

# Unauthorized Practice or Untenable Prohibitions: Refining and Redefining UPL, 13 St. Mary's J. on Legal Malpractice & Ethics 283 (2023)

*Jan L. Jacobowitz and Peter R. Jarvis*

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# ARTICLE

*Jan Jacobowitz | Peter Jarvis*

## Unauthorized Practice or Untenable Prohibitions: Refining and Redefining UPL

**Abstract.** An extraordinarily number of Americans either cannot afford or cannot find lawyers to assist them on civil legal matters. And an increasing number of Americans turn either to on-line apps or to nonlawyer professionals whose practices may overlap in whole or in part with what lawyers do. Although individuals receive much needed assistance, these alternative providers often confront allegations of committing the unauthorized practice of law. Unfortunately, the rules regarding the unauthorized practice of law (“UPL”) are both outdated and extraordinarily ambiguous. Moreover, UPL issues regarding alternative providers are distinct from questions concerning whether nonlawyers should be entitled to be law firm partners, own law firms, or issues arising in multijurisdictional practice. The question here is how to define what nonlawyers and entities that are not law firms can and should be able to do entirely on their own. This Article discusses both past and present definitions of UPL and the significant problems created by those definitions. It also presents a new approach to defining UPL that would permit a substantial increase in access to both legal information and services by allowing certain nonlawyers and computer apps to provide much needed assistance.

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*“Equal justice under law is not merely a caption on the facade of the Supreme Court. It is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”*<sup>1</sup>

## I. INTRODUCTION

The United States is in the middle of what has been called an “access to justice” crisis.<sup>2</sup> Too many Americans cannot find or cannot afford lawyers to provide them with the basic legal information and services that they need.<sup>3</sup> Moreover, this crisis is by no means limited to the poorest among us. As Supreme Court Justice Neil Gorsuch has written:

At some point just about every American will interact with our civil justice system. Whether it happens because of an eviction, a custody battle, a tort suit, or a contract claim, one thing is clear: Legal disputes are just as much a part of life as death and taxes. Yet today, legal services are increasingly difficult to obtain. A 2017 study found that low-income Americans fail to obtain adequate professional assistance with their legal problems 86% of the time. The vast majority don’t even try to obtain professional help, and those who do are often turned away. According to another study, at least one party lacks legal representation in nearly 80% of civil cases in this country.

The root cause for this state of affairs is not hard to discern: Legal services are expensive. Lawyers charge hundreds of dollars per hour for even the

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1. Justice Lewis Powell, Jr., Keynote Address at Legal Services Corporation: A Presidential Program of the Annual Meeting of the American Bar Association (Aug. 10, 1976).

2. See Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 49 (2019) (describing the access-to-justice crisis as a crisis of “unresolved justice issues,” and explaining “[t]ens of millions of Americans face justice problems that place them at risk of devastating outcomes”); see generally Lincoln Caplan, *The Invisible Justice Problem*, 148 DAEDALUS 19 (2019).

3. The key findings of the Legal Services Corporation’s 2022 Justice Gap Study’s assessment of the unmet civil legal needs of low-income Americans reveal:

Low-income Americans did not receive any legal help or enough legal help for 92% of the problems that substantially impacted their lives in the past year . . . LSC-funded organizations are unable to provide any or enough legal help for 71% of the civil legal problems brought to them; this translates to an estimated 1.4 million problems over the course of a year.

LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 19 (Mary C. Slosar et al. eds, 2022).

simplest of legal services. Even a single legal bill can prove financially devastating to many Americans.<sup>4</sup>

The compelling need to expand access to affordable legal information and services exists as a complex societal dilemma without a single simple solution. Nevertheless, and as Justice Gorsuch has also suggested, “[i]t seems well past time to reconsider our sweeping unauthorized practice of law prohibitions.”<sup>5</sup>

But even if it were not well past time to reconsider unauthorized practice of law (“UPL”) rules in light of access to justice issues, it is still past time to do so for two additional reasons. First, present definitions of UPL are generally “vague or conclusory”<sup>6</sup> and thereby contribute to the fact that “jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.”<sup>7</sup> Among other things, vague and conclusory definitions are likely to deter innovation and prevent the good along with the bad. Importantly, it is bad public policy for an area of law such as UPL to be so unclear. Second, the ongoing evolution of technology and its impact on society requires a reassessment of how any lines between the authorized and unauthorized practice of law should be drawn. Much of the present and future need for legal information and services for individuals, if not also entities, at all levels of income can, should, and will

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4. Hon. Neil M. Gorsuch, *Bridging the Affordability Gap*, 45-APR WYO. LAW., 16, 17 (2022). In *Raskin v. Dallas Indep. Sch. Dist.*, the court noted in the context of a case involving the rights of parents to represent their children in appeals relating to Social Security that:

