection, wage garnishments, housing violations, replevin, and other consumer matters are appearing pro se”); Charles L. Harwell, *Fall, ’Tis the Season?*, ARK. LAW., Fall 2012, at 5 (“One in five Arkansans live at or below 125% of the federal poverty level and are eligible to receive free civil legal services. Yet every year, nearly half of qualified Arkansans . . . are turned away due to a lack of sufficient resources. . . . The legal issues that affect Arkansas’s poor involve the most basic human needs: protection from domestic violence, economic security for the elderly and disabled, and safe and habitable housing, to name a few. Those who are unable to obtain legal aid or afford an attorney are left to navigate the legal system on their own, often with lasting repercussions.” (quoting *Home*, ARK. ACCESS TO JUST., [www.arkansasjustice.org](http://www.arkansasjustice.org) (last visited Apr. 26, 2014)); David M. Mandell, *Pro Bono Service in a Large Urban Setting*, 51 S. TEX. L. REV. 591, 591 (2010) (noting that in 2008, “Texas had the second largest poverty population in the United States . . . [but ranked forty-third] ‘in the nation in per capita revenue spent to provide civil legal aid[,]’ [serving only 20 to 25 percent] of the civil legal needs of low-income and poor Texans” (quoting Ryan Poulos, *Funding Crisis Cuts Legal Aid in Texas*, EL PASO INC. (Mar. 9, 2009, 12:14 PM), [http://www.elpasoinc.com/news/article\\_4dae6cbe-f4d2-550f-b495-185d22b3f8f1.html](http://www.elpasoinc.com/news/article_4dae6cbe-f4d2-550f-b495-185d22b3f8f1.html)) (citing ALEMAYEHU BISHAW & TRUDI J. RENWICK, U.S. CENSUS BUREAU, POVERTY: 2007 AND 2008 AMERICAN COMMUNITY SURVEYS 4 (2009), available at <http://www.census.gov/prod/2009pubs/acsbr08-1.pdf>)).

23. AM. BAR ASS’N, NATIONAL LAWYER POPULATION BY STATE 2 (2013), available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011\\_national\\_lawyer\\_by\\_state.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011_national_lawyer_by_state.authcheckdam.pdf).

24. See SHELDON KRANTZ, THE LEGAL PROFESSION: WHAT IS WRONG AND HOW TO FIX IT 4 (2013).

25. Cf. Clifford, *supra* note 22, at 12.

Women are disproportionately affected because they typically need assistance in the areas of divorce, child custody and support, housing, healthcare, public benefits, and debt collection.<sup>26</sup> The “economic downturn has made access to justice even more elusive” for litigants in domestic violence and mortgage foreclosure actions, and for unemployment compensation benefits.<sup>27</sup> While only 65 percent of the class of 2012 found jobs requiring law degrees, with 50.7 percent finding positions in private practice,<sup>28</sup> many of these graduates eschewed practice areas where the need is greatest.<sup>29</sup> Mired in debt, many recent graduates seek employment at big law firms, which typically do most of their work for major corporate entities.

Nearly one in five Americans (61.4 million people) qualified for the civil legal assistance services provided by the Legal Services Corporation (LSC) in 2012.<sup>30</sup> Unfortunately, many were not able to receive the needed assistance due to huge yearly cuts to LSC’s budget.<sup>31</sup> Voluntary law firm pro bono hours also declined in 2011, falling to their lowest levels in three years, and further compounded the problem of unmet legal needs.<sup>32</sup> Further still, some clients “[could not] get lawyers to take their case because the amount in dispute [was] considered to be too little for the attorney to take the case, yet the impact on the client who needs and is entitled to the

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26. See Shelly Dill Combs & Ilene Lin Bloom, *Women’s Disproportionate Need To Receive Legal Aid and the Current Funding Crisis*, COLO. LAW., Oct. 2012, at 51, 51.

27. See *id.*

28. See Press Release, Nat’l Ass’n for Law Placement, Law School Class of 2012 Finds More Jobs, Starting Salaries Rise—But Large Class Size Hurts Overall Employment Rate (June 20, 2013), available at [http://www.nalp.org/uploads/PressReleases/Classof2012SelectedFindingsPressRelease\\_june2013.pdf](http://www.nalp.org/uploads/PressReleases/Classof2012SelectedFindingsPressRelease_june2013.pdf).

29. See Lucille A. Jewel, *Tales of a Fourth Tier Nothing, a Response to Brian Tamanaha’s Failing Law Schools*, 38 J. LEGAL PROF. 125, 133 (2013) (“It is true that the profession is de facto divided and stratified between lawyers representing wealthy and corporate clients and lawyers representing ordinary people . . . .” (citing JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 48–51 (2005))).

30. LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE 1 (2012), available at [http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf). The LSC is a federally funded provider of civil legal assistance nationwide, with a fiscal year 2010 budget of \$420 million. See Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL’Y 571, 580 (2011) (“The LSC allocates funds for civil legal services for the poor to recipients in all states, the District of Columbia, and several territories. The allocation to each recipient jurisdiction is based on the percentage of the total population of poor persons . . . .”). That budget was cut in fiscal year 2012 to \$348 million. Press Release, Legal Servs. Corp., Fiscal Year 2013 Budget Requests Sent to Congress (Feb. 13, 2012), available at <http://www.lsc.gov/media/press-releases/fiscal-year-2013-budget-requests-sent-congress> (“LSC funding was approximately \$404 million in Fiscal Year 2011 before falling to \$348 million in Fiscal Year 2012.”).

31. See generally Clifford, *supra* note 22, at 12 (“Government funding for LSC has historically been inadequate and in recent years budget cuts have severely impacted legal service programs in many of the states. . . . [T]he Senate Appropriations Committee approved funding for LSC for 2012 at \$396 million, which if approved by Congress would be approximately 8 million dollars less than [2011] . . . . [T]he House Appropriations Committee recommended a more severe reduction in LSC’s FY 12 budget amounting to more than 100 million dollars.”).

32. *Pro Bono Report 2012: Under Construction*, AM. LAW., July/Aug. 2012, at 63.

amount in dispute is great.”<sup>33</sup> As a result of these factors, among others, an overwhelming majority of eligible civil litigants are unrepresented by attorneys.<sup>34</sup>

## II. THE LIMITATIONS OF A FREE MARKET FOR LEGAL SERVICES

A free-market system for legal services has numerous shortcomings that will limit, rather than expand, the public’s access to justice. Part II.A describes how market forces are ineffective because information asymmetry prevents qualitative assessments and market imperfections cloud warning systems. Part II.B discusses how the mischaracterization of legal matters as routine is used to justify the creation of a two-tiered market for legal services.

### A. Market Forces Are Ineffective

Advocates of a free market for legal services, including the FTC, have argued that “[c]onsumers of professional services, like all consumers, [would] benefit from competition” and “[i]f competition to provide such services is restrained, consumers may be forced to pay higher prices . . . .”<sup>35</sup> Many call for the expansion of the market for legal services to enable nonattorneys to provide legal services to the underserved populace, believing that nonattorneys can provide relatively similar services to those of attorneys—at least with respect to routine legal matters—but at a lower cost.<sup>36</sup> These critics of UPL restrictions contest the premise that only attorneys should handle legal matters because attorneys are trained to provide a higher quality of legal services than nonattorneys and can thereby better protect the public. They assert that consumers are no more protected by hiring an attorney over a nonattorney when it comes to assurances of competent legal services.<sup>37</sup> Moreover, critics of UPL restrictions argue that market forces will provide the needed societal protections by driving away those incompetent or unscrupulous nonattorney legal services providers

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33. Ashworth, *supra* note 22, at 11.

34. See, e.g., *A New Lawyer’s Duty*, N.Y. TIMES, May 2, 2012, at A26.

35. 2007 FTC Letter, *supra* note 13, at 2.

36. See *id.* at 6; see also *supra* note 5 and accompanying text.

37. See Dzienkowski & Peroni, *supra* note 17, at 92 (noting that the public protection theory is based on the belief that nonattorney legal providers “will make errors in legal work that [an attorney] would not make, and will thereby harm the consumer of the legal services”); Leef, *supra* note 5 (“In a free market for legal services, consumers would use the same information-gathering techniques to assess the competence of unlicensed practitioners that they now use to assess the competence of licensed ones.”); cf. Meredith Ann Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203, 234 (1990) (“In sum, the deregulation advocate’s free market is premised on simplicity: supply and demand. Legal services, however, are unlike products that are freely traded on the market: the consumer of legal services cannot pick up a sample of a legal service like a piece of fruit and test it for value. Legal services cannot and should not always be evaluated by price alone.”).

who consistently offer inferior services, because consumers will cease to seek out their assistance.<sup>38</sup> There are several problems with this hypothesis.

While deregulation could increase competition in the market for legal services, it also will bring more governance issues, including the lack of an oversight entity for nonattorney providers. The absence of fiduciary obligations that extend from a relationship of trust and confidence, including undivided loyalty that prevents conflicts of interest and the protection of client secrets, are just some of the benefits that low- and moderate-income consumers will (unknowingly) lose when they select nonattorney legal service providers over attorneys. These consumers also may lose a measurable standard of competence and quality of legal service when nonattorney providers are selected.

Market imperfections will limit any purported consumer protection that current regulations already provide to an attorney's clients.<sup>39</sup> The recent financial crisis has painfully illustrated that the market response to problems resulting from the deregulation of an industry takes too long, that revelations of wrongdoing in the deregulated market come too late, and that the resulting societal harm arising from the wrongdoing is too great.<sup>40</sup> The same consequences arguably will result from the deregulation of the legal services market. Indeed, consumers of legal services are prevented by market forces from avoiding the risk of harms given the nature of legal services (as a *product*) as well as the *nature* of the market in which that product is provided.

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38. See generally Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1273 (1995) (noting that under the market theory, "competition leads to the best quality services at the lowest cost. . . . Less sophisticated consumers are not situated any differently from consumers in many other business transactions, who will presumably be able to purchase such information through consumer guides or paid referral services if they feel they lack the expertise to make a decision" (citing Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 571 (1994); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 725–26 (1994))).

39. See Barton, *supra* note 16, at 436 ("[A] free-market system relies upon a combination of consumer expertise to choose the best and safest products, and *ex post* damages actions to control for substandard or dangerous products. When these options fail, *ex ante* regulation may be justified.").

40. See FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, at xviii (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> ("We conclude widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets. . . . More than 30 years of deregulation and reliance on self-regulation by financial institutions . . . had stripped away key safeguards, which could have helped avoid catastrophe."); see also Eduardo Porter, *Recession's True Cost Is Still Being Tallied*, N.Y. TIMES, Jan. 22, 2014, at B1 (citing three economists at the Federal Reserve Bank of Dallas, who noted that the Lehman Brothers collapse which paralyzed the world's financial markets "[a]t a bare minimum . . . cost nearly \$20,000 for each American. Adding in broader impacts on workers' well being—an admittedly speculative exercise—could raise the price tag to as much as \$120,000 for every man, woman, and child in the United States").



### 1. Information Asymmetry Prevents Qualitative Assessments

The legal services market is far from transparent, such that information asymmetry would be problematic for the market's new consumers. These new consumers may be ill-equipped to qualitatively determine whether they have received objectively reasonable legal services, or even whether they have selected the best legal service providers in general. This problem may be exacerbated when nonattorneys are added to the mix. Consumers' qualitative analysis is made even more difficult because any resulting harm to the consumer from receipt of objectively inadequate legal services may not be discovered—if at all—until it is too late to take corrective actions.<sup>41</sup> Even if there is timely discovery, the resulting harm to an individual's liberty or property rights may not be widely reported.<sup>42</sup> Therefore, other market participants may not be forewarned about the incompetent or unscrupulous nonattorney legal service provider.<sup>43</sup>

Unlike produce purchasers in the market for oranges, for example, many consumers in the legal services market are not consistent purchasers.<sup>44</sup> The typical consumer of legal services is an individual who seeks assistance to resolve a single, nonrecurring legal matter.<sup>45</sup> Many also tend to seek out legal counsel precisely because they alone do not possess sufficient information to make an informed decision about their respective legal rights or the extent of their obligations. Even assuming these consumers are savvy enough to determine that a legal issue exists and must be addressed to protect their rights or enforce the obligations of others, the knowledge gap of these first timers may be too substantial to allow them to appreciate the differences in the services offered by a nonattorney legal service provider from those of an attorney. Often, these legal service consumers remain unaware that there may have been alternative means to resolve their legal issue than that selected by the nonattorney provider.<sup>46</sup> These first-time legal service consumers are further challenged in reaching an informed decision by their subjective perspectives. Their judgments may be clouded by fear of the unknown, or worse, they may have heightened expectations based on what they have seen on television or read on the internet. Under

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41. For a discussion of harm, see *infra* Part III.

42. See Turfler, *supra* note 9, at 1918-20 (citing J. Howard Beales, III, *The Economics of Regulating the Professions*, in REGULATING THE PROFESSIONS 125, 127 (Roger D. Blair & Stephen Rubins eds., 1980); Joseph R. Julin, *The Legal Profession: Education and Entry*, in REGULATING THE PROFESSIONS, *supra*, at 201, 204).

43. See *id.*

44. See DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 144 (2000) (noting that most legal clients are "one-shot purchasers" who "seldom consult an attorney, and their lack of experience, coupled with the difficulties and expense of comparative shopping, makes it hard to assess the quality of assistance").

45. See generally *id.*

46. See Turfler, *supra* note 9, at 1931 ("But even if educational efforts are successful at increasing understanding of the legal services market, these efforts cannot solve all information asymmetry problems because no marketing device can change the unpredictable nature of legal services. Many consumers may not have the savvy to avoid an incompetent provider and may be unwittingly exposed to high risks.").

such circumstances, it will be immeasurably difficult to make an informed quality assessment of the legal services provided by the nonattorney.

