

# South Carolina Law Review

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Volume 67

Issue 2 *WHAT WE KNOW AND NEED TO KNOW  
ABOUT THE FUTURE OF LEGAL SERVICES:  
WHITE PAPERS FOR THE ABA COMMISSION  
ON THE FUTURE OF LEGAL SERVICES*

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Article 15

Winter 2016

## What We Know and Need to Know about the Delivery of Legal Services by Nonlawyers

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### Recommended Citation

Rhode, Deborah L. (2016) "What We Know and Need to Know about the Delivery of Legal Services by Nonlawyers," *South Carolina Law Review*. Vol. 67 : Iss. 2 , Article 15.

Available at: <https://scholarcommons.sc.edu/sclr/vol67/iss2/15>

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WHAT WE KNOW AND NEED TO KNOW ABOUT  
THE DELIVERY OF LEGAL SERVICES BY NONLAWYERS

Deborah L. Rhode\*

It is a shameful irony that the nation with one of the world's highest concentrations of lawyers does so little to make legal services accessible.<sup>1</sup> According to the World Justice Project, the United States ranks 67th (tied with Uganda) of 97 countries in access to justice and affordability of legal services.<sup>2</sup> "Equal justice under law" is one of America's most proudly proclaimed and routinely violated legal principles. It embellishes courthouse doors, but in no way describes what goes on behind them. Millions of Americans lack any access to justice let alone equal access. Over four-fifths of the legal needs of the poor and a majority of the needs of middle-income Americans remain unmet.<sup>3</sup>

Part of the problem is that the civil justice system is unduly lawyer-centric. Bar organizations, which have been the most powerful voice in the debate over access to justice, have seen the solution as more lawyers.<sup>4</sup> In 2006, the American Bar Association (ABA) unanimously adopted a resolution urging the provision of "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. . . ."<sup>5</sup> Many state and local bars passed comparable resolutions.<sup>6</sup> These organizations have not been similarly enthusiastic about court simplification and nonlawyer assistance, and have actively fought self-help

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1. For research suggesting that the United States ranks first or second among countries with advanced economies, see Charles N.W. Keckler, *Lawyered Up: A Book Review Essay*, 27 T.M. COOLEY L. REV. 57, 73 tbl.1 (2010); *America's Lawyers: Guilty as Charged*, ECONOMIST, Feb. 2, 2013, <http://www.economist.com/news/leaders/21571141-cheaper-legal-education-and-more-liberal-rules-would-benefit-americas-lawyersand-their>.

2. MARK DAVID AGRAS ET AL., THE WORLD JUSTICE PROJECT: RULE OF LAW INDEX 175, Factor 7: Civil Justice (2012-2013).

3. For a discussion of legal needs among low-income individuals, see LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1-13 (Sept. 2009), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGapInAmerica2009.authcheckdam.pdf>. Surveys find that between two-fifths and three-quarters of the needs of middle-income individuals are unaddressed, with most finding at least half. See DEBORAH L. RHODE, ACCESS TO JUSTICE 3, 79 (2004) [hereinafter RHODE, ACCESS TO JUSTICE]; Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1 (2009).

4. RHODE, ACCESS TO JUSTICE, *supra* note 3, at 121.

5. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A (2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf).

6. These are collected in the website of the Coalition for a Civil Right to Counsel. *2016 Civil Right to Counsel Bills*, NAT'L COALITION FOR A CIVIL RIGHT TO COUNSEL (NCCRC), [http://civilrighttocounsel.org/legislative\\_developments](http://civilrighttocounsel.org/legislative_developments) (last visited Mar. 30, 2016).

publications and nonlawyer providers.<sup>7</sup> As New York University law professor Steven Gillers notes, it has not been “the bar’s finest hour.”<sup>8</sup> From the profession’s perspective, the focus on guaranteeing more lawyers makes obvious sense.<sup>9</sup> But from the standpoint of the public, the objective is more access to justice, not necessarily to lawyers.<sup>10</sup>

## I. BARRIERS TO SELF-HELP AND NONLAWYER ASSISTANCE

In courts that handle housing, bankruptcy, small claims, and family matters, parties without attorneys are often now the rule rather than the exception.<sup>11</sup> Yet they must cope with procedures designed by and for lawyers. Although courts have made increasing attempts to accommodate these unrepresented litigants, one national survey found only eleven states with comprehensive programs to help self-represented parties.<sup>12</sup> Many of the services that are available are unusable by those who need help most: low-income litigants with limited computer competence and English language skills.<sup>13</sup> All too often, parties confront procedures of excessive and bewildering complexity, and forms with archaic jargon. The United States lags behind other nations in providing access through less expensive approaches than representation by lawyers.<sup>14</sup> In the United Kingdom, for example, trained nonlawyer volunteers provide routine assistance at 3,400 Citizens Advice Bureaus.<sup>15</sup> Legal assistance is also available

7. For historical examples of opposition, see Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 705 (1996) [hereinafter Rhode, *Professionalism Perspective*]. For the bar’s current opposition and enforcement efforts, see Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URBAN L.J. 1259, 1278 (2014); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2588 (2014) (quoting MODEL RULES OF PROF’L CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2013)).