[I]n some circumstances, the absolute bar [against a nonlawyer parent’s right to represent a child in court] may not protect children’s rights at all. When counsel is unavailable, the absolute bar ‘undermine[s] a child’s interest in having claims pursued for him or her,’ and ‘may force minors out of court altogether.’ ‘Children represent a disproportionate number of those living in poverty in the United States,’ and ‘[t]here is a dearth of legal services available’ in this country ‘to meet the legal needs of those who cannot afford to pay.’ As a result, ‘the mandate that parents retain counsel to advance their children’s claims cannot be met by a substantial portion of families.’

See *Raskin v. Dallas Indep. Sch. Dist.*, 69 F.4th 280, 286 (5th Cir. 2023) (first quoting *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005); and then quoting Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child’s Unconstitutional Catch-22*, 71 FLA. L. REV. 831, 856–58 (2019)). The *Raskin* opinion also references “the Founding generation’s . . . distaste for attorneys.” *Id.* at 292.

5. NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 257 (2019).

6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, cmt. c (2000).

7. *Id.*

likely be met by nonlawyers engaged in non-law firm businesses or by law-related applications accessible from cell phones, laptops, and desktops.

This Article proposes an update to the definition of UPL to address past, present, and anticipated future issues, primarily by presenting a series of exceptions regarding what should not be considered UPL. Some of the exceptions have been referenced in at least some authorities for a long time. Others are new, or at least much newer. Regardless, greater clarity in an updated definition of UPL is both needed and attainable.

This Article begins by reviewing the history of UPL prohibitions as applied to nonlawyers.<sup>8</sup> The discussion then moves into the twenty-first century, briefly exploring the evolution of the practice of law, current cases, and contemporary interpretations of UPL. The Article then provides the Authors' approach to refining and redefining UPL, both to provide greater clarity and to improve access to legal information and services. Finally, the Article will address a series of questions or concerns raised by readers of draft versions of this Article or that the Authors believe may be raised by critics of their approach.

## II. THE HISTORY AND GROWTH OF UPL

### A. *Early Origins*

The legal profession developed over centuries, long after the emergence of early civilizations whose laws were promulgated and enforced by their leaders—who were often thought to be divinely guided.<sup>9</sup> Instead, ancient Greece and Rome, with sparse regulation, sprouted the roots of the legal profession. In fact, the ancient Greeks' emphasis on pure democracy demanded what might be categorized as “reverse UPL,” meaning a mandate that individuals represent themselves.<sup>10</sup> Ancient Greek “unauthorized practice” would have been an advocate, other than the aggrieved, pleading

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8. This Article does not address UPL issues pertaining to lawyers who are licensed in one jurisdiction but who wish to practice in another or pertaining to whether nonlawyers ought to be permitted to be owners or co-owners of law firms. It focuses solely on what nonlawyers can and should be allowed to do on their own. This Article also does not address the distinct kind of UPL which exists when individuals who are not lawyers falsely tell others that they are lawyers—a prohibition against fraud and misrepresentation that should be retained.

9. See Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 VAND. J. ENT. & TECH. L., 279, 281 (2021) (discussing the strong connection between divinity and the law in ancient civilizations).

10. *Id.* at 283.

a case. Eventually guest speakers and speech writers emerged, but fees were prohibited.<sup>11</sup>

The authorized practice of law emerged in ancient Rome where it became accepted practice for the educated elite to study the law.<sup>12</sup> Additionally, “Roman Emperor Claudius legalized the profession and permitted advocates to charge a limited fee.”<sup>13</sup> Nonetheless, ancient Rome did not address the unauthorized practice of law; rather, the concept first appears “after the fall of the Western European Empire” when the legal profession reemerged in England in the thirteenth century.<sup>14</sup>

England developed professional standards designed to reinforce positive conduct and discourage abusive behavior.<sup>15</sup> Oaths of office, statutes, and court cases reflected evolving professional standards.<sup>16</sup> The London Ordinance of 1280 evidenced a “concern with excessive lawyers, their incompetence, and misconduct,”<sup>17</sup> and was enacted in response to an outcry that abusive behavior in the legal field was not being addressed.<sup>18</sup>

The ordinance stated a lawyer’s duty of respect for the court and other litigants (“make proffers at the bar without baseness and without reproach and foul words and without slandering any man”), duty of competence (“well and lawfully he shall exercise his profession”), the duty to avoid conflicts of interests (shall not “take pay from both parties in any action”), and the duty to not engage in champerty (shall not “undertake a suit to be a partner in such suit”). The final section provided that all persons who violated the act were subject to a variety of penalties, ranging from short suspensions to permanent disbarment and imprisonment.<sup>19</sup>

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11. *Id.* at 283–84.