Knowledge of the existence of a potential legal problem does not equate to an understanding of how the legal problem should be resolved. Nor does it equate to an understanding that various alternatives may be available to resolve that individual consumer's specific legal issue. That information about some legal matters exists on the internet and in the media to narrow consumers' information gap is not sufficient to overcome the problem of information asymmetry, nor is it a reasonable substitute for obtaining the assistance of attorneys. Similarly, no one would suggest that a patient should self-diagnose, and then seek and receive treatment for a medical condition based solely on the patient's web-based research.<sup>47</sup>

Nevertheless, under the guise of increasing access to justice, free-market advocates seemingly would propose that low- and moderate-income legal service consumers—some who are unsophisticated participants in the legal services market—self-diagnose their legal problems and seek assistance from nonattorney service providers because they purportedly offer more affordable services. Rather than yielding an increased benefit for low- and moderate-income consumers seeking affordable legal services, a free-market system for legal services would provide these consumers a false sense of security.

## 2. Market Imperfections Cloud Warning Systems

Free-market advocates assume that market forces will protect consumers of legal services from poorly performing nonattorney service providers because these consumers will be forewarned to avoid them.<sup>48</sup> Consumer complaints, as the argument continues, eventually would drive incompetent or unscrupulous nonattorney legal service providers from the market, effectively protecting the quality of the legal work conducted by those nonattorneys who remain in the legal services market.<sup>49</sup> This argument ignores the information asymmetry problem detailed above and assumes that unsatisfied consumers will sound an alarm.

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47. The medical profession has faced the twin pressures of dealing with drug advertisements and medication information websites when combating patient self-diagnosis. While drug advertisements appear to offer solutions to problems, the patient's problem actually may be completely different or radically more complex. *See, e.g.*, Yael Schenker et al., *The Ethics of Advertising for Health Care Services*, AM. J. BIOETHICS, Mar. 2014, at 34, 35 (“[P]atients often do not have an independent sense of what their medical needs are. . . . Advertising practices that generate the perception of a health care need may induce patients to seek unnecessary services.”).

48. *See* Fischer, *supra* note 5, at 142; *cf.* Pearce, *supra* note 38, at 1269, 1273.

49. *See* Fischer, *supra* note 5, at 142 (claiming that consumer choice will empower consumer to use the free market theory to opt into self-help methods when lawyers aren't necessary, either reducing lawyer fees or driving lawyers from the market); *cf.* Pearce, *supra* note 38, at 1269, 1273 (identifying pure-market- and middle-range-suggested approaches to the regulation of lawyers that depend on consumerism and free-market principles to eliminate undesired legal service providers from the market).

Walking away, for example, with an executed will codicil or trust amendment that was neither properly drafted, tailored to the consumer's specific needs, nor enforceable when later produced (in many instances) will not result in some action that would provide notice to the other marketplace participants. More often than not, receipt of inadequate services by a single consumer will result in no more than angry calls, the exchange of angry correspondence, or that consumer's decision never again to seek the services of that nonattorney legal service provider.

Reliance on market forces to protect these consumers necessarily also presumes the existence of a centralized reporting mechanism in the legal services market where complaints about substandard nonattorney legal service providers can be received (or posted)—beyond an angry message posted on one of a dozen complaint sites on the internet, or a letter to the local better business bureau. As is further discussed in Part III, most disgruntled consumers of legal services offered by nonattorneys will have little incentive to complain. Consequently, no public alert siren will blare.

Any suggestion that consumers of legal services generally seek out references or rely on word-of-mouth recommendations to assist them with the selection process to counterbalance the information asymmetry equation<sup>50</sup> similarly misses the mark because it presupposes that most of these consumers have adequately informed community networks in which to exchange such information.<sup>51</sup> Absent a mechanism to alert the public beyond siloed outbursts, the quality issue will remain hidden and society's protection will be jeopardized.

*B. The Mischaracterization of Legal Matters As Routine To Justify the Creation of a Two-Tiered Market for Legal Services*

This section examines two major pitfalls in the argument of proponents of demonopolizing the legal profession: First, free-market advocates incorrectly characterize particular aspects of legal service as "routine." Second, free-market advocates use this improper characterization to argue for the creation of a two-tiered market for legal services whereby only the monied are entitled to retain attorneys.

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50. See also Fischer, *supra* note 5, at 142–45, 147, 151–53; cf. Pearce, *supra* note 38, at 1273.

51. See Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has To Give*, 2012 MICH. ST. L. REV. 415, 468 (arguing that "[t]he consumer really has no way of evaluating the professional quality of the work being done," and observing that "[i]nformation about individual attorneys is hard to come by and most consumers rely on word-of-mouth, referrals, and recommendations of family and friends, who are often in no better position to judge the quality of the representation being provided").

### 1. The Inability To Define Routine Legal Matters

To increase access to the legal system, many deregulation proponents argue that there are so-called “routine legal matters” that should be directed towards nonlawyers.<sup>52</sup> To characterize legal matters as routine is a misnomer as this characterization fails to acknowledge that too few clients for legal services have homogenous legal issues. Legal services are by nature unpredictable.<sup>53</sup> Underlying the “routine legal matter” designation is a determination that there are some legal matters that can or should be deemed to be *low risk*; that the amount of harm that might arise from the faulty or incompetent provision of legal assistance is negligible at best.<sup>54</sup> Of course, real estate transactions, uncontested divorces, and estate planning—some examples of these “routine legal matters”<sup>55</sup>—are generally not viewed as such from a client’s perspective.<sup>56</sup>

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52. See 2007 FTC Letter, *supra* note 13; see also Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 20 (1998) (“A social worker could identify the character of the legal problem, make contacts, prepare papers, and resolve routine issues.”); Cramton, *supra* note 38, at 550–51 (“Some types of routine client service, such as sales of residences, simple wills, and uncontested divorces, may not require lawyers who are as thoroughly educated and as costly as lawyers are today.”); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1030 (2003) (“[T]here is actually little evidence to suggest that non-lawyers would do an inferior job when representing individuals on routine legal matters (e.g., divorce). In fact, there is considerable evidence that non-lawyers can be at least as effective as lawyers when handling such issues.”).

53. Although flat-fee arrangements purportedly can be used in certain matters that may appear repetitive, including real estate closings and in housing and family court, challenges remain in reasonably anticipating the costs of providing legal services. See Linda J. Ravdin & Kelly J. Capps, *Alternative Pricing of Legal Services in a Domestic Relations Practice: Choices and Ethical Considerations*, 33 FAM. L.Q. 387, 414 (1999) (“The challenge for lawyers charging flat fees is in determining in advance what flat fee to charge, in clearly articulating to the client what is and is not included in the fixed fee, and in addressing the many potential unpredictable events which might affect the level of time and attention required to handle the case.”); see also Daniel R. Victor, *Ethical Considerations Regarding Retainer and Billing Agreements*, MICH. B.J., June 2008, at 32, 35 (“Flat fees are appropriate when the issues involved in the cases are relatively common, allowing the client and the lawyer to predict what needs to be done from start to finish. . . . In some cases, it is impossible either to predict the total amount of work that will need to be done to bring a matter to conclusion or to know the level of skill that will be needed to handle an unpredictable issue.”).

54. See Turfler, *supra* note 9, at 1959 (“[A]n activity-centered approach provides for meaningful nonlawyer participation in the marketplace. By allowing nonlawyers to perform ‘low-risk’ services, services not restricted as the practice of law, nonlawyers will be able to offer many services to the public. Legal services consumers will utilize these services if they decide that any risk posed by a nonlawyer provider is personally acceptable.”).

55. See, e.g., 2007 FTC Letter, *supra* note 13 (noting that Connecticut’s proposed rules “may be read to require an attorney for . . . negotiating . . . any transaction involving property (real or personal), preparing documents related to the sale of property, performing real estate closing services . . . [and] is likely to unnecessarily restrain competition in service areas that do not necessarily require the skill or knowledge of a lawyer to perform”).

56. See Ian Weinstein, *Financial Retrenchment and Institutional Entrenchment: Will Legal Education Respond, Explode, or Just Wait It Out? A Clinician’s View*, 41 WASH. U. J.L. & POL’Y 61, 72 (2013) (“Our courts are full of unrepresented people in high-stakes litigation, particularly in family law, as well as in the myriad administrative proceedings through which the state regulates its social services.”); see also Peter J. Birnbaum, *Illinois*

As most attorneys are aware, within any seemingly routine legal matter lurks the potential for a more complex and nuanced legal issue. Unlike nonattorney legal service providers, however, attorneys generally can recognize the complexity of legal matters from the broad exposure to the law that legal education and bar preparation provide. That skill is broadened by the practice of law. Attorneys use this skill and awareness to obtain facts that might be critical to revealing, evaluating, and resolving their clients' legal problems through careful prodding of clients who alone may be incapable of remembering key information.

The ABA's aborted attempt to adopt a model definition for the practice of law further highlights the problem of delineating which legal matters could be excluded as routine.<sup>57</sup> The ABA faced a torrent of criticism when it proffered a model definition in 2002 that, according to critics, did not sufficiently exclude those legal matters that could presumably be defined as routine.<sup>58</sup> Unable to reach a consensus, the ABA gave up in August 2003 and simply recommended that each state adopt its own definition of the practice of law based on its own understanding of its citizens' needs and the available state protections.<sup>59</sup>

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*Real Estate Lawyers and the Battle To Control Residential Closings*, ILL. B.J., June 1996, at 132, 133 ("It is a fact that the unrepresented consumer pays higher settlement costs, enters into ill-advised transactions from both the technical and practical points of view, and incurs greater risk by proceeding unrepresented [in real estate transactions]."); Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-traditional Couples*, 27 SEATTLE U. L. REV. 75, 83 (2003) ("In the context of a traditional family, the consequences of poor estate planning are usually either financial (i.e., loss of tax savings) or administrative inconvenience (i.e., inheritances to minors subject to probate court supervision)." (citing Erica Bell, *Special Issues in Estate Planning for Non-marital Couples and Non-traditional Families*, 283 PRACTISING L. INST. 859, 861 (1999))).

57. In 2002, the ABA charged its appointed Task Force on the Model Definition of the Practice of Law to determine the best approach for the ABA to create a model definition "that would support the goal to provide the public with better access to legal services [and] be in concert with governmental concerns about anticompetitive restraints." ALFRED P. CARLTON, JR., AM. BAR ASS'N, MODEL DEFINITION OF THE PRACTICE OF LAW CHALLENGE STATEMENT 1 (2002), available at [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_challenge.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html).

58. See, e.g., Letter from the Fed. Trade Comm'n & the Dep't of Justice to the Task Force on the Model Definition of the Practice of Law 7-8 (Dec. 20, 2002), available at <http://www.justice.gov/atr/public/comments/200604.pdf>. The ABA Task Force's draft definition included several presumptively nonroutine activities as 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 or responsibilities on behalf of a person.

*Task Force on the Model Definition of the Practice of Law, Definition of the Practice of Law Draft (9/18/02)*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_definition.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html) (last visited Apr. 26, 2014).

59. See AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW STANDING COMM. ON CLIENT PROT., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION, available at <http://www.americanbar.org/content/dam/aba/migrated/>

Undaunted by the ABA's inability to adopt a model definition that would permit nonattorneys to practice law without liability exposure, deregulation proponents turned their attention to efforts by the states to adopt a definition. Deregulation proponents argued that the public interest would be better served by avoiding unnecessary restraints on attorney and nonattorney competition. To that end, the staff of the FTC's Office of Policy Planning, Bureau of Competition, and Bureau of Economics (FTC staff) has been active for more than a decade by providing antirestraint on competition comments to many states (including Connecticut, New York, Kansas, Massachusetts, North Carolina, and Florida, to name a few) as they individually attempt to propose rules that define the practice of law.<sup>60</sup>

In an effort to narrow restrictions on competition between attorneys and nonattorneys, the FTC staff has repeatedly urged states to reject the broad definition of the practice of law proposed by the ABA. The FTC staff, in comment letters to the judiciaries of Connecticut<sup>61</sup> and Hawaii,<sup>62</sup> advocated "allowing non-attorneys to compete in the provision of *certain types of services* that do not require such knowledge and skill," because unrestricted access would "permit[] consumers to select from a broader range of options."<sup>63</sup> Yet, the FTC staff also failed to determine what types of legal services do not require an attorney's knowledge and skill.

Indeed, the FTC staff suggested that states follow the course taken by the District of Columbia in 2004,<sup>64</sup> where despite broadly defining the practice of law, both the rule's preamble<sup>65</sup> and commentary, when taken together,

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cpr/model-def/recomm.authcheckdam.pdf ("RESOLVED, That the American Bar Association recommends that every state and territory adopt a definition of the practice of law.").

60. See 2007 FTC Letter, *supra* note 13, at 2 & n.5.

61. See *id.* at 4.

62. See Letter from the Fed. Trade Comm'n to the Haw. Judiciary Pub. Affairs Office (Jan. 25, 2008), available at [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-and-department-justice-comment-supreme-court-hawaii-concerning-proposed-definition-practice-law/v080004letter.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-supreme-court-hawaii-concerning-proposed-definition-practice-law/v080004letter.pdf).