8. Steven Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 979 (2012).

9. RHODE, ACCESS TO JUSTICE, *supra* note 3, at 1231.

10. *Id.*

11. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URBAN L.J. 37, 41–43 (2010) [hereinafter Engler, *Self-Representation*] (summarizing reports on representation rates in housing, small claims, and family law cases).

12. ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007, at 20–21 (Aug. 22, 2007), <http://www.clasp.org/resources-and-publications/files/0373.pdf>.

13. For the kind of services available, see Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 20–22 (1998).

14. Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2225 (2013).

15. See CITIZENS ADVICE BUREAU, INTRODUCTION TO THE SERVICE 1 (2012–2013), [https://www.citizensadvice.org.uk/Global/Migrated\\_Documents/corporate/citizens-advice-introduction-to-the-service-2012-13.pdf](https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/citizens-advice-introduction-to-the-service-2012-13.pdf).

through government networks of help desks, online services, insurers, banks, unions, consumer organizations, and even grocery stores.<sup>16</sup> In this country, millions of individuals lack such help, and only about half of Americans have reported satisfaction with their own resolution of legal problems.<sup>17</sup> The experience of one pro se litigant was all too common.<sup>18</sup> When told by a trial court that he lacked a draft order that would authorize a referral to counseling, the man began asking questions about how to prepare the order.<sup>19</sup> The judge responded, “I’m not your secretary” and shoed the man out of the courtroom.<sup>20</sup>

Moreover, for some cases, such as uncontested divorces, lawyers may be contributing more to the problem than the solution. In one survey of parents represented by counsel, 71% felt that the legal process exacerbated hostility.<sup>21</sup> Parents also felt that the role of attorneys contributed to conflict by replacing direct communication with discussion filtered only through counsel.<sup>22</sup> Other research finds that divorcing parties prefer simpler, less adversarial procedures, and that many do not hire lawyers for fear of intensifying conflict.<sup>23</sup>

#### A. *Unauthorized Practice of Law*

At the doctrinal level, a fundamental problem arises from courts’ inherent power to regulate the practice of law, and their exercise of that power to ban the unauthorized practice of law (UPL) by nonlawyers without respect to its quality or cost-effectiveness.<sup>24</sup> A second problem involves courts’ restrictive standards for determining when court-appointed counsel is available. The result has been to place on unrepresented litigants an unrealistic burden of showing that the absence of a lawyer makes a legal proceeding fundamentally unfair.<sup>25</sup>

A common feature of statutory and common law prohibitions on unauthorized practice of law is their broad and ambiguous scope.<sup>26</sup> A number of

16. Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS 32 (forthcoming June 2016).

17. AM. BAR ASS’N, CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS; MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 16 (1994).

18. Amanda Ripley, *Who Needs Lawyers?*, TIME (June 4, 2000).

19. *Id.*

20. *Id.*

21. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L. Q. 283, 298 (1999).

22. *Id.*

23. See Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2117–18 (2013).

24. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 42 (1981) [hereinafter Rhode, *Policing*].

25. *Id.* at 76.

26. *Id.* at 45.

jurisdictions simply prohibit without defining the practice of law by nonlawyers.<sup>27</sup> Others take a circular approach: the practice of law is what lawyers do.<sup>28</sup> Some list conduct that is illustrative, such as legal advice, legal representation, and preparation of legal instruments, and then conclude with some amorphous catch-all provision, such as “any action taken for others in any matter connected with the law.”<sup>29</sup> On their face, these prohibitions encompass a wide range of common commercial activity.<sup>30</sup> Many individuals, including accountants, financial advisors, real estate brokers, insurance agents, and even newspaper advice columnists could not give intelligent advice without reference to legal concerns.<sup>31</sup> Moreover, the ban on personalized assistance stands as a powerful barrier to competent low-cost providers.<sup>32</sup> So, for example, form-processing services may provide clerical help, but are prohibited from correcting obvious errors or answering simple questions about where and when papers must be filed.<sup>33</sup> A few decisions have even held that online document assistance constitutes the unauthorized practice of law because the services go beyond clerical support.<sup>34</sup> Court clerks are also banned from giving advice to unrepresented parties.<sup>35</sup> Some courthouses even have signs stating that clerks “can’t answer questions of a legal nature.”<sup>36</sup> Yet as one California judge noted, those are the only questions that clerks generally encounter, other than “where is the restroom.”<sup>37</sup>