12. *Id.* at 283.

13. *Id.* at 285.

14. *Id.* at 285–86; Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97, 103 (2018).

15. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1409 (2004).

16. *Id.*

17. Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345, 353 (1998).

18. *Id.* at 353–54.

19. Andrews, *supra* note 15, at 1413 (quoting Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 131–32 (1998)).

Interestingly, a little over a decade later, England enacted the first statute addressing the unauthorized practice of law. The statute, enacted in 1292 under Edward I, empowered the “Lord Chief Justice ‘to appoint a certain number of attorneys and lawyers of the best and most apt for their learning and skill, who might do service to his court and people; and that those chosen only and no other, should practice.’”<sup>20</sup> Thus, when English lawyers later traveled across the Atlantic to the American colonies, they presumably brought with them a semblance of both professional standards and the concept of the unauthorized practice of law.<sup>21</sup> Nonetheless, it does not appear that the nascent American legal profession concerned itself with the activities of nonlawyers outside of the courthouse despite a growing attention to who could be admitted and authorized to practice law in court.<sup>22</sup>

In fact, regulations varied among the colonies, which remained the case after the Revolutionary War as the colonies became states. Moreover, after the war, lawyers suffered a decline in reputation as many of them were viewed essentially as debt collectors or otherwise viewed with disdain.<sup>23</sup> A decline in the restrictions to practice law accompanied the reputational damage. Indeed, Laurel Rigertas explains:

Scholars have referred to this period of “Jacksonian democracy” as a time of de-professionalization. “A product of frontier conditions, this egalitarian spirit, which held any man capable of doing anything, gave real impetus to the movement to open up the practice of law to any who might wish to pursue it, without regard to educational or other qualifications.” “Fourteen out of nineteen jurisdictions required all lawyers to complete an apprenticeship” in 1800, but sixty years later, only nine out of thirty-nine jurisdictions had this requirement.<sup>24</sup>

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20. Rigertas, *supra* note 14, at 103–04 (quoting F. Trowbridge vom Baur, *An Historical Sketch of the Unauthorized Practice of Law*, 24 UNAUTHORIZED PRAC. NEWS 1, 3 (1958)).

21. Jacobowitz, *supra* note 9, at 286.

22. Rigertas, *supra* note 14, at 104.

23. Jan L. Jacobowitz & Scott Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY’S J. LEGAL MAL. & ETHICS 198, 207–10 (2014).

24. Rigertas, *supra* note 14, at 105 (first quoting TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATES CRISES, AND PROFESSIONAL EMPOWERMENT* (1987); then quoting Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 2 AM. B. FOUND. RES. J. 159, 172 (1980); and then quoting RICHARD L. ABEL, *AMERICAN LAWYERS* 40 (1989)).

Rigertas's research further reveals during the 1800's many states opened the practice of law, either by statute or constitutional provision, to any citizen at the age of majority without further requirements.<sup>25</sup> Although some states required registration and certain additional requirements, "[a]s a practical matter . . . by the time of the Civil War there were no significant restrictions on admission to law practice."<sup>26</sup>

In fact, law schools and law degrees did not become widely available until much later.<sup>27</sup> After William Blackstone asserted the insufficiency of the pre-Revolutionary apprenticeship method that included reading English common law texts, the first law professorship was established at William and Mary College in 1779.<sup>28</sup> In 1784, the first independent law school, Litchfield Law School, was founded in Connecticut as an outgrowth of Tapping Reeve's law office.<sup>29</sup>

Eventually, other law schools were founded and Christopher Langdell, the Dean of Harvard Law School, developed the case method of teaching.<sup>30</sup> In 1886, Langdell explained: "What qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law."<sup>31</sup>

The establishment of law schools and the shift of legal education away from practical experience and towards theoretical instruction was not without its critics. An individual with practical experience and a frontier spirit but no law school education (e.g., Abraham Lincoln) could plainly have more skill and insight than someone who was merely theoretically trained. Moreover, nineteenth-century state bar associations were often reluctant to require formal legal education as a requisite for admission to practice law because such a requirement could render the practice of law

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25. Rigertas, *supra* note 14, at 105.

26. Rigertas, *supra* note 14, at 105 (quoting Christensen, *supra* note 24, at 172).

27. Jacobowitz & Rogers, *supra* note 23, at 207–10 (discussing the evolution of legal education in America).

28. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1964–65 (2012); *see also* Susannah Furnish, *The Progression of Legal Education Models: Everything Old Is New Again*, 6 NE. U. L.J. 7, 8 (2013) (noting legal training was primarily through apprenticeships until the 1870s).