63. See 2007 FTC Letter, *supra* note 13, at 4 (emphasis added).

64. See *id.*

65. See D.C. Ct. App. R. 49(b)(2), available at [http://www.dccourts.gov/internet/documents/DCCA\\_Rules-1-01-11.pdf](http://www.dccourts.gov/internet/documents/DCCA_Rules-1-01-11.pdf). The preamble in Rule 49(b)(2) provides in relevant part:

(2) "Practice of Law" means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

- (A) Preparing any legal document . . . ;
- (B) Preparing or expressing legal opinions;
- (C) Appearing or acting as an attorney in any tribunal;
- (D) Preparing any claims, demands or pleadings . . . containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
- (E) Providing advice or counsel as to how any of the activities described in subparagraph (A) through (D) might be done, or whether they were done, in accordance with applicable law;
- (F) Furnishing an attorney . . . to render the services described in subparagraphs (a) through (e) above.

narrow the definition by creating a rebuttable presumption *against* inclusion of certain *actors* in the definition of the practice of law. Specifically, the commentary to D.C. Court of Appeals Rule 49 states in pertinent part:

The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be *rebutted* by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent. . . . Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and standing in the law [are specifically excluded from the definition of] the practice of law, *because their relationship with the customer is not based on a reasonable expectation that learned and authorized professional legal advice is being given.*<sup>66</sup>

Stated differently, the FTC staff (also unable to determine what constitutes routine legal matters) defaulted to providing an exemption that would allow certain nonattorneys to practice law and suggesting instead that states create a *safe harbor warning* that "no attorney-client relationship exists" when consumers of legal services use nonattorneys to resolve their legal issues.<sup>67</sup> These FTC proposals illustrate that concerns about increasing competition outweigh concerns for the public's safety.

Seemingly mindful of this criticism, the FTC staff also suggested that specific written warnings about the use of nonattorney legal service providers might provide added safety protections to the public amid concerns that consumers may be harmed when they obtain legal services from nonattorneys whom consumers believe can provide comparable services. Specifically, the FTC staff advocated that states mandate that consumers of legal services who might rely on nonattorneys "for services that *draw close* to those requiring the skill and knowledge of an attorney" be given some "*written notice* explaining the risks involved in proceeding . . . without an attorney,"<sup>68</sup> purportedly to give consumers the opportunity "to make an informed choice about whether to use non-attorney [legal service providers]."<sup>69</sup>

However, neither the FTC staff's proposed exclusion of certain actors from the definition of the practice of law, nor this consumer warning sufficiently protects consumers who need legal assistance. The proposed safe harbor warning, in particular, fails to address those instances where unsophisticated legal service consumers are unaware of their legal needs to reasonably appreciate the risks that they would be assuming when they

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66. *Id.* R. 49(b)(2) cmt. (emphasis added).

67. 2007 FTC Letter, *supra* note 13, at 7–8; *see also* Letter from the Fed. Trade Comm'n to the Haw. Judiciary Pub. Affairs Office, *supra* note 62, at 8–9.

68. 2007 FTC Letter, *supra* note 13, at 7–8 (emphasis added) (citing *In re* Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1363 (N.J. 1995)).

69. *Id.* at 8.

nevertheless engage a nonattorney.<sup>70</sup> The FTC staff proposals also deny legal service consumers the essential “reliance element” of most claims arising from receipt of inadequate or incompetent legal services from nonattorney providers. Moreover, they erode a certain degree of assurance that nonattorney legal services are sufficient. Finally, and more importantly, the proposals completely ignore the premise upon which arguments for deregulation are based: consumers are seeking assistance for their legal matters and, *but for* the perceived associated costs, would have retained an attorney and would have received the associated professional and ethical protections.

## 2. The Antimonopoly Movement’s Creation of a Two-Tiered Market for Legal Services

To stabilize the quality of legal services offered by nonattorney providers, there are proposals to delineate between “qualified” and “unqualified” laypersons by use of a “certification program” for nonattorneys.<sup>71</sup> Primarily, some argue that permitting these designated nonattorneys to provide legal service in the areas where the legal needs are unmet would help provide low- and moderate-income individuals with better access to justice. Secondly, it is argued that some designation between qualified and unqualified nonattorneys would assist consumers in avoiding those market imperfections that prevent full consumer protections, including the information asymmetry dilemma discussed above. Here, as that argument continues, consumers are permitted to knowingly choose an uncertified nonattorney and assume the risk of receiving lower-quality legal services in pursuing a cheaper avenue to legal assistance.<sup>72</sup>

Addressing the latter rationale for this proposal first, societal protections are not greatly improved simply by employing such designations. These labels certainly are more tolerable than the FTC staff-proposed consumer

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70. See *infra* Part II.B.2.

71. In 1995, the ABA issued a report suggesting that states consider registration, certification, and licensing of nonattorneys to ensure competence. See AM. BAR ASS’N COMM’N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 144–47 (1995); *id.* at 147 (“Certification may be a valuable tool to inform the public of those qualifications or credentials considered to be appropriate for nonlawyer activities while still providing the public with a free choice of providers. Certified nonlawyers may publish their superior qualifications and even charge a higher fee. The public would be free to place its own value on certification and choose to pay or not pay any higher fee that may result.”); see also Michael S. Knowles, Note, *Keep Your Friends Close and the Laymen Closer: State Bar Associations Can Combat the Problems Associated with Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through a Certification Program*, 43 CREIGHTON L. REV. 855, 885 (2010) (proposing the use of certification programs for estate planning, noting that “[u]nder a certification system, non-certified individuals are not proscribed from providing the regulated activity so long as non-certified individuals refrain from using the occupational title” (citing AM. BAR ASS’N COMM’N ON NONLAWYER PRACTICE, *supra*, at 146)).

72. See Turfler, *supra* note 9, at 1928; see also Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2595 (1999).



warnings that make it all but impossible to bring a claim for wrongdoing, including negligence and fraud, by eliminating the reliance element. However, as previously identified, many legal services consumers cannot appreciate what they do not know.<sup>73</sup> Consider the impact on those legal service consumers who, based on their self-diagnosed legal problem and seeking the most cost-effective resolution, choose the unqualified layperson.<sup>74</sup> They may be unaware of, or even ignore as unlikely, consequences that other alternatives might better resolve what may actually be more complex legal problems. Believing that their respective legal matter is simple and that the law permits nonattorneys (designated either qualified or unqualified) to provide legal services, these consumers might have a false sense of security that they could not make an incorrect and perhaps harmful selection. Without proof of sophistication, as previously illustrated, it would be difficult to suggest that these consumers are making knowing assumptions of the risk when they select the unqualified layperson.

The “access to justice” rationale underlying the qualified layperson proposal will not only fail to yield the desired result, but also will create a new problem: a two-tiered market for legal services—one for those clients who can afford to retain an attorney and another for low- and moderate-income individuals who also may need, but cannot afford, to hire an attorney. The group most in need of legal assistance would be relegated only to nonattorney providers.<sup>75</sup> This outcome is inapposite to the need to increase access to justice. Attorneys also seemingly would be relieved of their professional responsibility to society’s underserved.<sup>76</sup> Low- and moderate-income individuals, like the well-heeled, deserve to have their legal concerns addressed by attorneys.<sup>77</sup> Access to justice, if it is to have any true meaning, must mean access to *equal* legal services.<sup>78</sup> Nonattorneys do not provide equal services.

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73. See Jon D. Levy, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 573 (2010) (“Informed decision-making is a necessary prerequisite for meaningful participation. Informed decision-making recognizes the fundamental notion that choice is premised on information and a basic understanding of the consequences that flow from that choice.”).

74. See *id.* at 572 (“We would never conclude that a person with a serious illness has been afforded meaningful access to health care if that person is permitted to enter the hospital and make use of its facilities, but without the involvement of a trained doctor.”).

75. See *id.* at 562 (“[T]he decisions that get made in civil courts have life-altering consequences. The outcome in a single case frequently has a ripple effect that extends far beyond the participants, reaching their families, neighbors, communities, employers, and others.”).

76. See *infra* Part IV.A.

77. Weinstein, *supra* note 56, at 72 (“We can imagine how permitting people with less rigorous, and presumably less expensive, training to serve certain parts of the market could expand access to justice for middle class and underclass Americans . . . . But that idea also threatens a future in which people with lesser means are served by lesser-qualified, less well-trained legal service providers who would likely wield less authority on their behalf.”).

78. Levy, *supra* note 73, at 563 (“Society has a vital stake in assuring equal access to justice because it is not possible for our democracy to sustain the rule of law without it. Our nation’s founders understood this fundamental truth.”); *id.* at 572 (“Central to a new vision is

### III. THE “ABSENCE OF CONSUMER HARMS OR COMPLAINTS” ARGUMENT IS A RED HERRING

Opponents of UPL restrictions generally argue, “We are not aware of evidence of consumer harm arising from [the provision of legal services by nonattorneys] that would justify foreclosing competition.”<sup>79</sup> Some opponents of UPL restrictions also maintained that “complaints about the unauthorized practice of law in most states did not come from consumers, the potential victims of such conduct, but from attorneys.”<sup>80</sup> These frequently made arguments actually overlook resulting harms and fail to take into account that the empirical studies relied upon are limited in scope<sup>81</sup> because either the studies focused on the absence of consumer complaints to state bar committees, the absence of complaints lodged in connection with certain types of administrative proceedings,<sup>82</sup> or the absence of complaints about particular actors in limited proceedings.<sup>83</sup>

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a clear understanding of what equal access to justice means . . . . “[P]eople require access to the courts, to administrative agencies and other forums that is meaningful, with representation by qualified counsel, the opportunity to physically enter the court or other forum and to understand and to participate in the proceedings, and the assurance that their claims will be heard by a fair and capable decision-maker and decided pursuant to the rule of law.” (quoting JUSTICE ACTION GRP., JUSTICE FOR ALL: A REPORT OF THE JUSTICE ACTION GROUP 5 (2007)).

79. 2007 FTC Letter, *supra* note 13, at 8; *see also* Fischer, *supra* note 5, at 139 (“In reality, there is strikingly little case law involving injury to individuals from unauthorized practice.” (citing Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1 AM. B. FOUND. RES. J. 159, 200 (1980))); Leef, *supra* note 5 (“Bar supporters argue that without UPL statutes, incompetent or dishonest practitioners would harm consumers. But that is a case of looking only at the supposed hazards of a free market while ignoring the palpable benefits.”); Rhode, *Professional Monopoly*, *supra* note 5, at 37 (“Whether lay activity presents a comparable problem for consumers is a matter of some dispute, even among bar officials.”).

80. 2007 FTC Letter, *supra* note 13, at 8; *see also* Fischer, *supra* note 5, at 139 (“An examination of 144 reported unauthorized practice cases from 1908 to 1969 indicates only twelve that involve actual injury to anyone. The vast majority of such actions have been brought by the bar as a result of committee investigations against potential dangers of such an injury, not direct complaints by consumers.”); Leef, *supra* note 5 (“Experience shows that the vast majority of UPL cases are brought by bar organizations, not injured consumers. Actual cases of harm to clients due to incompetent or dishonest nonattorney assistance are rare.”); Rhode, *Professional Monopoly*, *supra* note 5, at 33 (noting, in a 1979 study, “Of the 1188 inquiries, investigations, and complaints reported by chairmen responding [to a question about consumer complaints], only 27 (2%) reportedly arose from customer complaints and involved specific customer injury”).

81. 2007 FTC Letter, *supra* note 13, at 6 (citing Rhode, *Access to Justice*, *supra* note 5, at 407–08).

82. *See id.* at 6 (citing HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 50–51 (1998); Rhode, *Access to Justice*, *supra* note 5, at 407–08) (“[L]ay specialists who provide bankruptcy and administrative agency hearing representation found that they performed as well as or better than attorneys.”).

83. *See id.* For example, laypersons are assisting in bankruptcy filings, unemployment compensation appeals, and real estate transactions. *See* Rhode, *Professional Monopoly*, *supra* note 5, at 10 (“[M]ost enforcement focuses on laymen, especially those seeking to prepare documents of legal significance and to provide related advice. . . . [A]mong those triggering the most visible unauthorized practice controversy are real estate brokers who draw up documents or counsel parties in real property transfers, and uncontested divorce services . . . . Other principal areas of bar concern include lay involvement in insurance,

*A. Consumer Harms Abound*

Recently, the New York State Bar Association's Committee on Unlawful Practice of Law recommended updating existing UPL rules after hearing testimony about the varying degrees of harm and injury that arise from unlawful law practice in matters involving identity theft, bank fraud, reverse mortgage scams targeting the elderly, immigration, and illegal real estate schemes.<sup>84</sup> To enhance deterrence, New York recently amended its UPL rules to make violations a felony, up from a simple misdemeanor, if the violation substantially damages the consumer.<sup>85</sup> In July 2013, Connecticut also raised the penalty for UPL violations to a felony when the Chief State's Attorney highlighted some egregious cases where nonattorneys scammed victims, offering worthless legal services.<sup>86</sup> He noted that although there were previous cases deserving criminal prosecution, the penalty under the then existing rule was too limited to justify devoting his limited prosecutorial resources to the effort.<sup>87</sup> Proponents similarly noted that increasing jeopardy would have a deterrent effect.<sup>88</sup>

In 2012, the ABA undertook its fourth review of state UPL enforcement authorities, inquiring into complaints about nonattorney providers.<sup>89</sup> Of the

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debt collection, bankruptcy, immigration, trust, and probate matters, as well as lay appearances before administrative agencies.”).

84. See COMM. ON UNLAWFUL PRACTICE OF LAW, PROPOSAL TO ENACT NEW SECTION 485-A AND AMEND SECTION 486 AND 495(3) OF THE JUDICIARY LAW 2, *available at* <http://www.nysba.org/workarea/DownloadAsset.aspx?id=33686> (“It had been previously perceived that violations of these sections against the unlawful practice of law were not considered a public menace but merely an attempt by the legal profession to ‘protect their own interest.’ At hearings held by the Committee, testimony has been elicited from judges, lawyers and citizens groups from all over the state that detailed the prevalence of identity theft, bankruptcy fraud, reverse mortgage scams that target the vulnerable elderly, widespread immigration abuse, and illegal real estate schemes that deprive citizens of their home equity and even ownership of their homes.”).