Such expansive prohibitions ill serve the public interest. Although courts repeatedly insist that broad prohibitions on unauthorized practice serve to protect

27. For examples, see *id.* at 45 n.135. For state courts’ reluctance to offer a definition, see Susan D. Hoppock, *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, 722 n.35 (2007) (citing cases).

28. Rhode, *Policing*, *supra* note 24, at 45 n.136.

29. *Id.* at 46 n.140–42.

30. *Id.* at 47.

31. *Id.*

32. *Id.* at 53.

33. Fifteenth Judicial Dist. Unified Bar Ass’n v. Glasgow, 1999 WL 1128847, at 3 (Tenn. Ct. App. Dec. 10, 1999); Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978).

34. *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011). A Texas ruling was overturned by a legislative exemption and the Missouri case was subsequently settled without banning the services altogether. See Tom McNichol, *Is LegalZoom’s Gain Your Loss?*, CALIFORNIA LAW. 20, 22 (Sept. 2010). In 2014, LegalZoom was battling lawsuits in four states. Susan Beck, *The Future of Law*, AM. LAW. 36 (Aug. 2014).

35. John M. Greacen, “Clerk’s Office Staff Cannot Give Legal Advice”: *What Does That Mean?*, COURT MANAGER, Winter 1995, at 35.

36. RHODE, ACCESS TO JUSTICE, *supra* note 3, at 83.

37. *Id.*

the public, support for that claim is often lacking.<sup>38</sup> In my recent review of ten years of reported UPL cases, only a quarter analyzed whether actual harm occurred or could occur from the unauthorized practice in question.<sup>39</sup> In my national survey of officials involved in UPL enforcement, two-thirds could not recall a specific case of injury in the past year.<sup>40</sup> Other research similarly casts doubt on the frequency of client injury.<sup>41</sup> The vast majority of UPL lawsuits filed against online services are brought not by consumers but by lawyers or unauthorized practice committees, and generally settle without examples of harm.<sup>42</sup>

Other nations permit nonlawyers to provide legal advice and assist with routine documents, and the evidence available does not suggest that their performance has been inadequate.<sup>43</sup> In a study comparing outcomes for low-income clients in the United Kingdom on matters such as welfare benefits, housing, and employment, nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction.<sup>44</sup> After reviewing their own and other empirical studies, the authors of that study concluded that “it is specialization, not professional status, which appears to be the best predictor of quality.”<sup>45</sup> Ontario allows licensed paralegals to represent individuals in minor court cases and administrative tribunal proceedings, and a five-year review reported “solid levels of [public] satisfaction with the services received.”<sup>46</sup>

In the United States, research on lay specialists who provide legal representation in bankruptcy and administrative agency hearings finds that they generally perform as well or better than attorneys.<sup>47</sup> Extensive formal training is

38. Kentucky Bar Ass’n v. Tarpinian, 337 S.W.3d 627, 628 (Ky. 2011) (adopting Special Commissioner’s report that defendant engaged in the unauthorized practice of law); Louisiana State Bar Ass’n v. Carr & Assocs., Inc., 15 So. 3d 158, 167 (La. Ct. App. 2009).

39. Rhode & Ricca, *supra* note 7, at 2604.

40. *Id.* at 2595.

41. *Id.* at 2596.

42. Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 722 (2012).

43. RHODE, ACCESS TO JUSTICE, *supra* note 3, at 89; Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT’L L.J. 1629, 1636 (2010) (discussing Swedish legal advice providers); Herbert M. Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100, 100–01 (Nov.-Dec. 1997) [hereinafter Kritzer, *Rethinking Barriers*] (discussing English Citizen’s Advice Bureaus with trained nonlawyer volunteers).

44. Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765, 785–87 (2003). For discussion, see Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 890 (2004).

45. Moorhead et al., *supra* note 44, at 795 (citing HAZEL GENN & YVETTE GENN, THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS, REPORT TO THE LORD CHANCELLOR (1989); HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998)).