29. Spencer, *supra* note 28, at 1966–67.

30. 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 372 (1908).

31. *Id.* at 361 (quoting a speech delivered by Dean Christopher Langdell at Harvard Law School Association Dinner on November 5, 1886).

“accessible to only elites.”<sup>32</sup> Thus, law school, a law degree, and formal theoretical education about the practice of law were not universally thought necessary to imbue individuals with the competence required to provide legal information and advice to clients.

## B. *The Nineteenth into the Twentieth Century*

### 1. Early UPL Authorities

Although some states attempted to regulate the practice of law in the 1800s, the enforcement mechanisms for punishing the unauthorized practice of law were virtually nonexistent in a statutory context. Thus, the courts, asserting their inherent power to govern the practice of law in the courtroom, ruled on allegations of UPL.<sup>33</sup> UPL decisions generally concerned unauthorized individuals representing others in court.<sup>34</sup> UPL allegations emerged as a defense tactic with the resulting penalty often being a dismissal of the lawsuit rather than a penalty imposed upon the individual who had been accused of UPL.<sup>35</sup> UPL allegations outside of a courtroom context were not common; no general proactive attempt to prosecute or punish UPL existed.<sup>36</sup> As Laurel Rigertas explains:

The [UPL] issue . . . was not a common one in the 1800s. George Brand’s 1937 handbook on the unauthorized practice of law may not have been a complete collection of all unauthorized practice of law cases at the time of its publication, but it only referenced seven cases from the 1800s that addressed unauthorized practice of law issues. By comparison, the handbook

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32. Spencer, *supra* note 28, at 1970–71.

33. Rigertas, *supra* note 14, at 107 (“In the absence of statutory authorization to enforce prohibitions on unlicensed practitioners during most of the 1800s, remedies were often rooted in the courts’ inherent authority to prevent unlicensed practitioners from appearing in their courtrooms.”).

34. *Id.*

35. *Id.* at 108.

36. *Id.* at 108, n.66. Laurel Rigertas adds to her footnote describing how she was unable to locate any cases from the 1800s where a cause of action was brought to enjoin the practice of law. In other words, there were no prosecutors charging people who appeared in court without a license and no bar association committees pursuing legal action against people who appeared in court without a license. See also Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 713 (2012) (stating “[p]rior to the twentieth century, a non-lawyer violated the unauthorized practice of law rules only by representing another individual in court”).

summarized over one hundred cases from the first three decades of the twentieth century that addressed unauthorized practice issues.<sup>37</sup>

George Brand's 1937 handbook containing the proliferation of unauthorized practice of law cases in the early twentieth century reflects both the growth of the legal profession and the beginning of a more unified effort not only to establish professional standards for the practice of law but also to prohibit the unauthorized practice of law. The court in *People v. Alfani*<sup>38</sup> provided one explanation for the need of unified standards:

The reason why preparatory study, educational qualifications, experience, examination, and license by the courts are required, is not to protect the bar, as stated in the opinion below, but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry, and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest, and knowledge reveals how it may be avoided.<sup>39</sup>

## 2. Growth in the Number of Lawyers and in Bar Associations

Throughout the nineteenth century, the population of the legal profession exploded from approximately 20,000 lawyers in 1850 to about 114,000 lawyers at the turn of the century.<sup>40</sup> The proliferation of lawyers aligned with the increase of business and the expansion of America's economy.<sup>41</sup> The legal profession's rapid growth served as a catalyst for the formation of bar associations, which began in the late 1800's.<sup>42</sup> By 1900, forty state or territorial bar associations had been established, including the American Bar Association ("ABA"), founded in 1878.<sup>43</sup>

Although initially serving a social function, the bar associations began to engage in professional advocacy by the beginning of the twentieth century, including a focus on the unauthorized practice of law.<sup>44</sup> Some of the literature concludes "[t]heir initiatives were steeped in rhetoric about

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37. Rigertas, *supra* note 14, at 107–08.

38. *People v. Alfani*, 125 N.E. 671 (N.Y. 1919).

39. *Id.* at 673.

40. Rigertas, *supra* note 14, at 111.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 112.

increasing the professional status of the bar, but those initiatives focused more on erecting barriers of entry to protect the professional elite.”<sup>45</sup>

Laurel Rigertas’s comprehensive examination of the history of UPL explores the early efforts of the New York and Chicago Bar Associations to establish committees on the unauthorized practice of law. The committees then sought to enlist the legislature and courts to both assist in identifying licensed individuals and in developing methods to enforce penalties for unauthorized practice.<sup>46</sup> Perhaps the aspects of the nineteenth century most relevant to the Authors contemporary evaluation of UPL reside in the Industrial Revolution and the rise of corporations as a competitive threat to the legal profession.