85. Effective November 1, 2013, it is a class E felony when a person:

- (1) falsely holds himself or herself out as a person licensed to practice law in this state, a person otherwise permitted to practice law in this state, or a person who can provide services that only attorneys are authorized to provide; and
- (2) causes another person to suffer monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right to which he or she is entitled.

N.Y. JUD. LAW § 485-a (McKinney Supp. 2014). The New York State Attorney General also was recently authorized to prosecute UPL violations—either as a misdemeanor or felony. See *id.* § 476-a. The enhanced penalty applies to both individuals and businesses that seek to offer legal advice using a nonlegal title. *Id.*

86. See Mark Dubois, *Opinion: The Authorized Practice of Law*, CONN. L. TRIB., July 29, 2013, at 30.

87. *Id.*

88. *Id.*

89. The ABA Committee's questionnaire was sent electronically to all U.S. jurisdictions. See AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., 2012 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (2012) [hereinafter ABA 2012 UPL SURVEY], *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2012\\_upl\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf). The ABA Committee incorporated responses to its 2009 ABA UPL Survey for those jurisdictions that failed to respond to its 2012 ABA UPL Survey. *Id.* Nine states (Georgia, Kansas, Massachusetts, Michigan, Minnesota, Nevada,

twenty-nine bar committees that responded, twenty-five noted (without identifying the source of the complainant) that they had received complaints about website services, document preparers, and form shops.<sup>90</sup> Most indicated that the violating actors were *notarios* practicing immigration law and nonattorneys providing legal advice and documents about real estate closings, foreclosures, divorces, and mortgage modifications.<sup>91</sup>

Nonattorney-operated, self-help online sites that provide legal services, which have proliferated in recent years, are also responsible for considerable consumer harm. Many represent that they perform the same services as a law firm but at lower costs, provide confusing representations of legal expertise, and often imply that prepared documents are reviewed by attorneys, all while disclaiming the existence of an attorney-client relationship or the reliability of the prepared document and requiring mandatory arbitration of all claims.<sup>92</sup> Unfortunately, consumers who rely on these nonattorney legal service providers have been harmed when they obtained one-size-fits-all documents based on inaccurate or out-of-date forms that were not in compliance with the state law that neither resolved their legal issues, nor were subject to any attorney review.<sup>93</sup> Nevertheless, the injured consumers were generally without adequate recourse—even though the service provider selected the particular form, created the document based on a prompted consumer profile, and, in some cases, filed the completed documents on the consumers' behalf.<sup>94</sup> Claims of deceptive trade practices, misrepresentation or breach of contract could be found to be outside of a court's jurisdiction.

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New Hampshire, Rhode Island, and South Carolina) failed to respond to the 2009 and the 2012 ABA UPL Surveys. *See id.* at chart III.

90. *See id.* chart III.

91. *Id.*

92. *See, e.g., About Us*, LEGALZOOM, <http://www.legalzoom.com> (last visited Apr. 26, 2014) (advertising itself as the “leading, nationally recognized legal brand for small business and consumers in the United States”).

93. *See, e.g., Susan D. Phillips, Bar Association Facilitating Access to Legal Services*, COURIER-J., Jan. 11, 2014, at A10 (discussing how pro se litigants using forms provided by nonattorneys—sometimes downloaded from the internet at substantial cost—could lead to significant harm due to the failure to file proper motions or request appropriate remedies).

94. *See LegalZoom.com, Inc. v. McIlwain*, No. CV-12-1043, 2013 WL 5497717, at \*2 (Ark. Oct. 3, 2013) (enforcing, despite a divided Arkansas Supreme Court, LegalZoom's mandatory arbitration of “all disputes and claims . . . whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory”). Nevertheless, at least four state bar association committees have also found that the company violated their UPL restrictions. *See Unauthorized Practice of Law Comm., Informal Op. 2008-01*, at 1–2 (2008), *available at* <http://www1.ctbar.org/sectionsandcommittees/committees/UPL/08-01.pdf>; Bd. on the Unauthorized Practice of Law of the Supreme Court of Ohio, *Advisory Op. UPL 2008-03* (2008), *available at* [http://www.supremecourt.ohio.gov/Boards/UPL/advisory\\_opinions/UPLAdvOp\\_08\\_03.pdf](http://www.supremecourt.ohio.gov/Boards/UPL/advisory_opinions/UPLAdvOp_08_03.pdf); Penn. Bar Ass'n *Unauthorized Practice of Law Comm., Formal Op. 2010-01*, at 4–6 (2010), *available at* <http://pabar.org/public/committees/UNA01/Opinions/2010-01LglDocumentPreparation.pdf>.

*B. Consumer Complaints: Knowing Where To Look*

The lack of consumer complaints against nonattorney legal service providers arguably is due to the nature of the product purchased. As demonstrated in Part II, many legal service consumers have inadequate information and very little experience with the legal system to enable them to knowingly judge the quality of the legal services received. For example, a 2009 study conducted by the LSC found that low-income households encounter two to three legal problems a year but seek assistance from an attorney (privately or publicly funded) only one-fifth of the time.<sup>95</sup> The data from another study similarly suggests that “[a]bout a quarter of middle-income individuals and between a fifth to half of low-income individuals” took no action in response to legal problems.<sup>96</sup>

If critics of UPL restrictions only review state disciplinary actions or letters to state bar committees to discern consumer complaint levels, they will overlook other sources that may reveal consumer dissatisfaction with nonattorney legal service providers. As illustrated above, most of these consumers generally level their complaints through nontraditional channels, choosing instead to post complaints on the internet through personal or company-based social media websites, or they direct complaint letters or angry calls to the legal service providers, local better business bureau or state attorney general’s office. Those who would complain about UPL violations are not even aware of where to complain. Generally the information in the marketplace is about avoiding UPL restrictions, not how to hold individuals accountable. Arguably, the cost of bringing an action against the nonattorney legal service provider would be a barrier as well. It strains the imagination to reason that most unsatisfied consumers now will retain an attorney to proceed against the nonattorney provider to challenge a liability disclaimer or to file a claim for fraud or breach of contract when, for economic reasons, they failed to consult an attorney regarding their initial legal problem.

Finally, critics ignore that consumers of nonattorney legal services typically have little recourse upon receipt of inadequate and incompetent services. They are stymied by the general absence of privity necessary to maintain a malpractice action and generally lack standing to bring action for the unauthorized practice of law. In fact, most jurisdictions deny

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95. See Rhode, *Access to Justice*, *supra* note 5, at 534 (citing LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 1–13 (2009), available at [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf)).

96. See *id.* (citing Gillian Hadfield, *Higher Demand, Lower Supply?: A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 135–42 (2010)). Apart from highlighting how infrequently consumers enter the market for legal services, the survey findings raise additional questions for future study, including: (1) why low and moderate income individuals choose not to seek legal advice from attorneys; (2) what, if any, alternatives are being employed to resolve the legal problems assuming that many are aware that redressable legal problems exists; and (3) whether the legal problems were satisfactorily resolved. Responses to these questions are necessary before measures to expand the legal service market should be entertained.

consumers the ability to maintain a private right of action for the unauthorized practice of law.<sup>97</sup> Only six states, and the District of Columbia, recognize a private right of action for aggrieved parties to sue for violations of the UPL restrictions.<sup>98</sup> Even where the private right of action exists, however, the aggrieved party is required first to understand both that a harm has occurred and that the right to sue for UPL violation exists. As previously mentioned, most consumers have little prior experience against which to compare the present service received from nonattorneys and probably have limited resources upon which to pursue such a time-consuming action for private damages. In Illinois, only attorneys have standing to sue, based on the notion that the unlicensed person is infringing upon the rights of one who is properly licensed.<sup>99</sup>

#### IV. MEANINGFUL ACCESS TO JUSTICE REQUIRES ACCESS TO AFFORDABLE ATTORNEYS

In light of the weaknesses of the free-market proponents' argument, this Part asserts that the solution to the access-to-justice problem can be found by increasing attorney availability to the underserved through funding and mandatory pro bono requirements and by ensuring that those engaged in UPL are punished appropriately.

##### A. *The Profession's Role in Increasing Access*

Too few available attorneys to meet the needs of the populace is a problem that the legal profession must address. Rising legal costs, while a consideration, may not be the sole obstacle that prevents a large number of low- and moderate-income individuals from seeking legal counsel and advice from attorneys. Other factors, including language and structural and information barriers, play a significant role in directing clients away from

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97. See 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, 733–34 (2007).

98. *Id.* (“A few jurisdictions, including Alabama, Washington, West Virginia, Arkansas, Texas, and the District of Columbia recognize the ability of any aggrieved party to sue UPL violators.” (footnotes omitted)); see also *Greenspan v. Third Fed. Sav. & Loan Ass'n*, 912 N.E.2d 567, 572 (Ohio 2009). In *Greenspan*, the court recognized that no private cause of action for the unauthorized practice of law existed prior to the General Assembly's 2004 amendment to OHIO REV. CODE ANN. § 4705.07 (LexisNexis 2013). *Greenspan*, 912 N.E.2d at 572. However, noting its exclusive jurisdiction over unauthorized practice of law claims, the court opined,

[T]he General Assembly avoided invading this court's exclusive jurisdiction over the practice of law by creating a statutory scheme under which a claimant may commence a civil action for the unauthorized practice of law only “upon a finding by the supreme court that the other person has committed an act that is prohibited by the supreme court as being the unauthorized practice of law.”

*Id.*; see also Appendix B.

99. Hoppock, *supra* note 97, at 734 (“Illinois recognizes the right of licensed attorneys to sue UPL violators on a theory that UPL ‘constitutes an infringement upon the rights of those who are properly licensed, [therefore] attorneys and law firms have standing to bring a cause of action for such unauthorized practice.’” (quoting *Richard F. Mallen & Assocs., Ltd. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 76 (Ill. App. Ct. 2002))).

attorneys.<sup>100</sup> Clearly, additional research is needed to determine what drives potential clients away from attorneys and toward nonattorneys.

Attorneys know that more must be done in the meantime to help meet the legal needs of low- and moderate-income individuals before wholesale policy changes to the legal profession occur that would enable nonattorneys to engage in the practice of law without restriction. State courts and state bar committees have endeavored to find a solution for some time. In response to the large number of unrepresented litigants in both the family and civil courts in Kentucky, for example, the Louisville Bar Association (LBA) joined forces with the Kentucky Supreme Court Access to Justice Committee and the Legal Aid Society to help provide some needed assistance.<sup>101</sup> The LBA's Pro Bono Consortium of volunteer attorneys, judges, and representatives of the Legal Aid Society and the University of Louisville Brandeis School of Law, for example, have developed a series of self-help legal forms for individual use (alone or with minimal assistance) in divorce, child support, custody and visitation proceedings.<sup>102</sup> The forms are available through the Jefferson County Circuit Court Clerk's Office and the Legal Aid Society. Twice monthly, the LBA Pro Bono Consortium offers free clinics at the Jefferson County Judicial Center to inform potential litigants of how to properly complete and file the necessary forms.<sup>103</sup> While these actions work to help the unrepresented client better navigate the judicial system, everyone involved acknowledges that it is no substitute for having attorney representation at these proceedings.

Full representation by an attorney is necessary in many instances to ensure that a person knows his or her legal rights, makes informed decisions, and, if the representation involves administrative or judicial proceedings, is competently represented before the tribunal. Fully represented parties receive benefits that affect not just their own lives, but the lives of those around them.<sup>104</sup> One study that examined the difference in outcomes between represented and pro se parties found that the odds of success of the represented parties increased by 72 percent over their unrepresented counterparts.<sup>105</sup> The benefits of representation are not limited to the success rate. If people feel that a lack of representation prevents them from meaningfully engaging in the legal system, they will view the government and that legal system cynically.<sup>106</sup> The ABA

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100. See Vincent E. Doyle III, *Promoting Fairness In Immigration Matters*, N.Y. ST. B. ASS'N J., Oct. 2011, at 5, 5 ("Language issues, limited English proficiency and cultural barriers can render them vulnerable to exploitation by unscrupulous individuals who exact exorbitant fees to provide inadequate services . . . that actually harms their cases and makes it more difficult for a court to grant discretionary relief. Some respondents cannot afford to retain adequate legal services, or they simply may not know where to turn for help.").

101. See Phillips, *supra* note 93.

102. See *id.*

103. *Id.*

104. Levy, *supra* note 73, at 573.

105. *Id.* at 573, 576 ("The research disclosed that tenants who proceeded without counsel achieved a generally favorable outcome 58 percent of the time, while those that had the benefit of counsel achieved a generally favorable outcome 85 percent of the time.").

106. *Id.* at 582-83.

recognized the importance of the right to an attorney for indigent civil litigants when it advocated for expanded access in 2006. Specifically, the ABA resolved:

That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody . . . .<sup>107</sup>

Despite the fact that, in comparison to other developed countries, the United States has a higher percentage of lawyers per person, “fewer than 1 percent of American lawyers are in a legal services practice.”<sup>108</sup> In other words, for every group of 14,000 indigent or near-indigent people, there is only one full-time legal services lawyer.<sup>109</sup> As a result, low- or middle-income individuals are likely to handle civil legal problems without legal representation.<sup>110</sup> The growing frequency with which self-representation is occurring is indefensible.