46. DAVID B. MORRIS, REPORT TO THE ATTORNEY GENERAL OF ONTARIO: REPORT OF APPOINTEE’S FIVE-YEAR REVIEW OF PARALEGAL REGULATION IN ONTARIO 12 (Nov. 2012).

47. KRITZER, *supra* note 45, at 76, 108, 148, 190, 201.

less critical than daily experience for effective advocacy.<sup>48</sup> Outside the immigration context, there is little evidence of harm to consumers from nonlawyer practitioners.<sup>49</sup> Yet existing unauthorized practice doctrine focuses only on whether the nonlawyer is providing legal assistance, not the quality of that assistance or evidence of public injury.<sup>50</sup>

On the rare occasions when its opinion has been solicited, four-fifths of the public agreed that many things that lawyers handle can be done as well and less expensively by nonlawyers.<sup>51</sup> Yet ordinary citizens lack adequate incentives to mobilize for reforms permitting access to such service providers.<sup>52</sup> Unlike health care, which is a crucial and continuing need, most Americans' demand for legal assistance is much more episodic and less life-threatening.<sup>53</sup>

### B. *Obstacles to Reform*

The obstacles to reform of pro se services and unauthorized practice doctrine are formidable, given the organized bar's incentives and capacity for resistance. No other occupation enjoys such prominence in all three branches of government. As a result, the bar has traditionally been well positioned to block changes that might benefit the public at the profession's expense. The bar has repeatedly fought publication of self-help materials and opposed access to nonlawyer assistance.<sup>54</sup> The ABA is on record as supporting efforts to strengthen unauthorized practice enforcement and over four-fifths of surveyed lawyers favor prosecution of independent paralegals.<sup>55</sup> The bar has also been concerned that "pro se court reform will spread upwards from the poor to the middle class and beyond."<sup>56</sup> And the courts, which enforce unauthorized

48. *Id.* at 201.

49. Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611 (2014).

50. Rhode & Ricca, *supra* note 7, at 2605.

51. BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 231 (1977). The bar has not recently asked that question.

52. *Id.* at 138.

53. *Id.* at 135.

54. See generally Beck, *supra* note 34; Rhode, *Professionalism Perspective*, *supra* note 7, at 705. For the Texas bar effort to ban a self-help computer software program that was overturned by the Texas legislature, see *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999); Randall Samborn, *So What Is a Lawyer Anyway?*, NAT'L L.J., June 21, 1993, at 1, 12. For bar suits against LegalZoom despite high rates of customer satisfaction, see Rhode & Ricca, *supra* note 7, at 2605; Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, A.B.A. J. (May 19, 2013), [http://www.abajournal.com/news/article/legalzoom\\_hits\\_a\\_hurdle\\_in\\_north\\_carolina](http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina).

55. RHODE, ACCESS TO JUSTICE, *supra* note 3, at 88; ABA, SELECT COMMITTEE REPORT ON THE 2000 MIDYEAR MEETING (2000), <http://www.abanet.org/leadership/2000house.html>; James Podgers, *Legal Profession Faces Rising Tide of Nonlawyer Practice*, A.B.A. J., Dec. 1993, at 51, 56.

56. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012).

practice prohibitions and control procedural simplification and pro se assistance programs, have been unduly deferential to the bar on matters that affect its livelihood.<sup>57</sup>

## II. AN AGENDA FOR REFORM

Despite these obstacles to reform, there is reason to hope that some progress is possible in increasing access to pro se assistance and nonlawyer services. First, the increasing public interest in do-it-yourself publications and services and the increasing volume of pro se litigants has created corresponding pressure for reform.<sup>58</sup> As Russell Engler notes, attitudes toward the role of judges and court clerks concerning unrepresented parties have “undergone a sea change over the past fifteen years . . . .”<sup>59</sup> About half the states have access to justice commissions, and a consortium of law professors recently formed to support research and teaching initiatives on access issues.<sup>60</sup> The state of Washington has enacted a licensing system for independent paralegals who can provide certain routine services, New York has approved a system of trained nonlawyer “Navigators” who can assist pro se litigants in certain courts, and California is considering similar reforms.<sup>61</sup> Bar efforts to crack down on self-help software have triggered reversal by state legislatures.<sup>62</sup> And the ABA has abandoned its attempt to promulgate a restrictive definition of unauthorized practice after the Justice Department, the Federal Trade Commission, and the ABA’s own antitrust division suggested that the revision would be anticompetitive.<sup>63</sup> An ABA Task Force on Legal Education has recommended a licensing system for paralegals to provide routine legal services.<sup>64</sup> Another ABA Task Force on the Legal Access Job Corps is considering ways to help new entrants to the bar provide assistance

57. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 138 (2011); Benjamin Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* 2 (Univ. of Tenn. College of Law Legal Studies Research Paper No. 1, Oct. 2007), <http://ssrn.com/abstract=976478>.

58. Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 *HARV. L. & POL’Y REV.* 31, 44 (2013) [hereinafter Engler, *Turner v. Rogers*].

59. *Id.* at 45.

60. For access to justice commissions, see Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies*, 95 *JUDICATURE* 255, 264 (2012). For the consortium, see Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 *J. LEGAL EDUC.* 531, 548 (2013) [hereinafter Rhode, *An Agenda*].

61. Don J. DeBenedictis, *Licensing of Nonlawyers Gets Traction*, *DAILY J.*, Apr. 11, 2013, at 1; Joyce E. Cutler, *California State Bar Group Approves Report to Spur Support for Nonlawyer Practitioners*, 29 *LAW. MANUAL PROF’L CONDUCT* 416 (2013); JONATHAN LIPPMAN, *THE STATE OF THE JUDICIARY* 8 (2014).

62. RHODE, *ACCESS TO JUSTICE*, *supra* note 3, at 88.

63. *See id.*

64. AM. BAR ASS’N, *TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS* 3 (Jan. 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).



to underserved populations.<sup>65</sup> Never has there been a more receptive climate for access to justice issues.

Further progress will require strategies on several levels. First, we need to maximize opportunities for self-help and for legal assistance from less expensive service providers than lawyers. An additional strategy should involve research to assess nonlawyer assistance.<sup>66</sup> A final strategy should ensure more education of the public and the profession about the need for reform.

#### A. Self-Help and Nonlawyer Service Providers

The first strategy is already well underway. Courts around the country are implementing reform efforts to accommodate unrepresented “pro se” litigants.<sup>67</sup> These litigants are often particularly vulnerable. They are disproportionately poor and unfamiliar with legal proceedings, and many face barriers of language and computer literacy.<sup>68</sup> They need what Richard Zorza has termed “The Self-Help Friendly Court.”<sup>69</sup> This court would seek to reduce complexity, utilize technology, and train judges and staff in assisting litigants.<sup>70</sup> Models are increasingly available.<sup>71</sup> The American Judicature Society and the National Center for State Courts have published guides to make legal proceedings more equitable and accessible to parties without lawyers.<sup>72</sup> The Self-Represented Litigation Network has also published materials compiling best practices and

65. James R. Silkenat, *Connecting Supply and Demand: The Legal Access Job Corps*, A.B.A. J. 8, 1 (Oct. 2013); Sarah Parvini, *ABA Seeks Match of Lawyers, People Needing Services*, S.F. DAILY J., Apr. 11, 2004, at 4.

66. Charn, *supra* note 14, at 2232.

67. See Barton & Bibas, *supra* note 56, at 987–90 (citations omitted).

68. Engler, *Self-Representation*, *supra* note 11, at 79.

69. RICHARD ZORZA, NAT’L CTR. FOR STATE COURTS, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* (2002).

70. Engler, *Turner v. Rogers*, *supra* note 58, at 58.

71. See, e.g., JUDICIAL COUNCIL OF CAL., *MODEL SELF-HELP PILOT PROGRAM: A REPORT TO THE LEGISLATOR* 3 (Mar. 2005), [http://www.courts.ca.gov/documents/Self-Help\\_full.pdf](http://www.courts.ca.gov/documents/Self-Help_full.pdf) (providing a self-help court model).

72. CYNTHIA GRAY, AM. JUDICATURE SOC’Y & STATE JUSTICE INST., *REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF REPRESENTED LITIGANTS* 51–57 (2005) (basing the ideas of the paper on Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 97 (2007)); JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS, SUBCOMM. ON JUDICIAL GUIDELINES OF THE MASS. SUP. CT. STEERING COMM. ON SELF-REPRESENTED LITIGANTS (Apr. 28, 2006), *reprinted in* BEST PRACTICES IN MANAGING SELF-REPRESENTED LITIGATION: GUIDELINES, STRATEGIES, AND BENCH SKILLS (Mar. 30, 2012)), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_atj\\_best\\_practices\\_in\\_managing\\_srl\\_toc.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_best_practices_in_managing_srl_toc.authcheckdam.pdf) (last visited Mar. 30, 2016); PROPOSED PROTOCOL TO BE USED BY JUDICIAL OFFICERS DURING HEARINGS INVOLVING PRO SE LITIGANTS, PRO SE IMPLEMENTATION COMMITTEE OF THE MINN. CONFERENCE OF CHIEF JUDGES *reprinted in* Rebecca Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES’ J., Winter 2003, 18; Albrecht et al., *supra*, at 16; John Greacen, *Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts*, JUDGES’ J., Winter 2005, at 24.