This created a turf battle over work outside the courtroom that nonlawyers had occupied without much resistance for some time. An article from 1958 providing one of the earliest historical sketches of the unauthorized practice of law, described the Industrial Revolution as a “spectacular development,” by stating:

The growth of corporations and new businesses, however, did not just change the nature of lawyers’ work—corporations also became competitors to lawyers. As Barlow Christensen described, “[T]he business corporation posed a threat to lawyers both because corporate business tended to develop legal needs that lawyers seemed not yet able to meet, and because corporations had, or could develop, the capacity to compete effectively with lawyers in providing traditional kinds of legal services.”<sup>47</sup>

During the second decade of the 1900s, additional state bar associations echoed the New York and Chicago Bar Associations’ stated concerns about the unauthorized practice of law.<sup>48</sup> Interestingly, the ABA enacted the first Canon of Ethics in 1908 without a definition of the practice of law or the unauthorized practice of law.<sup>49</sup> Since then, it has never provided a concrete

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45. *Id.*

46. *Id.* at 112–39.

47. *Id.* at 139–40 (quoting Christensen, *supra* note 24, at 177–178 (alteration in original) (footnote omitted)).

48. *Id.* at 140–42.

49. See REGINALD M. TURNER, REPORT OF THE FUTURE OF LAWYERING SUBCOMMITTEE OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS REGARDING PROPOSED REVISED MODEL RULE 5.5, at 17 (Apr. 18, 2022), <https://aprl.net/wp-content/uploads/2022/04/Letter-regarding-our-proposal-to-ABA-President.pdf> [<https://perma.cc/34G5-8LMW>].

definition of the practice of law. The ABA did establish a Standing Committee on the Unauthorized Practice of Law in 1933 that published a 1934 handbook emphasizing the role of the courts in defining the practice of law.<sup>50</sup> The handbook advised that “statutes ‘should not undertake to define the practice of law, for definitions undertaking this have been universally found to be self-limiting and to invite evasion.’ Whether or not a particular course of conduct constitutes the practice of law should be left to the courts for determination.”<sup>51</sup>

In a 1933 ABA Journal article on UPL, Ralph Catterall discussed the role of the courts, but first observed:

In recent years . . . many business men have invaded the lawyers’ field and are practicing law. The crime that these business men commit is not one that appears criminal to laymen in general or to grand juries in particular. District attorneys and police detectives do not waste energy ferreting out this particular crime. The lay public, for whose protection the restrictions exist, is not interested. The members of the bar, for whose protection the restrictions were not imposed, benefit indirectly from the restriction in two ways. The fact that the profession is a restricted one adds to the dignity of the profession, and increases the incomes of lawyers. If the lawyers do not try to keep the laymen out of their preserve, nobody else will.<sup>52</sup>

Catterall described how most offenders at that time were corporations whose transgressions had resulted in a number of appellate decisions.<sup>53</sup> He noted that the court decisions of his day offered an extremely broad definition of the practice of law—“the giving of any legal advice, and any action taken for others in any matter connected with the law.”<sup>54</sup> He conceded both the absurdity of applying such a definition and what he saw as the impossibility of defining the practice of law.<sup>55</sup> Instead, he suggested the practice of law can be best described by outlining the actions that constitute the practice of law.<sup>56</sup>

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50. Rigertas, *supra* note 14, at 156.

51. Rigertas, *supra* note 14, at 157 (quoting *Report of the Special Committee on unauthorized Practice of Law*, 58 A.B.A. REPORTS 483 (1933)).

52. Ralph T. Catterall, *The Unauthorized Practice of Law*, 19 A.B.A. J. 652, 652 (1933).

53. *Id.* at 652, n. 5.

54. *Id.* at 652.

55. *Id.*

56. *Id.*

Catterall reviewed some cases of first impression and stated that defining the practice of law necessarily “depends on the perception of differences of degree and shadings of emphasis.”<sup>57</sup> Thus, he concluded:

The present flourishing of unauthorized practice of the law is, I think, the chief circumstance that makes it appear as if it were hard to tell what is meant by “practicing law.” What that great figure in the development of the common law, the ordinary reasonable man, would think is practicing law, usually is practicing law.<sup>58</sup>

Regardless of Catterall’s attempt at simplifying the distinction between the practice of law and UPL, within five years of the article’s publication, more than 400 committees on the unauthorized practice of law were established throughout the country.<sup>59</sup> Moreover, these committees were reinforced in the second half of the twentieth century.<sup>60</sup> Needless to say, Catterall could join today’s conversation and would likely not be surprised to learn technology has changed “the perception of differences and shadings of emphasis”<sup>61</sup> when it comes to deciding or defining what nonlawyers may do.<sup>62</sup>

### C. *Continuing Into the Twenty-First Century*

#### 1. Public Policy and UPL Definitions

Although turf-protection has been and no doubt remains part of the reason behind lawyer opposition to UPL, it has also been true that “[t]he primary justification given for unauthorized practice limitations was that of consumer protection—to protect consumers of unauthorized practitioner

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57. *Id.* at 653–56.