Rule 6.1 of the ABA’s Model Rules of Professional Conduct provides that every lawyer has a professional responsibility to provide legal services for those who are unable to pay.<sup>111</sup> Rather than eschewing responsibility and, as some would advocate, leaving it to nonattorneys to meet the legal needs of low- and moderate-income individuals, action by all members of the profession is required to ensure that those with legal needs are able to have a licensed attorney handle their matters.

Everyone should be aware by now of the ever-increasing budget cuts that have negatively impacted legal aid service providers nationwide in recent

107. See TASK FORCE ON ACCESS TO CIVIL JUSTICE, RESOLUTION ON CIVIL RIGHT TO COUNSEL (2006), available at <http://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fmigrated%2Fleadership%2F2006%2Fannual%2Fdailyjournal%2Fhundredtwelve.authcheckdam.doc>.

108. Combs & Bloom, *supra* note 26, at 51 (citing DEBORAH RHODE, ACCESS TO JUSTICE 3–4 (2004)).

109. *Id.* “That statistic does not include the lower middle class, many of whom are priced out of the legal market.” *Id.*

110. *Id.*; see also Rhode, *Access to Justice*, *supra* note 5, at 534; Steve Banks, *Legal Aid’s Chief Attorney, Predicts Budget Cuts Will Have Harsh Impact on Vulnerable New Yorkers, Urges City Council To Restore Funding for Civil Legal Services; Warns of Uncertainties That Affect Criminal Client Services*, LEGAL AID SOCIETY (May 16, 2011), <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/stevebanks,legalaidschiefattorney,predictsbudgetcutswillhaveharshimpactonvulnerablenewyorkers.aspx> [hereinafter *Steve Banks*] (“We are mindful of the extreme financial difficulties that the City is facing. At the same time, these extraordinary economic conditions are having an especially harsh impact on low income New Yorkers and the need for the legal help that the Society provides to these struggling families and individuals is increasing exponentially,” Banks told the Council. “We are forced to turn away eight out of every nine New Yorkers who seek our help.”); Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid*, N.Y. TIMES, Jan. 18, 2009, at A12 (“Scores of legal aid societies that help poor people with noncriminal cases—like disputes over foreclosures, evictions and eligibility for unemployment benefits—are being forced to cut their staffs and services, even as requests for help have soared.”).

111. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013).



years.<sup>112</sup> These budget cuts have forced too many qualified clients to be turned away from affordable attorney representation—a number that has only exploded after the 2008 economic crisis.<sup>113</sup> Mindful of this problem, the profession should play a greater role to ensure that a steady funding source exists. One attorney-centered option to restore funding is for the respective state courts and bar committees nationwide to mandate an increase in both the attorney registration fees and bar dues (calculating the increase using a percentage of the average salary earned by each member during the prior two-year period).<sup>114</sup> Thereafter, those excess funds should be directed to help shore up the annual budgets of those legal aid providers who work within our respective states. Such a move would enable attorneys both to shoulder some of the responsibility in helping to fund those legal aid providers in their jurisdictions and to personally meet their ethical and moral obligations by addressing the cost element that might have prevented potential clients from obtaining the legal assistance of an attorney.

Another (nonexclusive) option that would enable low and moderate income individuals to obtain legal assistance from attorneys requires action from both the ABA and all state attorney-licensing bodies: now is the time to finally, and swiftly, adopt the mandatory pro bono service obligation for all licensed attorneys—an idea that has been bandied about for years. A 2012 study found that the number of attorneys performing more than twenty hours of pro bono services annually dipped to less than 44 percent.<sup>115</sup> The ABA's boldest move in this area to date has been to urge that every attorney "should aspire to render at least (50) hours of pro bono publico legal services per year."<sup>116</sup> Unfortunately, there has not been enough voluntary movement either to meet this exhortation or to lessen the burden of those with unmet legal needs.<sup>117</sup> State licensing officials similarly are well aware of what has been unfolding in housing courts, family courts, and people's courts (to name a few) for more than a decade. It is a failure of leadership to continue to ignore a potentially viable solution, while witnessing so many low- and moderate-income individuals lose their

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112. See Rhode, *Access to Justice*, *supra* note 5, at 532–33 & n.2; *supra* note 31.

113. See Banks, *supra* note 110.

114. See Combs & Bloom, *supra* note 26, at 54 (noting that this option for increasing legal services funding was adopted by Illinois, Minnesota, Missouri, Pennsylvania, Texas, and Wisconsin, where attorney registration fees were increased in order to do so). For example, a proposed mandatory fee of "\$25 per attorney based on 35,790 registered attorneys in 2011 . . . would [have raised] an additional \$894,750 per year for legal services funding." *Id.*

115. *Pro Bono Report 2012: Under Construction*, *supra* note 32, at 63.

116. MODEL RULES OF PROF'L CONDUCT R. 6.1.

117. State-imposed mandatory reporting obligations may serve to increase voluntary pro bono commitments, though the sample size is too small to be conclusive. See Combs & Bloom, *supra* note 26, at 54–55 ("Seven states—Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada, and New Mexico—have mandated the reporting of *pro bono* hours on an annual basis. The data is scarce regarding the effectiveness of mandatory reporting, but in Florida, the mandatory reporting requirement has brought about significant increases in *pro bono* participants and monetary contributions to legal aid organizations.").

homes, jobs, spousal support, or custody simply because they were unable to afford to hire an attorney.<sup>118</sup>

It is past time to mandate pro bono obligations for all practicing attorneys.<sup>119</sup> Specifically, every attorney should be required to render at least 120 hours of pro bono publico legal services over each two-year period of attorney registration. Such service obligation must be directed either to persons of limited means or to charitable, religious, civic, community, governmental, and education organizations that primarily address the needs of persons of limited means.<sup>120</sup> These attorneys could direct their services to meeting the needs of civil litigants in housing or family courts, or handle consumer matters in district court. More than a dent in the unmet legal needs of many could result.<sup>121</sup> Arguments against effecting mandatory pro bono obligations<sup>122</sup> ring hollow when attorneys do meet other mandated obligations, including those relating to continuing

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118. See LOUIS D. BRANDEIS, *The Opportunity in the Law* (May 4, 1905), in *BUSINESS—A PROFESSION* 313, 321 (1914) (“It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.”).

119. “Approximately ninety percent of all law schools currently have some type of organized pro bono program.” Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 *BUFF. L. REV.* 1355, 1356 (2007). Unfortunately, student participation even in mandatory law school pro bono programs did not equate to increased voluntary pro bono involvement following graduation. See *id.* at 1411.

120. Under this proposal, attorneys may be able to discharge the mandatory service obligation only if a monetary payment, equivalent to the salary of a legal aid attorney performing the same hours of work, is made prior to the service obligation. Although Michigan does not mandate a pro bono obligation, it does incorporate a similar fundraising mechanism for attorneys who would like to shoulder some responsibility for providing legal representation to persons of limited means, but who choose not to perform pro bono services. See Ronald D. Keefe, *No Foreclosure of Access to Justice*, *MICH. B.J.*, Mar. 2008, at 14 (“The State Bar asks each lawyer in Michigan to donate 30 hours of pro bono legal services annually, handle three pro bono cases, or donate at least \$300 to a legal service provider.”); see also Johnstone, *supra* note 30, at 607 (“The fee should be the equivalent of the average two-week salary of full-time legal aid lawyers engaged in the provision of legal services for the poor in the state where the licensed lawyer maintains his or her principal office.”).

121. This is the case even though attorneys might be unfamiliar with legal problems of pro bono clients. Many state bar associations provide mentorship programs for attorney volunteers. See, e.g., Dean J. Zipser, *Pro Bono Work—The Question Is Not “Why?” But “Why Not,”* *ORANGE CNTY. LAW.*, June 2005, at 6 (noting that attorney volunteers would have “one or more ‘experts’ whom they may call upon . . . to give them the necessary guidance and counseling on the key specialized subject matters . . . includ[ing] family law, probate and estate planning, consumer bankruptcy, and landlord/tenant-real estate law”); cf. Johnstone, *supra* note 30, at 605–06 (noting the argument about “alleged inefficiency of mandatory pro bono [because] many practicing lawyers lack familiarity with the legal problems of the poor, and if these lawyers take on such representation, they must spend additional time acquiring the background knowledge needed to provide competent representation of the poor”).

122. See Johnstone, *supra* note 30, at 606 (noting the existence of constitutional arguments against mandatory pro bono, including that it would be “a violation of the First, Fifth, Thirteenth, and Fourteenth Amendments of the U.S. Constitution—although due to lack of adoptions of mandatory pro bono there is no case law authority clearly so holding”).

legal education.<sup>123</sup> In 2015, New York (for example) will begin requiring new lawyers to perform fifty hours of pro bono work as a condition for obtaining a law license.<sup>124</sup> While this is a great start, we must question why this obligation should end after the attorney is admitted to practice and why other attorneys should be exempted.

A final attorney-centered option would require action from the ABA and the collective involvement of both the private bar and the legal academy. The ABA should examine whether an attorney apprenticeship program for new law graduates is practicable.<sup>125</sup> Such a program would be a particularly timely response for recent law graduates who continue to experience a very tight job market.<sup>126</sup> This endeavor also would address concerns that law schools do not sufficiently prepare law graduates to enter the profession practice ready despite their rigorous analytical training.<sup>127</sup> Law schools, in partnership with the state and local bar committees, can create the apprenticeship programs to which recent law graduates may apply. Law schools currently are working to increase student opportunities for experiential learning, including offering more skills-related courses and externship opportunities. In the search for legal opportunities for their law students, law schools are building stronger relationships with the public and private bar that can enable them to serve as conduits for apprentice opportunities for their recent graduates. Newly licensed attorneys would benefit from the opportunity to further hone their legal and professional skills under the tutelage of a more senior legal advisor while also providing

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123. See Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers' Monopoly*, 101 NW. U. L. REV. 1343, 1356 (2007). The validity of the constitutional objections to mandatory pro bono are questionable. See *id.* at 1357–58. Other impediments to a mandatory pro bono obligation are also surmountable. See *id.* at 1358–59.

124. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16(a) (2013) (“(a) Fifty-hour pro bono requirement. Every applicant admitted to the New York State bar on or after January 1, 2015, other than applicants for admission without examination pursuant to section 520.10 of this Part, shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.”).

125. See John J. Farmer, Jr., Op-Ed., *To Practice Law, Apprentice First*, N.Y. TIMES, Feb. 18, 2013, at A17 (proposing, as the dean of Rutgers School of Law, a new system, “the equivalent of a medical residency,” whereby “[l]aw school graduates would practice for two years . . . under experienced supervision, at reduced hourly rates”). While Dean Farmer proposes that this system would enable (large and small) law firms to hire more attorneys, see *id.*, I propose that the firms could also direct this “residency” work to cases arising in family and housing courts or to cases that focus on small business, foreclosure, or consumer issues.

126. See generally Lucy B. Bansal, Note, *A Lawyer for John Doe: Alternative Models for Representing Maryland's Middle Class*, 13 MD. L.J. RACE, RELIGION, GENDER & CLASS 156 (2013) (proposing, as one of four models, the adoption of mentorship program for new lawyers to encourage middle-class representation at novice rates).

127. See Dawinder S. Sidhu, *Civic Education As an Instrument of Social Mobility*, 90 DENV. U. L. REV. 977, 997 (2013) (“Law schools are being battered by charges that they do not sufficiently prepare law students with the requisite skills for legal employment and that they saddle graduates with too much debt . . . .” (citing Elizabeth Lesly Stevens, *Will Law Students Have Jobs After They Graduate?*, WASH. POST (Oct. 31, 2012), [http://www.washingtonpost.com/lifestyle/magazine/will-law-school-students-have-jobs-after-they-graduate/2012/10/31/f9916726-0f30-11e2-bd1a-b868e65d57eb\\_story.html](http://www.washingtonpost.com/lifestyle/magazine/will-law-school-students-have-jobs-after-they-graduate/2012/10/31/f9916726-0f30-11e2-bd1a-b868e65d57eb_story.html))).

assistance in those practice areas where there is some unmet need. Mentoring was recognized as one method to increase competency in the 1994 Henson-Dolan Commission report<sup>128</sup> and was recently reinforced by a study that new attorneys gain substantive professional and development skills, as well as client relations skills, from mentoring.<sup>129</sup> “By embracing a residency model, the profession can rebalance the tension between profit and service.”<sup>130</sup>

### B. Stricter Enforcement of UPL Restrictions

Increased enforcement actions that target violations of state UPL restrictions are needed to create the necessary deterrent effect. Unfortunately, enforcement efforts are not uniform across the states. Thirty-two states reported some level of active enforcement of UPL restrictions,<sup>131</sup> with several states permitting multiple entities (e.g., state supreme court, state bar counsel, state bar committee, and county prosecutor) to enforce UPL restrictions.<sup>132</sup> Authority to enforce UPL restrictions is established by statute in twenty-nine states and by court rules in twenty-three states.<sup>133</sup> Despite overlapping grants of authority, however, insufficient funding or staff resources challenge many of the states’ ability to bring enforcement actions.<sup>134</sup>

Penalties for UPL violations also vary from state to state, some with overlapping sanctions: civil injunctions in thirty-two states; criminal fines in twenty-four; prison sentences in twenty; civil contempt in twenty-two; restitution in sixteen; and civil fines in thirteen.<sup>135</sup> The spotty enforcement effort, coupled with the varied designations of wrongdoing and the resulting penalties from UPL violations, can impede the deterrent effect on nonattorneys. Criminal prosecutions, for example, are not widespread, because such cases typically fall on the overburdened state attorney general, and where designated as misdemeanors, the time and costs of prosecution are outweighed.<sup>136</sup> Though prosecutorial power may be delegated to a state

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128. See REPORT OF THE ADVISORY COMMITTEE TO REVIEW LAWYER DISCIPLINE IN MINNESOTA AND EVALUATE THE RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION 36 (1994).