innovative approaches.<sup>73</sup> Some court systems have established special magistrate courts for pro se cases, or employed staff attorneys to assist pro se litigants.<sup>74</sup> Others have hot lines, pro se clerks offices, “lawyers of the day programs”, and self-help centers.<sup>75</sup> However, all of these strategies assume a commitment to making courts more accessible that has too often been lagging.<sup>76</sup> In many jurisdictions, severe financial constraints and recent budgetary cutbacks have compounded the challenge of funding adequate pro se services.<sup>77</sup> Surmounting those obstacles will require more exposure of inaccessible systems, more resources for innovation, and more ways to hold the courts accountable.

We also need changes in unauthorized practice doctrine and enforcement. Charges of unauthorized practice should only be brought in cases of demonstrated consumer injury. Judges should follow the lead of courts that have weighed the public interest in determining whether to ban nonlawyer assistance. For example, the Colorado Supreme Court upheld a system enabling nonlawyers to represent claimants in unemployment proceedings; the Court reasoned that lay representation had been accepted by the public for fifty years and “poses no threat to the People of the State of Colorado. Nor is it interfering with the proper administration of justice. No evidence was presented to the contrary.”<sup>78</sup> Similarly, the Washington State Supreme Court, after considering factors such as cost, availability of services, and consumer convenience, concluded that it was in the public interest to allow licensed real estate brokers to fill in standard form agreements.<sup>79</sup> The Supreme Court, in its recent antitrust ruling against anticompetitive practices by the North Carolina State board of Dental

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73. SELF-REPRESENTED LITIGATION NETWORK (SRLN), CORE MATERIALS ON SELF-REPRESENTED LITIGATION INNOVATION (2006).

74. For the New York magistrate court, see Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 493–97 (2002) (citations omitted). For the San Antonio staff attorney program, see Anita Davis, *A Pro Se Program That Is Also “Pro” Judges, Lawyers, and the Public*, 63 TEXAS B.J. 896 (2000).

75. Engler, *Turner v. Rogers*, *supra* note 58, at 42. See also SHELDON KRANTZ, *THE LEGAL PROFESSION: WHAT IS WRONG AND HOW TO FIX IT* 97–98 (2013).

76. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 38 (2002). For negative perceptions about pro se litigants and the burdens they create, see Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009) (citing Jona Goldschmidt et al., *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* 52 (Am. Judicature Soc’y, 1998)).

77. See Julia Cheever, *Deep Cuts to Court Funding Make CA Chief Justice “Afraid to See the Future,”* S.F. APPEAL (Aug. 9, 2013, 5:12 AM), <http://sfappeal.com/2013/08/deep-cuts-to-court-funding-make-ca-chief-justice-afraid-to-see-the-future>; Sheri Qualters, *No Respite: State Courts Face Another Year of Lean Budgets and Tough Cuts*, NAT’L L.J., Feb. 20, 2012, at 1; *Mounting Budget Troubles Crimp Delivery of Justice*, U.S.A. TODAY, Dec. 6 2011, at 10A.

78. *Unauthorized Practice of Law Comm., Supreme Court of Colorado v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Col. 1986).

79. *Cultum v. Heritage House Realtors*, 694 P.2d 630, 633 (Wash. 1985).

Examiners, also is demonstrating increased sensitivity to consumer concerns.<sup>80</sup> This public interest-oriented approach would make for a more socially defensible regulatory structure than conventional bans on nonlawyer practice irrespective of its quality and cost-effectiveness.