58. *Id.* at 656.

59. Rotenburg, *supra* note 36, at 714.

60. *Id.*

61. Catterall, *supra* note 52, at 656.

62. See Frederick C. Hicks & Elliott R. Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L.J. 69, 70–71 (1931) (noting “many unlicensed individuals and organizations are today performing functions heretofore commonly regarded as within the exclusive province of the lawyer,” and asserting “[l]awyers further contend that limiting their exclusive franchise to the preparation and trial of cases would inevitably destroy the legal profession. The immediate effect would be to deprive lawyers of the most lucrative part of their present practice.”). The above article also asserts that, at least at the time of writing, there appeared to be an oversupply of lawyers. *Id.*

services against the significant risk of harm believed to be threatened by the nonlawyer practitioner's incompetence or lack of ethical constraints."<sup>63</sup>

Thus, the South Carolina Supreme Court recently stated its "regulation of the practice of law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law."<sup>64</sup> This explanation is fundamentally no different than the statement of the purpose of UPL provisions made almost ninety years ago by the Texas Court of Civil Appeals:

Manifestly the reason or purpose of the law in requiring that those who desire to engage in the practice of the law shall meet certain tests and requirements, is not the fact that a fee or consideration may be charged for rendering such legal services. The controlling purpose of all laws, rules and decisions with regard to the licensing of lawyers is to protect the public against persons inexperienced and unlearned in legal matters from attempting to perform legal services.<sup>65</sup>

The public policy rationale behind UPL prohibitions is not the only aspect of UPL that remains unchanged. The general definitions of what constitutes UPL have not moved much, if at all, beyond where they have long been. Examples include applying the law or legal principles to specific factual situations,<sup>66</sup> giving legal advice to others,<sup>67</sup> or whatever it is that lawyers do that goes beyond what lay people generally know about the law<sup>68</sup>

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63. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. b (2000). As the reader will no doubt have concluded, the Authors do not believe that lawyer turf protection justifies the historical approach to UPL. On the other hand, the fact that broad UPL provisions may be turf-protecting would not justify changing the UPL rules if, in fact, the benefits of the historical approach outweighed the burdens. As explained below, however, the burdens of the historical approach far outweigh the benefits.

64. Matter of Anonymous Applicant for Admission to South Carolina Bar, 875 S.E.2d 618, 623 (2022).

65. Grievance Comm., State Bar of Tex., Twenty-First Cong. Dist. v. Coryell, 190 S.W.2d 130, 131 (Tex. App.—Austin 1945, writ ref'd w.o.m.).

66. *Definition of the Practice of Law*, W.V. STATE BAR, <https://wvbar.org/definition-of-the-practice-of-law> [<https://perma.cc/96UF-RQUA>] (including advising another "in any matter involving the application of legal principles to facts, purposes or desires").

67. Ohio State Bar Ass'n v. Pro-Net Fin., Inc., 196 N.E.3d 792, 795 (Ohio 2022).

68. People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919) ("The Legislature is presumed to have used the words as persons generally would understand them, and, not being technical or scientific terms, 'to

or that “reasonably demand[s] the application of a trained legal mind.”<sup>69</sup> And while noting that the definition of UPL can be different in different jurisdictions, ABA Formal Op. 506 (2023) appears to assert that UPL exists whenever a prospective or current client asks a question that “requires the application of law to the facts of the case, as opposed to a question that merely asks about a firm procedural matter.”

Also common in both old and new cases are statements acknowledging the impossibility of constructing a one-size-fits-all definition of the practice of law for UPL purposes, and that it is therefore necessary to closely examine the specific factual and legal circumstances of each situation before reaching a conclusion.<sup>70</sup> Nonetheless, as stated two decades ago, the basic standard definitions of what constitutes UPL remain, in the language of Comment C to Restatement § 4, “vague or conclusory,” thereby contributing to different results in different jurisdictions.<sup>71</sup>

This is not to suggest that standard definitions are completely useless. They do serve as partial definitions by way of exclusion. If, for example, particular conduct does not fall within the basic standard definitions, or in other words, within the range of what lawyers do, it would make no sense to deem such conduct to be UPL.