129. See Tammy A. Patterson & Mark J. Korf, *The Power of Informal Mentoring Programs*, BENCHER (Mar./Apr. 2013), <http://home.innsocourt.org/for-members/current-members/the-bencher/recent-bencher-articles/marchapril-2013/the-power-of-informal-mentoring-programs.aspx> (analyzing the results of a study conducted by the National Association for Law Placement Foundation for Law Career Research & Education and Beyond the Bar, part of West LegalEdcenter, a division of Thomson Reuters).

130. See Farmer, *supra* note 125.

131. See ABA 2012 UPL SURVEY, *supra* note 89, chart II.

132. See *id.* chart I.

133. See *id.*

134. See *id.*

135. See *id.* chart II.

136. The Chief State’s Attorney of Connecticut noted that although there were previous UPL cases deserving of criminal prosecution, the penalty for a misdemeanor rule violation was so limited to justify devoting his limited prosecutorial resources to the effort. See Dubois, *supra* note 86. Though a felony in South Carolina, the unauthorized practice of law

bar committee, the number of UPL enforcement actions generally does not improve given the budget constraints of many state bar committees.<sup>137</sup> Civil injunctions, though useful against the threat of repeat offenders, similarly are not wholly effective to deter noncompliance given the insufficient level of accompanying monetary sanctions.

#### CONCLUSION

The UPL restrictions are necessary to preserve the “core values” of the legal profession—i.e., that clients should receive ethically competent legal services from their attorneys, including the requirement that attorneys are independent and loyal, maintain client confidences, and eschew conflicts of interest. Attorneys who fail to meet their ethical and professional obligations are subject to discipline and other sanctions. These core values are what consumers of legal services have come to expect, whether they retain an attorney or purchase legal services from nonattorney providers. These core values are also what have continually maintained our civil society.

A two-tiered system of representation in the market for legal services will not provide the relief sought after decades of hand-wringing. Rather than continually debating whether the category of legal service providers should be broadened to allow nonattorneys to compete, the ABA, state licensing officials, and state bar committees should focus attention exclusively on ways to broaden individuals’ access to licensed attorneys at affordable rates. A mandatory attorney pro bono obligation is the solution that has been willfully overlooked for too long.

Consideration of different models for delivering attorney-provided legal services to individuals in practice areas where the need is greater, coupled with better enforcement of the UPL regulations and attorney disciplinary rules will provide the access to justice that 88 percent of the public expects.<sup>138</sup> Hard choices must be made in the face of the intransigent but unreasonable opposition to any requirement that attorneys play a greater role in seriously dealing with the unmet legal needs of low- and moderate-income individuals. This Article advances some options to get the ball rolling to ensure attorney representation to a significant segment of the U.S. population.

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restriction has not been prosecuted as such. *See* S.C. CODE ANN. § 40-5-310 (2009). No private right of action for UPL violations exists in South Carolina. *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 623 (2002) (“We . . . hold there is no private right of action in South Carolina for the unauthorized practice of law.”); *see also* Appendix B.

137. *See* ABA 2012 UPL SURVEY, *supra* note 89, chart I.

138. *See* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 908 (2009) (“In a 2009 ABA-commissioned survey, 88 percent of Americans agreed that it is essential that a nonprofit provider of legal services [e.g., a legal aid office] be available to assist those who could not otherwise afford legal help; two-thirds supported federal funding for such assistance.”).

APPENDIX A. EXISTENCE OF A PUBLIC REGISTRY OF ATTORNEY  
DISCIPLINARY ACTIONS ORGANIZED BY STATE

State	Is There a Registry?	Notes
<b>Alabama</b>	No	
<b>Alaska</b>	Limited <sup>139</sup>	More information is available by calling (907) 272-7469.
<b>Arizona</b>	Yes <sup>140</sup>	
<b>Arkansas</b>	Yes <sup>141</sup>	
<b>California</b>	Yes <sup>142</sup>	
<b>Colorado</b>	Yes <sup>143</sup>	
<b>Connecticut</b>	Yes <sup>144</sup>	
<b>Delaware</b>	Yes <sup>145</sup>	
<b>Florida</b>	Limited <sup>146</sup>	Can find a history of a specific attorney's discipline if that attorney's name is known
<b>Georgia</b>	Limited <sup>147</sup>	Can find only recent disciplinary actions

139. *Resources for the Public/Complaints Against Attorneys*, ALASKA B. ASS'N, [https://www.alaskabar.org/servlet/content/resources\\_for\\_the.html](https://www.alaskabar.org/servlet/content/resources_for_the.html) (last visited Apr. 26, 2014).

140. *Attorney Misconduct*, ARIZ. JUD. BRANCH, <http://www.azcourts.gov/attorneydiscipline/Home.aspx> (last visited Apr. 26, 2014).

141. *Opinions and Disciplinary Decisions*, Ark. Judiciary, <https://courts.arkansas.gov/opinions-and-disciplinary-decisions> (last visited Apr. 26, 2014).

142. *California State Bar Court Reporter*, ST. B. CT. CAL., <http://www.statebarcourt.ca.gov/Opinions/CaliforniaStateBarCourtReporter.aspx> (last visited Apr. 26, 2014); *Non-published Opinions*, ST. B. CT. CAL., <http://www.statebarcourt.ca.gov/Opinions/NonPublishedOpinions.aspx> (last visited Apr. 26, 2014); *Published Opinions*, ST. B. CT. CAL., <http://www.statebarcourt.ca.gov/Opinions/PublishedOpinions.aspx> (last visited Apr. 26, 2014).

143. *Office of the Presiding Disciplinary Judge*, COLO. SUPREME CT., <http://www.coloradosupremecourt.com/PDJ/pdj.htm> (last visited Apr. 26, 2014); *Opinions/Rules/Statutes*, COLO. B. ASS'N, <http://www.cobar.org/ors.cfm> (last visited Apr. 26, 2014).

144. *Grievance Decisions*, ST. CONN. JUD. BRANCH, <http://jud.ct.gov/sgcdecisions/names.aspx> (last visited Apr. 26, 2014).

145. *Office of Disciplinary Counsel, Digest of Lawyer Discipline*, DEL. ST. COURTS, <http://courts.delaware.gov/odc/digest/> (last visited Apr. 26, 2014).

146. FLA. B., <http://www.floridabar.org/> (last visited Apr. 26, 2014).

<b>Hawaii</b>	Limited <sup>148</sup>	Can find status of attorneys; no ability to find the case itself
<b>Idaho</b>	Limited <sup>149</sup>	Can find recent history online; attorney's discipline history can be requested
<b>Illinois</b>	Yes <sup>150</sup>	Can search by specific attorney's name to see if he or she has been disciplined and can find recent status changes without knowing the name of a specific attorney
<b>Indiana</b>	Yes <sup>151</sup>	
<b>Iowa</b>	Limited <sup>152</sup>	Can search by specific attorney's name; recent (60 days) disciplinary actions can also be found
<b>Kansas</b>	Limited <sup>153</sup>	Can search the status of an attorney by name
<b>Kentucky</b>	Limited <sup>154</sup>	Can find whether an attorney is currently active or is inactive
<b>Louisiana</b>	Yes <sup>155</sup>	
<b>Maine</b>	Yes <sup>156</sup>	
<b>Maryland</b>	Yes <sup>157</sup>	

147. *Recent Attorney Discipline*, ST. B. GA., <http://www.gabar.org/forthepublic/recent-discipline.cfm> (last visited Apr. 26, 2014).

148. *Not Authorized To Practice Law in Hawaii*, HAW. ST. B. ASS'N, <http://hsba.org/resources/1/Status/inactive.htm> (last visited Apr. 26, 2014).

149. *Attorney Discipline*, IDAHO ST. B., [http://isb.idaho.gov/bar\\_counsel/bc\\_info\\_public.html](http://isb.idaho.gov/bar_counsel/bc_info_public.html) (last visited Apr. 26, 2014).

150. *Lawyer Search*, ATT'Y REGISTRATION & DISCIPLINARY COMM'N SUPREME CT. ILL., <https://www.iardc.org/lawyersearch.asp> (last visited Apr. 26, 2014).

151. *Orders and Opinions Regarding Final Resolution in Attorney Discipline Cases 2014*, JUD. BRANCH IND., <http://www.in.gov/judiciary/2768.htm> (last visited Apr. 26, 2014).

152. *Recent Attorney Disability and Disciplinary Orders (Past 60 Days)*, IOWA JUD. BRANCH, <https://www.iacourtcommissions.org/icc/SearchDiscipline.do?action=recentSearch> (last visited Apr. 26, 2014).

153. *Attorney Directory*, KAN. SUPREME CT., [http://intranet.kscourts.org:7780/pls/ar/ATTORNEY\\_REGISTRATION\\_PKG.request\\_attorney](http://intranet.kscourts.org:7780/pls/ar/ATTORNEY_REGISTRATION_PKG.request_attorney) (last visited Apr. 26, 2014).

154. *Membership, Lawyer Locator*, KY. ST. B. ASS'N, <http://www.kybar.org/26> (last visited Apr. 26, 2014).

155. *Recent Rulings*, LA. ATT'Y DISCIPLINARY BOARD, [http://www.ladb.org/NXT/gateway.dll?f=templates\\$fn=default.htm\\$vid=ladb:ladbview](http://www.ladb.org/NXT/gateway.dll?f=templates$fn=default.htm$vid=ladb:ladbview) (last visited Apr. 26, 2014).

156. *Attorney Directory, Attorney Information Search*, ME. BOARD OVERSEERS B., [https://www1.maine.gov/cgi-bin/online/maine\\_bar/attorney\\_directory.pl](https://www1.maine.gov/cgi-bin/online/maine_bar/attorney_directory.pl) (last visited Apr. 26, 2014).

<b>Massachusetts</b>	Limited <sup>158</sup>	Can search by specific attorney's name
<b>Michigan</b>	Limited <sup>159</sup>	Can search by specific attorney's name; recent opinions (two years) can also be found
<b>Minnesota</b>	Yes <sup>160</sup>	
<b>Mississippi</b>	Limited <sup>161</sup>	Can search by specific attorney's name, firm, city, or county
<b>Missouri</b>	Yes <sup>162</sup>	Anyone can find out if a Missouri attorney has a record of public discipline by contacting the Office of the Chief Disciplinary Counsel.  Office of the Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, MO 65109 Phone (573) 635-7400; Fax (573) 635-2240.
<b>Montana</b>	Limited <sup>163</sup>	Can search by specific attorney's name
<b>Nebraska</b>	Limited <sup>164</sup>	Can search by specific attorney's name
<b>Nevada</b>	Limited <sup>165</sup>	Can search by specific attorney's name or location for discipline since 2003
<b>New Hampshire</b>	Yes <sup>166</sup>	Can search by several criteria

157. *Maryland Attorneys—Disciplinary Actions, FY 2006 to Present*, MD. COURTS, <http://www.courts.state.md.us/attygrievance/sanctions.html> (last visited Apr. 26, 2014).

158. *How To Search for an Attorney by Name or City*, MASS. BOARD B. OVERSEERS, <http://massbbo.org/bbolookup.php> (last visited Apr. 26, 2014).

159. *Attorney Database*, ATT'Y DISCIPLINE BOARD ST. MICH., <http://www.adbmich.org/CHECKER.HTM> (last visited Apr. 26, 2014); *Recent Board Orders and Opinions*, ATT'Y DISCIPLINE BOARD ST. MICH., <http://www.adbmich.org/RECENTOPN.HTM> (last visited Apr. 26, 2014).

160. *Minnesota Lawyer Public Decision Search*, MINN. LAW. PROF. RESP. BOARD, <http://lprb.mncourts.gov/LawyerSearch/Pages/default.aspx> (last visited Apr. 26, 2014).

161. *Lawyer Directory*, MISS. B., <http://msbar.org/lawyer-directory.aspx> (last visited Apr. 26, 2014).

162. *For the Public: Disciplinary Proceedings*, OFF. CHIEF DISCIPLINARY COUNS. MO., <http://mochiefcounsel.org/ocdc.htm?id=24&cat=2> (last visited Apr. 26, 2014).

163. *Public Discipline of Attorneys*, OFF. DISCIPLINARY COUNS. FOR ST. MONT., <http://www.montanaodc.org/Portals/ODC/Public%20Discipline%20List.pdf> (last visited Apr. 26, 2014).

164. *Public Orders Imposed Against Nebraska Attorneys*, ST. NEB. JUD. BRANCH, <http://supremecourt.ne.gov/attorney-sanctions> (last visited Apr. 26, 2014).

165. *Find a Lawyer*, ST. B. NEV., <http://nvbar.org/find-a-lawyer> (last visited Apr. 26, 2014).



<b>New Jersey</b>	Yes <sup>167</sup>	
<b>New Mexico</b>	Limited <sup>168</sup>	Can find whether an attorney is currently active or inactive
<b>New York</b>	Limited <sup>169</sup>	Can search by specific attorney's name to find status
<b>North Carolina</b>	Yes <sup>170</sup>	Can search by specific attorney's name or by recent decisions
<b>North Dakota</b>	Limited	More information is available by calling (701) 328-2221.
<b>Ohio</b>	Limited <sup>171</sup>	Can search by specific attorney's name
<b>Oklahoma</b>	No	
<b>Oregon</b>	Yes <sup>172</sup>	
<b>Pennsylvania</b>	Limited <sup>173</sup>	Can search by specific attorney's name
<b>Rhode Island</b>	Limited <sup>174</sup>	Can search by specific attorney's name
<b>South Carolina</b>	Limited <sup>175</sup>	Recent (2 year) discipline history

166. *Search for Public Discipline Issued Since January 1, 2004*, N.H. SUPREME CT. ATT'Y DISCIPLINE SYS., <http://www.nhattyreg.org/search.php> (last visited Apr. 26, 2014).