Licensing systems could also be developed to allow qualified nonlawyers to offer personalized assistance on routine matters. Consumer protections could be required concerning qualifications, disclaimers, ethical standards, malpractice insurance, and discipline.<sup>81</sup> Many administrative agencies already have power to regulate nonlawyers appearing before them, and no evidence suggests that the performance of these nonlawyers has been inadequate.<sup>82</sup> Under their inherent powers, courts could oversee the development of such licensing systems or could approve legislatively authorized structures as consistent with the public interest. More states should follow the lead of Washington and New York, which have already taken steps in this direction.<sup>83</sup> If the goal is to protect clients from incompetence, rather than lawyers from competition, then regulation—not prohibition—of lay specialists makes sense. And the bar should not control the regulatory system.<sup>84</sup>

Such an approach would be particularly beneficial in the area of immigration, a field characterized by both pervasive fraud and pervasive unmet needs.<sup>85</sup> Individuals holding themselves out as notaries and immigration consultants have preyed on the ignorance of undocumented consumers who cannot afford attorneys and who are reluctant to approach authorities to complain

80. N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, No. 13-534, slip op. at 14 (Feb. 25, 2015).

81. Steven Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 417 (2013).

82. Kritzer, *Rethinking Barriers*, *supra* note 43, at 101; Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ.: A J. OF THEORY & PRAC. 425, 448 (2011); *see also* Zachery C. Zurek, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 242, 265 (discussing requirements for nonlawyer patent specialists) (citing 37 C.F.R. § 11.7 (2012)).

83. *See generally* CHIEF JUDGE'S COMMITTEE ON NONLAWYERS AND THE JUSTICE GAP, NEW YORK STATE COURT NAVIGATOR PROGRAM, NAVIGATOR SNAPSHOT REPORT (Dec. 2014), <http://nylawyer.nylj.com/adgifs/decisions15/022415report.pdf> (report on New York pilot program training nonlawyers demonstrating measurable benefits); Wash. Ct. APR 28 (2015) (licenses authorizing the limited practice of law for nonlawyers in Washington).

84. For a critique of the unduly restrictive Washington regulations developed by the state bar, *see* Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, HASTINGS L.J. (forthcoming 2016).

85. For fraud, *see* Unger, *supra* note 82; Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 589 (2009); Jessica Wesberg & Bridget O'Shea, *Fake Lawyers and Notaries Prey on Immigrants*, N.Y. TIMES, Oct. 23, 2011, at A25. For unmet need, *see* Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 654-55 (2012) (citing 8 U.S.C. § 1252(b)(2) (2006); 8 U.S.C. § 1362 (2006); 8 C.F.R. § 1240.3 (2004); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 395 (2000); Aguilera-Enriquez v. Immigr. & Naturalization Serv., 516 F.2d 565, 568 (6th Cir. 1975)).

about fraudulent practices.<sup>86</sup> Many of these consultants capitalize on the status of notario publicos in some Latin American countries, where these legal professionals enjoy formal legal training and authority to provide legal assistance.<sup>87</sup> The situation would benefit from a licensing structure similar to that in Australia, Canada, and the United Kingdom, which allow licensed nonlawyer experts to provide immigration-related assistance.<sup>88</sup> Although the United States allows accredited nonlawyers to represent individuals in immigration appeals, it permits only representatives who work for nonprofit organizations and who accept only nominal fees for their efforts.<sup>89</sup> An expanded licensing system that would allow qualified lay experts to charge reasonable fees could expand access to justice for a population in great need of assistance.<sup>90</sup>

In short, the current structure is both under-enforced and over-inclusive. Bar prohibitions encompass a sweeping array of competent, low-cost services.<sup>91</sup> Yet strong consumer demand for such assistance makes these prohibitions difficult to enforce. As a result, most lay practice goes unregulated, and when abuses occur, as in the immigration context, the public has inadequate remedies. A preferable regulatory structure would provide both less and more protection—less for attorneys and more for consumers.

### B. Research and Education

A major obstacle to increasing access to justice is the lack of research on key issues. For example, we know little about when counsel is necessary to secure fundamental fairness. Methodologically sound studies on the contributions of

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86. See Wesberg & O’Shea, *supra* note 85 (finding immigrants being preyed on and reluctant to seek help).

87. Ann E. Langford, *What’s in a Name? Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 119–20 (2004) (citations omitted).

88. For the role of registered migration agents in Australia, see *Consumer Guide*, AUSTRALIAN GOVERNMENT OFFICE OF THE MIGRATION AGENTS REGISTRATION AUTHORITY, <https://www.mara.gov.au/Consumer-Information/Information-for-Consumers/default.aspx> (last visited Mar. 30, 2016). For the role of authorized immigration consultants in Canada, see *Use an Authorized Representative*, CITIZENSHIP & IMMIGRATION CANADA, <http://www.cic.gc.ca/english/information/representative/rep-who.asp> (last modified June 11, 2015). For the role of regulated immigration advisors in the United Kingdom, see *The Code of Standards and Commissioner’s Rules*, OFF. IMMIGR. SERVS. COMM’R, <http://oisc.homeoffice.gov.uk/servefile.aspx?docid=6> (last updated Sept. 4, 2015).