This also is not meant to be a failure to acknowledge that some jurisdictions have identified examples of specific conduct and adopted additional limitations on what may be regarded as UPL. For example, some UPL statutes provide that when it comes to the giving of advice (as distinct from the drafting of legal documents or the representation of others in court), the person offering the advice must be doing so for compensation<sup>72</sup> or that UPL principles may not or do not apply to advice given by friends

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practice as an attorney at law’ means to do the work, as a business, which is commonly and usually done by lawyers here in this country.”).

69. *People v. Landlords Pro. Servs.*, 264 Cal. Rptr. 548, 551 (Ct. App. 1989) (quoting *Agran v. Shapiro*, 273 P.2d 619, 626 (Cal. App. Dep’t Super. Ct. 1954); *Altizer v. Highsmith*, 265 Cal. Rptr. 3d 832, 840 (2020)).

70. *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 711 (S.C. 2017).

71. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000).

72. *See* MO. ANN. STAT. § 484.010(2) (2022) (defining “the law business,” as distinct from representing others in legal proceedings, as requiring “a valuable consideration?”); *see also* Bd. of Comm’rs of Utah State Bar v. Petersen, 937 P.2d 1263, 1268 (Utah 1997) (stating UPL is “usually for gain” (quoting *Nelson v. Smith* 154 P.2d 634, 638 (Utah 1944))).

or neighbors.<sup>73</sup> Similarly, UPL principles may not apply to some minor courts or proceedings where “the procedure is so informal as to constitute the judge really an arbiter in the dispute”<sup>74</sup> or to some, but not necessarily all, types of administrative matters.<sup>75</sup> Some courts also distinguish between contracts that do and contracts that do not involve the application of significant legal principles.<sup>76</sup>

Other authorities note that given certain constitutional provisions—including the Supremacy Clause—states cannot prohibit as UPL what federal law allows.<sup>77</sup> Most, if not all, note UPL does not exist when the legal

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73. *People v. Alfani*, 125 N.E. 671, 674 (N.Y. 1919) (“All rules must have their limitations, according to circumstances, and as the evils disappear or lessen. Thus a man may plead his own case in court, or draft his own will or legal papers. Probably he may ask a friend or neighbor to assist him.”).

74. *Id.*

75. This can be either because the rules of the administrative body allow nonlawyer representation or because the level of the administrative matter have caused a court not to consider the representation of others as the practice of law. *See* 42 U.S.C. § 406(a)(1) (allowing the Social Security Commissioner to create rules to permit nonlawyers to represent others in administrative proceedings); OR. REV. STAT. ANN. § 309.100(4)(a)(E) (2019) (stating in property tax disputes, owners may be represented by “[a] state certified appraiser or a state licensed appraiser under ORS 674.310 or a registered appraiser under ORS 308.010.”); *see also* ALASKA BAR RULES 43.5 (2022) (establishing a limited representation program for nonlawyers subject to review by the Alaska Legal Services Corporation). In *Burlington Police Department v. Hagopian*, defendant Hagopian appealed from the imposition of a motor vehicle infraction on the ground that a police officer had been allowed to prosecute the violation against him and that that constituted UPL. *Burlington Police Dep’t v. Hagopian*, 184 N.E.3d 789 (Mass. App. Ct. 2022). The court disagreed, noting in part that “[m]unicipalities are unlikely to incur the expense of hiring private counsel to prosecute a civil motor vehicle infraction, and those with law departments may be reluctant to divert the attention of staff attorneys away from the numerous duties of town counsel.” *Id.* at 795.

76. *See* *Ohio State Bar Ass’n v. Pro-Net Fin., Inc.*, 196 N.E.3d 792, 798 (Ohio 2022) (stating nonlawyer’s negotiation and documentation of terms of settlement of debts is not UPL absent indication that the nonlawyer used or “intended to use any legal tactics or methods” (citing *Ohio State Bar Ass’n v. Watkins Glob. Network*, 150 N.E.3d 68, 72–73 (Ohio 2020) (explaining UPL is not always present when a nonlawyer negotiates debts with debtors on behalf of creditors but is present if nonlawyer gives legal advice and counsel to creditors))).