167. *Disciplinary Histories*, N.J. COURTS, <http://www.judiciary.state.nj.us/oe/discipline.htm> (last visited Apr. 26, 2014).

168. *Find an Attorney*, ST. B. N.M., <http://www.nmbar.org/findattorney/attorneyfinder.aspx> (last visited Apr. 26, 2014).

169. *Attorney Search*, N.Y. ST. UNIFIED CT. SYS., <http://iapps.courts.state.ny.us/attorney/AttorneySearch> (last visited Apr. 26, 2014).

170. *Disciplinary Actions from the Most Recent Journal*, N.C. ST. B., <http://www.ncbar.com/discipline/> (last visited Apr. 26, 2014).

171. *Attorney Information Search*, SUPREME CT. OHIO & OHIO JUD. SYS., [http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/Public\\_AtorneyInformation.asp](http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/Public_AtorneyInformation.asp) (last visited Apr. 26, 2014).

172. *Discipline*, OR. ST. B., <http://www.osbar.org/publications/dbreporter/dbreport.html> (last visited Apr. 26, 2014).

173. *Look Up a PA Attorney*, DISCIPLINARY BOARD SUPREME CT. PA., <http://www.padisciplinaryboard.org/look-up/pa-attorney-search.php> (last visited Apr. 26, 2014).

174. *Attorney Search*, R.I. JUD., <http://rijrs.courts.ri.gov/rijrs/attorneyDisclaimer.do> (last visited Apr. 26, 2014).

175. *Member Discipline*, S.C. B., <http://www.scbar.org/MemberResources/Publications/SouthCarolinaLawyer/WhatsNew/MemberDiscipline.aspx> (last visited Apr. 26, 2014).

<b>South Dakota</b>	No	
<b>Tennessee</b>	Limited <sup>176</sup>	Can search by specific attorney's name
<b>Texas</b>	Limited <sup>177</sup>	Can search by specific attorney's name
<b>Utah</b>	Limited <sup>178</sup>	Notices of suspension, disbarment, resignation with discipline pending, transfer to and from disability status, and petitions for reinstatements or re-admissions are published in the <i>Utah Bar Journal</i> and in a newspaper of general circulation in each judicial district within the state in which the lawyer maintained an office for the practice of law. Additionally, carrying out its responsibility to provide informal guidance on issues related to professional conduct, the bar publishes disciplinary results in the <i>Utah Bar Journal</i> . The bar publishes summaries of private admonitions but omits any details that identify the lawyer.
<b>Vermont</b>	Yes <sup>179</sup>	
<b>Virginia</b>	Limited <sup>180</sup>	Can search by specific attorney's name
<b>Washington</b>	Limited <sup>181</sup>	Can search by specific attorney's name
<b>West Virginia</b>	Yes <sup>182</sup>	

176. *Online Attorney Directory*, BOARD PROF. RESP. SUPREME CT. TENN., <http://www.tbpr.org/Consumers/AttorneySearch/> (last visited Apr. 26, 2014).

177. *Find a Lawyer*, ST. B. TEX., [http://www.texasbar.com/AM/Template.cfm?Section=Find\\_A\\_Lawyer&Template=/CustomSource/MemberDirectory/Search\\_Form\\_Client\\_Main.cfm](http://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm) (last visited Apr. 26, 2014).

178. *Office of Professional Conduct Frequently Asked Questions*, UTAH ST. B., <http://www.utahbar.org/opc/office-of-professional-conduct-frequently-asked-questions/#a21> (last visited Apr. 26, 2014).

179. *Legal Community, Attorney Discipline Information, Professional Responsibility Program*, ST. VT. JUDICIARY, <https://www.vermontjudiciary.org/LC/attydiscipline.aspx> (last visited Apr. 26, 2014).

180. *Attorney Records Search*, VA. ST. B., <http://www.vsb.org/attorney/attSearch.asp?S=D> (last visited Apr. 26, 2014).

181. *Discipline Notice Search*, WASH. ST. B. ASS'N, <https://www.mywsba.org/DisciplineNotice.aspx> (last visited Apr. 26, 2014).

182. *Recent Disciplinary Decisions, Supreme Court Decisions*, W.V. OFF. DISCIPLINARY COUNS., <http://www.wvdc.org/decisionslist.htm> (last visited Apr. 26, 2014).

<b>Wisconsin</b>	Limited <sup>183</sup>	Can search by specific attorney's name
<b>Wyoming</b>	Limited <sup>184</sup>	Organized by the rule violated

APPENDIX B. AVAILABILITY OF PRIVATE ACTION TO ENFORCE CLAIMS OF  
UNAUTHORIZED PRACTICE OF LAW ORGANIZED BY STATE

<b>Alabama</b>	<b>Definition of "Practice"</b> <sup>185</sup>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	Yes <sup>186</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Unauthorized Practice of Law Committee receives, reviews, investigates, and acts on complaints alleging the unauthorized practice of law by individuals or entities not licensed to practice law in the State of Alabama, and assists in educating attorneys, judges, and the public regarding unauthorized practice of law issues. It must be noted that while the Unauthorized Practice of Law Committee may conduct preliminary investigations of complaints, it does not act as counsel for complainants or provide them with legal services or advice. <sup>187</sup>	
<b>Alaska</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	UPL is a misdemeanor criminal offense and is enforced by state prosecutors. <sup>188</sup>	

183. *For the Public: Lawyer Regulation*, WIS. CT. SYS., <http://wicourts.gov/services/public/lawyerreg/status.htm> (last visited Apr. 26, 2014).

184. *Disciplinary Summary*, WYO. ST. B., [http://www.wyomingbar.org/pdf/Disciplinary\\_Summary.pdf](http://www.wyomingbar.org/pdf/Disciplinary_Summary.pdf) (last visited Apr. 26, 2014).

185. All descriptions of the definitions of "practice" are based on the ABA Task Force on the Model Definition of the Practice of Law's appendix collecting state definitions of the practice of law. See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 3, app. A.

186. Hoppock, *supra* note 97, at 733–34.

187. *ASB's UPL Committee*, ALA. ST. B., <http://www.alabar.org/public/upl.cfm> (last visited Apr. 26, 2014).

188. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

<b>Arizona</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad (many exceptions)	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Arkansas</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	"[I]mpossible to frame any comprehensible definition . . . each case must be decided on its own particular facts."	Yes <sup>189</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>California</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Colorado</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No

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189. Hoppock, *supra* note 97, at 733–34.

<b>Colorado</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Colorado Supreme Court Office of Attorney Regulation Counsel investigates and prosecutes complaints involving the unauthorized practice of law (UPL). The process begins with a UPL complaint being received and the intake department conducts the initial investigation, which can eventually be referred to the Colorado Supreme Court for action. <sup>190</sup>	
<b>Connecticut</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Delaware</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>191</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	

190. *The Unauthorized Practice of Law in Colorado*, COLO. SUPREME CT., <http://coloradosupremecourt.com/Regulation/UPL.htm> (last visited Apr. 26, 2014); *UPL Complaint Process*, COLO. SUPREME CT., [http://coloradosupremecourt.com/Regulation/UPL\\_Process/Copy%20of%20UPL\\_Process.htm](http://coloradosupremecourt.com/Regulation/UPL_Process/Copy%20of%20UPL_Process.htm) (last visited Apr. 26, 2014).

191. Johanna Namir, *UPL Lawsuit Dismissed As Improper Private Cause of Action*, L. FORWARD (Sept. 23, 2010, 4:34 PM), <http://lawforward.legalzoom.com/unauthorized-practice-of-law/upl-lawsuit-dismissed-as-improper-private-cause-of-action/>.

<b>Florida</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>192</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	Treated as a criminal prosecution. State attorney’s office prosecutes. <sup>193</sup>	
<b>Georgia</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>194</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	“The State Bar of Georgia, the Judicial Council of the State of Georgia, and all organized bar associations of this state are each authorized to inquire into and investigate: (1) any charges or complaints of unauthorized or unlawful practice of law; . . . (3) any charges or complaints that any person, in violation of Code Section 15-19-55 or rules promulgated by the Supreme Court, is orally or by writing, for a consideration then or afterwards to be charged or received by himself or another, offering or tendering to another person, without the solicitation of the person, the services of an attorney at law, resident or nonresident of this state, in order for the attorney to institute an action or represent the person in the courts of this or any other state or of the United States in the enforcement or collection by law of any claim, debt, or demand of the person against another or is suggesting or urging the bringing of such action; and (4) Any charge or complaints that any person is engaged in the practice of seeking out and proposing to other persons that they present and urge through any attorney at law the collection of any claim, debt, or demand of such person against another.” <sup>195</sup>	

192. *Goldberg v. Merrill Lynch Credit Corp*, 981 So. 2d 550, 553 (Fla. Dist. Ct. App. 2008).

193. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

194. *Oswell v. Nixon*, 620 S.E.2d 419, 421–22 (Ga. Ct. App. 2005).

195. GA. CODE ANN. § 15-19-57 (2010).

<b>Hawaii</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>196</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	Criminal statute enforced by attorney general. <sup>197</sup>	
<b>Idaho</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Unauthorized Practice of Law Committee (a state bar committee) supervises local committees, receives reports concerning investigation, and makes recommendations regarding disposition to the Board of Commissioners. <sup>198</sup>	
<b>Illinois</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	Yes but only on a theory that UPL “constitutes an infringement upon the rights of those who are properly licensed, [therefore] attorneys and law firms have standing to bring a cause of action for such unauthorized practice,” but others do not. <sup>199</sup>

196. *Reliable Collection Agency, Ltd. v. Cole*, 584 P.2d 107, 111 (Haw. 1978).

197. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

198. *Idaho State Bar Committees*, IDAHO ST. B., <http://isb.idaho.gov/general/committees.html> (last visited Apr. 26, 2014).

199. *Richard F. Mallen & Assocs. v. Myinjuryclaim.com*, 769 N.E.2d 74, 76 (Ill. App. Ct. 2002) (finding that UPL “constitutes an infringement upon the rights of those who are properly licensed, [therefore] attorneys and law firms have standing to bring a cause of action for such unauthorized practice”).

<b>Illinois</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	After a request for investigation is submitted, the task force on the unauthorized practice of law investigates allegations of unauthorized practice of law and can take civil actions if necessary or warranted. County prosecutors must bring any criminal action. <sup>200</sup>	
<b>Indiana</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>201</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Iowa</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	Individuals can file complaints with the Commission on the Unauthorized Practice of Law (a commission of the Iowa Supreme Court). The commission will then request information about the charge from the respondent. The complaint will be investigated by staff at the Office of Professional Regulation, and the complaint and any materials gathered by the staff will be forwarded to the commission at their next regular quarterly meeting. At the quarterly meeting, the complaint will be assigned to a commission member for follow up. Depending on the circumstances and facts, the complaint may be closed, referred to obtain a cease and desist agreement, or referred for civil prosecution. <sup>202</sup>	

200. *Task Force on Unauthorized Practice of Law*, ILL. ST. B. ASS'N, <http://www.isba.org/resources/upl> (last visited Apr. 26, 2014).

201. *Grace Vill. Health Care Facilities, Inc. v. Lancaster Pollard & Co.*, 896 F. Supp. 2d 757, 766–67 (N.D. Ind. 2012).

202. *The Commission on the Unauthorized Practice of Law*, IOWA JUD. BRANCH, [http://www.iowacourts.gov/For\\_Attorneys/Professional\\_Regulation/Commission\\_on\\_Unauthorized\\_Practice\\_of\\_Law/](http://www.iowacourts.gov/For_Attorneys/Professional_Regulation/Commission_on_Unauthorized_Practice_of_Law/) (last visited Apr. 26, 2014).



<b>Kansas</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Kentucky</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The role of the Unauthorized Practice of Law Committee, of the state bar association, is to render advisory opinions on questions of whether a particular activity may constitute the unauthorized practice of law by a nonlawyer. Formal unauthorized practice of law opinions may be issued by the Board of Governors upon recommendation of the Unauthorized Practice of Law Committee. <sup>203</sup>	
<b>Louisiana</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Representing another or advising/counseling someone as to secular law for consideration or drawing documents for consideration	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Maine</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	

203. *KBA Committees*, KY. B. ASS'N, <http://www.kybar.org/72> (last visited Apr. 26, 2014).

<b>Maine</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Maryland</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Massachusetts</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	Yes, but only on an unlawful competition theory (i.e., only attorneys allowed private cause of action). <sup>204</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Michigan</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Practice of law is left to the discretion of courts, but "charging a fee can take an otherwise incidental act into the realm of the unauthorized practice of law." <sup>205</sup>	
	<b>Procedures for Complaining to Enforcement Agency</b>	

204. Steinberg v. McKay, 3 N.E.2d 23, 24 (Mass. 1936).

205. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 3, app. A, at 15.

<b>Minnesota</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	“What is and what is not the practice of law cannot be drawn with precision.” <sup>206</sup>	No <sup>207</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Mississippi</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Narrow; however, court opinions make it clear that there are many other acts (not listed in the statute) which might be performed by an unlicensed person which may also constitute the practice of law.	No <sup>208</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Missouri</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>209</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	

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206. *Id.* app. A, at 16.

207. *Kronzer v. First Nat’l Bank of Minneapolis*, 235 N.W.2d 187, 191–94 (Minn. 1975) (finding that plaintiff has no standing to bring a direct action for the unauthorized practice of law, but may be able to prevail on a negligence claim).