89. See 8 C.F.R. § 1292.1 (2012) (referencing 8 C.F.R. § 1292.2 (2012) for organization qualifications for representation); Shannon, *supra* note 85, at 602–03 (citations omitted).

90. See Unger, *supra* note 82, at 443–49; Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437 (2001) (referencing Langford, *supra* note 87, at 134 and Unger, *supra* note 82, in encouraging licensing to propagate reasonable fees).

91. See Loyd P. Derby, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331, 1333 (1966).

lawyers in routine cases are scarce and conflicting.<sup>92</sup> Researchers using randomized control groups have come to different conclusions as to whether lawyers improve outcomes.<sup>93</sup> We also lack adequate data about various self-help strategies such as hotlines, pro se clinics, and document preparation services like Legal Zoom.<sup>94</sup> More research is critical to assessing the relative cost-effectiveness of particular forms of assistance. The American Bar Association's Commission on the Future of Legal Services, and the reports and articles that it has spawned, are a step in the right direction.<sup>95</sup>

We should also do more to educate the public concerning these issues. As noted earlier, much of the problem concerning access to justice stems from the lack of public recognition that there *is* a significant problem. Academics need to do more writing for non-academic audiences in forms that put a human face on legal needs, and that mobilize consumers to demand access to qualified nonlawyer service.

92. Barton & Bibas, *supra* note 56, at 991 (citing D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2198 (2012) in finding scarcity of credible data and conflicting findings); Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295, (2010) (researching, discussing, and describing conflicting outcomes); Rhode, *An Agenda*, *supra* note 60, at 538–39 (citations omitted) (discussing scarcity of data and conflicting results); Gillian K. Hadfield, *Higher Demand, Lower Supply—A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 129 (2010) (noting “slim empirical basis” for evaluating lawyers performance); Charn, *supra* note 14, at 2222 (noting that we lack “empirical evidence that would support confident advice to claimants about what assistance would best meet their needs”) (referencing Abel, *supra*); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 158 (2011) (noting that neither judges nor litigants have the basis for knowing “whether adding lawyers would enhance accuracy”); Engler, *Self-Representation*, *supra* note 11, at 69–73 (citations omitted) (noting lack of evaluation of pro se assistance on case outcomes and problems in using satisfaction as a measure of success for hotlines and self-help programs); Greiner & Pattanayak, *supra* note 92, at 2198–208 (citations omitted) (discussing methodological weaknesses of many studies and conflicting results); Engler, *Turner v. Rogers*, *supra* note 58, at 52–53 (quoting Laura Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 DENVER U. L. REV. 805, 821 (2011-2012) (noting the “shortage of reliable data concerning which types of legal assistance various types of litigants need to obtain meaningful access”).

93. Compare Greiner & Pattanayak, *supra* note 92, at 2149 (finding that access to representation did not correlate with favorable outcomes), with Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001) (tenants with lawyer assistance did better than those without). See also D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 930 (2013) (finding tenants with access to lawyer fared better than those who were randomly assigned to information and self-help).

94. See sources cited in RHODE, ACCESS TO JUSTICE, *supra* note 3, at 121, 228 n.38; Milan Markovic, *Legal Zoom Redux*, LEGAL ETHICS FORUM (May 5, 2014, 3:55 AM), <http://www.legalethicsforum.com/blog/2014/05/legal-zoom-redux.html>.

95. See A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., [http://www.americanbar.org/groups/centers\\_commissions/commission-on-the-future-of-legal-services.html](http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html) (last visited Mar. 30, 2016).

Over three decades ago, then-President Jimmy Carter noted that the United States had “the heaviest concentration of lawyers on earth . . . but no resource of talent and training . . . is more wastefully or unfairly distributed than legal skills. Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented.”<sup>96</sup> The situation has not improved. And at least part of the problem is of the profession’s own making. We do not lack for ideas of how to make legal services more accessible. The challenge remaining is to learn more about what strategies work best, and to make them a public and a professional priority. If our nation is truly committed to equal justice under law, we must do more to translate that rhetorical aspiration into daily reality.

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96. James Carter, Remarks, President Carter’s Attack on Lawyers, President Spann’s Response, and Chief Justice Burger’s Remarks, 64 A.B.A. J. 840, 842 (1978) (remarks of James Carter at the 100th Anniversary Luncheon of the Los Angeles County Bar Association, May 4, 1978).

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