208. *Thorne v. Prommis Solutions Holding Corp. (In re Thorne)*, 471 B.R. 496, 509 (Bankr. N.D. Miss. 2012).

209. *Janssen v. Guar. Land Title Co.*, 571 S.W.2d 702, 706 (Mo. Ct. App. 1978).

<b>Montana</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	What is and what is not the practice of law cannot be drawn with precision.	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Nebraska</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Determine in each case whether the defendant "purported to exercise the legal training, experience and skill of an attorney at law without a license to do so." <sup>210</sup>	No <sup>211</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Nevada</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
		No <sup>212</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	

210. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 3, app. A, at 17.

211. *Richmond v. Case*, 647 N.W.2d 90, 96 (Neb. 2002) (denying the plaintiff's "private cause of action for money damages against another for the unauthorized practice of law" because it was an issue of first impression in the state and had not been addressed below).

212. *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 50 (Nev. 2005), *abrogated on other grounds by* *Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670 (Nev. 2008).

<b>New Hampshire</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	"matters involving professional judgment" <sup>213</sup>	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>New Jersey</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	"asking whether the public interest is disserved by permitting such conduct" <sup>214</sup> (by nonlawyers)	No
<b>New Jersey</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	"On request of any person, or in connection with the consideration of any complaint or any investigation made on its own initiative, the committee may render advisory opinions relating to the unauthorized practice of law and arrange for their publication. The committee shall have jurisdiction over and shall inquire into and consider complaints alleging the unauthorized practice of law by any natural or other persons or entity."	

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213. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 3, app. A, at 18.

214. *Id.*

<b>New Jersey</b>	<p>“The committee may, on its own initiative, and without any complaint being made to it, investigate any condition or situation of which it becomes aware that may involve the unauthorized practice of law. Within 20 days after an opinion is published, or within 30 days after any final action of the Committee on the Unauthorized Practice of Law other than the publication of any opinion, any aggrieved member of the bar, bar association, person or entity may seek review thereof by serving on the Attorney General a notice of petition for review by the Supreme Court and by filing the original notice with the Clerk of the Supreme Court. If it appears that the conduct in question involves the unauthorized practice of law, the committee shall endeavor to have the person, persons or entity enter into a written agreement to refrain in the future from such conduct.</p> <p>“The informal disposition of matters as provided in this rule is encouraged. If, after a finding by the committee of the unauthorized practice of law, a person or entity declines to enter into a written agreement pursuant to this rule, the committee shall refer the matter to an appropriate law enforcement or other agency. When the committee concludes from its preliminary investigation or from the failure of an informal conference as provided in R. 1:22-5 that an amicable disposition of any matter within its jurisdiction with the person, persons or entity concerned cannot be effected, it shall, based upon the nature of the complaint, the relief sought, and the facts as then known, refer the matter to the law enforcement or other agency the committee determines is best suited to conduct an investigation and any prosecution of such matter.”<sup>215</sup></p>
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<b>New Mexico</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	

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215. N.J. Ct. R. 1:22.

<b>New York</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>216</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	Statute enforced by attorney general and county prosecutors. <sup>217</sup>	
<b>North Carolina</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The North Carolina State Bar has the authority by statute to investigate allegations of unauthorized practice of law as well as the district attorney. The State Bar may seek injunctive relief. District attorneys may prosecute charges of unauthorized practice of law as a class 1 criminal misdemeanor. The Authorized Practice Committee of the North Carolina State Bar investigates complaints of unauthorized practice of law. The procedures for the committee are found at 27 N.C. ADMIN CODE 1D.0104 (2004). Complaints must be filed in writing. <sup>218</sup>	
<b>North Dakota</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	<b>Procedures for Complaining to Enforcement Agency</b>	

216. *Lawrence v. Houston*, 567 N.Y.S.2d 962, 964 (App. Div. 1991).

217. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

218. *Preventing Unlicensed Legal Practice*, N.C. ST. B., <http://www.ncbar.gov/public/upl.asp> (last visited Apr. 26, 2014).

<b>Ohio</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	Yes, but no court has subject-matter jurisdiction over a claim for the UPL against a person unless the Supreme Court of Ohio has first made a finding that the very person is engaged in the UPL. <sup>219</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Board on the Unauthorized Practice of Law of the Supreme Court of Ohio conducts hearings, preserves the record, and makes findings and recommendations to the supreme court in cases involving the alleged unauthorized practice of law. The unauthorized practice of law committee of a bar association or disciplinary counsel shall investigate any matter referred to it or that comes to its attention and may file a complaint pursuant to Rule 7 of the Supreme Court Rules for the Government of the Bar of Ohio. The attorney general may also file a complaint pursuant to this rule. Each bar association, disciplinary counsel, and the attorney general shall file with the board, on a form provided by the board, a report of its activity on unauthorized practice of law complaints, investigations, and other matters requested by the board. <sup>220</sup>	
<b>Oklahoma</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	

219. *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109, at \*2 (N.D. Ohio July 19, 2012).

220. OHIO SUP. CT. R. 7; *Board on the Unauthorized Practice of Law*, SUPREME CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/boards/upl/> (last visited Apr. 26, 2014).



<b>Oregon</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
<p>The Oregon State Bar is responsible for investigating allegations of the unlawful practice of law. Generally, enforcement of prohibitions on the unlawful practice of law is complaint driven. The bar relies on the public to provide information about individuals practicing law without a license. The bar receives complaints from judges, injured consumers, lawyers and other state bar associations. Complaints are forwarded to the Unlawful Practice of Law Committee of the Oregon State Bar. This committee consists of about sixteen lawyers and two public members, all volunteers appointed by the OSB Board of Governors. Each complaint is assigned to a member of the committee for investigation. The investigator contacts the complaining party and the person being accused of practicing law without a license, and makes other investigation as the facts warrant. The investigator then prepares a report, which is considered by the entire committee at its monthly public meetings. Except in the most complicated cases, the time from initial complaint to consideration by the UPL committee is about six months. The UPL committee has authority to: dismiss a complaint if there is insufficient evidence; send a notice letter, warning that the accused's activities could be considered the unlawful practice of law; issue a cautionary letter advising the accused that the committee has evidence that the accused engaged in the unlawful practice of law; enter into a cease and desist agreement with the accused; or, recommend to the Oregon State Bar Board of Governors that the Oregon State Bar file a lawsuit against the accused to prevent him or her from continuing to practice law without authorization. Occasionally, if an investigation suggests that there has been some illegal activity that the UPL committee cannot address, then the UPL committee will forward the results of its investigation to other state bars, to the Oregon Attorney General, or to another appropriate regulatory or law enforcement agency.</p>		

<b>Oregon</b>	If the UPL committee refers a complaint to the Oregon State Bar Board of Governors, and the board authorizes a lawsuit, the usual relief sought is an injunction against the continuation of the unlawful practice of law. OR. REV. STAT. 9.166 (2011). The OSB may also seek restitution for any victims. The OSB can also recover attorney's fees and other expenses of litigation. Most cases are resolved before this step. <sup>221</sup>	
<b>Pennsylvania</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The attorney general and county prosecutors have responsibility for enforcing UPL criminal statutes. <sup>222</sup>	
<b>Rhode Island</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Appearance or acting as an attorney of another person before a court, legal advice for consideration, representing another in a capacity to dispose of a case, and preparation or drafting of specific documents which require legal knowledge are usually prepared by lawyers.	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>South Carolina</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No <sup>223</sup>

221. *Frequently Asked Questions*, OR. ST. B., <http://www.osbar.org/UPL/faq.html#g> (last visited Apr. 26, 2014).

222. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

223. *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 622–23 (S.C. 2002).

<b>South Carolina</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	The South Carolina Bar's UPL Committee may share this information (in a complaint filed with the bar) with other persons and agencies in an effort to improve the protection of citizens and to coordinate enforcement of the law. <sup>224</sup>	
<b>South Dakota</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Tennessee</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	Yes, but consumers may only file complaints with the attorney general's office; the attorney general litigates the actual claim. <sup>225</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Office of the Attorney General can file civil lawsuits against individuals and companies engaged in the unauthorized practice of law. Investigations are largely complaint driven. <sup>226</sup>	

224. Form 4, Unauthorized Practice of Law (UPL) Complaint Form, available at [www.scbars.org/public/files/docs/UPLform.doc](http://www.scbars.org/public/files/docs/UPLform.doc).

225. ABA 2012 UPL SURVEY, *supra* note 89, chart I; Caitlin Doty, *Combating the Unauthorized Practice of Law in Tennessee*, L. LOGIX (Sept. 17, 2012), <http://www.lawlogix.com/blog/combating-unauthorized-practice-law-tennessee> ("To start the process, consumers file UPL complaints directly with the Attorney General's office. . . . [T]he State is absolutely dependent upon consumers making complaints in order to take action."); *cf.* State of Tenn. Office of the Attorney Gen., Op. 02-078, at 2 (2002), available at <http://www.tn.gov/attorneygeneral/op/2002/op/op78.pdf> (stating that the Tennessee attorney general enforces the Tennessee UPL statute).

226. *Prosecuting the Unauthorized Practice of Law*, OFF. ATT'Y GEN. ST. TENN., <http://www.tn.gov/attorneygeneral/upl/upl.html> (last visited Apr. 26, 2014).

Texas	Definition of “Practice”	Permits a Private Cause of Action for UPL
	Broad (specifically excludes creation, publication, sale, distribution of forms, books, computer software, etc., if the products clearly and conspicuously state that the product is not a substitute for the advice of an attorney).	Yes <sup>227</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Unauthorized Practice of Law Committee of the Texas Supreme Court (UPLC) delegates the investigation of UPL complaints to investigators who are members of local subcommittees appointed by the UPLC. The UPLC meets at least twice a year to receive reports from its regional and district chairpersons and votes whether to authorize civil court lawsuits to enjoin the unauthorized practice of law. If suit is authorized, the suit is prosecuted for the UPLC by volunteer attorneys. The UPLC cannot give advisory opinions about whether a certain activity is UPL. <sup>228</sup>	
Utah	Definition of “Practice”	Permits a Private Cause of Action for UPL
	Narrow (representing another before a tribunal or holding yourself out as an attorney).	No

227. Hoppock, *supra* note 97, at 733–34.

228. TEX. UPL COMM., <http://www.txuplc.org> (last visited Apr. 26, 2014).

<b>Utah</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Unauthorized Practice of Law Committee is comprised of volunteer Utah attorneys and paralegals who investigate complaints against individuals and organizations based upon Utah Supreme Court Rules of Professional Practice Rule 14-802, which governs authorization to practice law in the State of Utah. The committee meets monthly to evaluate complaints and report on investigations. Despite the serious consequences that the unauthorized practice of law can have on innocent victims, the unauthorized practice of law is not a crime in Utah. The committee itself cannot arrest people who violate Utah Supreme Court Rules of Professional Practice Rule 14-802 or impose monetary sanctions. The committee also cannot file lawsuits on behalf of complainants. <sup>229</sup>	
<b>Vermont</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	Enforcement by attorney general and county prosecutors. <sup>230</sup>	
<b>Virginia</b>	<b>Definition of “Practice”</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad (advice to another is only the practice of law if compensation is involved).	

229. *Bar Committee: Unauthorized Practice of Law*, UTAH ST. B., <http://silk.utahbar.org/bar-operations/bar-committee-upl/> (last visited Apr. 26, 2014).

230. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

<b>Virginia</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	The ethics counsel and staff screen incoming complaints and open files for investigation if there is probable cause to believe that a nonlawyer is holding himself or herself out as authorized to practice law or is engaging in UPL. The case is then assigned to an investigator. The Standing Committee on Unauthorized Practice of Law determines the disposition of UPL complaints based upon the investigators' written reports and the recommendations of the ethics counsel and staff.	
<b>Washington</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad; however, there is a specific exemption for the sale of legal forms in any format.	Yes <sup>231</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Practice of Law Board (administered by the Washington Bar Association) was established by the supreme court, in part to investigate and enforce UPL. They attempt to enter into cease and desist agreements with violators of UPL statutes. The board, however, has limited enforcement authority and refers cases to the county prosecutor and attorney general. <sup>232</sup>	
<b>West Virginia</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	Yes <sup>233</sup>
	<b>Procedures for Complaining to Enforcement Agency</b>	
<b>Wisconsin</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Narrow	No

231. Hoppock, *supra* note 97, at 733–34.

232. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

233. *McMahon v. Advanced Title Servs. Co. of W. Va.*, 607 S.E.2d 519, 523 (W. Va. 2004).

<b>Wisconsin</b>	<b>Procedures for Complaining to Enforcement Agency</b>	
	Only enforcement is per statute by county prosecutors. <sup>234</sup>	
<b>Wyoming</b>	<b>Definition of "Practice"</b>	<b>Permits a Private Cause of Action for UPL</b>
	Broad	No
	<b>Procedures for Complaining to Enforcement Agency</b>	
	The Unauthorized Practice of Law Committee, appointed by the supreme court, shall receive complaints alleging the unauthorized practice of law and shall investigate those complaints and initiate litigation in the district court for injunctive relief or criminal contempt proceedings. The committee may retain the services of investigators and private attorneys to carry out these functions. <sup>235</sup>	

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234. ABA 2012 UPL SURVEY, *supra* note 89, chart I.

235. *Rules of Procedure Governing Unauthorized Practice of Law*, WY. JUD. BRANCH, [http://courts.state.wy.us/CourtRules\\_Entities.aspx?RulesPage=UnauthorizedPracticeOfLaw.xml](http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=UnauthorizedPracticeOfLaw.xml) (last visited Apr. 26, 2014).