77. *See* *State ex rel. Fla. Bar v. Sperry*, 140 So.2d 587, 594 (Fla. 1962), *vacated on other grounds by* 373 U.S. 379 (1963) (“[T]his state may not prohibit any person from appearing and practicing law before a federal court or agency, even though such person not be a member of the Bar of this state.”). In the wake of *National Institute of Family & Life Advocates v. Becerra*, there are also constitutional questions about when or how far a state may go in limiting professional advice-giving. *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018). *See generally* *Ariz. Att’ys for Crim. Just. v. Ducey*, No. CV-17-01422-PHX-SPL, 2022 WL 16631088 (D. Ariz. Nov. 2, 2022); *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022).

knowledge to be used is limited to what the lay public would know.<sup>78</sup> Additionally, some authorities note that nonlawyer employees may take actions on behalf of their employers that might otherwise be considered the practice of law.<sup>79</sup> Other authorities have concluded that when it comes to other businesses that may have some overlap with legal issues, UPL should not be held to exist unless there are “difficult or doubtful question[s] of law” from the standpoint of “a reasonably intelligent layman who is reasonably familiar with similar transactions.”<sup>80</sup>

The need for clearer and more fully stated exceptions to what constitutes UPL is thus a matter of the need both to conform the law to practical realities and to clearly and intelligently state the law so that individuals are not left to speculation or guesswork. For example, it should be clear that UPL rules do not prevent friends or acquaintances from discussing even the most complex of legal issues as if, say, one friend asks another for advice about how to approach a legal issue that the other previously experienced.

The need for clearer and more fully stated exceptions to what constitutes UPL is also a matter of accepting technological and societal changes. For example, it was probably true until relatively recently that nonlawyers had extremely limited direct access to law-related materials unless they happened to live near public libraries which contained such materials. In the Internet Age, however, anyone with a cell phone has access; a great deal of information and written analysis about the law is available on blogs, websites, and elsewhere. Because of these technological changes, a great many people have become comfortable accessing information on online without the need for one-on-one contacts.

Moreover, there has been a rise in the type and number of non-law firm businesses that touch upon or concern the law and on which a great many citizens can and do rely with reasonable confidence. Historically and most obviously recognized to be true for professionals such as insurance agents

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78. See *Shortz v. Farrell*, 193 A. 20, 21 (Pa. 1937) (stating UPL exists, *inter alia*, when a nonlawyer “prepares for clients documents requiring familiarity with legal principles beyond the ken of the ordinary layman” (citing *Childs v. Smeltzer*, 171 A. 883 (Pa. 1934))).

79. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, cmt. g (2000) (“In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice.”); VA. R. SUP. CT. VI, § I(3)(G) (excluding from the definition of UPL “[p]reparing legal documents as an employee of an entity that are incidental to the entity’s business and in connection with a transaction in which the entity has a direct or primary interest.”).

80. *Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951).

and accountants, the present list of these nonlawyers includes, but is by no means limited to, human relations consultants, payroll management companies (with respect to wage and hour issues, for example), home remodeling contractors (who advise homeowners about what may or may not be consistent with local building codes), ordinary salespeople (who inform customers about what may or may not be covered under a warranty), and nonlawyer employees of a business (who negotiate or draft contracts for their employers or who subsequently advise their employers about the meaning of those contracts). Thus, just as in our personal lives, many legal issues arise during the course of business dealings that can be and are addressed by individuals who have not spent three years in law school and passed a bar exam.

### III. LEARNING FROM EXPERIENCE: WHAT THE DATA REVEALS

Given the extent of law-related work that has been done by nonlawyers for years, one would expect that if there were serious and systematic problems in the quality of such work, it would have been noted and publicized. To the best of the Authors knowledge, however, no such data exist. For example, there do not seem to be any studies or reports to the effect that the nonlawyers who represent clients in administrative matters engage in malpractice or otherwise violate acceptable norms any more than lawyers who perform similar work (or, for that matter, than lawyers who supervise nonlawyer staff in performing such work).

In fact, a recent study from Stanford Law School's Center on the Legal Profession found that the regulatory reform and innovative programming currently underway in Arizona and Utah "does not appear to pose a substantial risk of consumer harm."<sup>81</sup> Moreover, a relaxation of UPL appears to be a key towards increasing access to justice for lower income populations.<sup>82</sup> Utah's regulatory sandbox approach allows participants to request a waiver of UPL restrictions, and the study notes that these waivers appear to have a more significant impact on access to legal services for lower

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81. DAVID FREEMAN ENGSTROM ET AL., LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE 7, Stan. L. Sch. (Sept. 2022) [hereinafter STANFORD STUDY], <https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf> [<https://perma.cc/6F6W-QQZK>].

82. *Id.* at 40.

income populations than Arizona's Alternative Business Structure ("ABS") program.<sup>83</sup>

Arizona's program does not include a waiver of UPL provision.<sup>84</sup> Instead, Arizona permanently removed the prohibition of sharing fees with nonlawyers and permits nonlawyer ownership of ABS entities providing legal services so long as an Arizona barred compliance lawyer is involved in the entity.<sup>85</sup> The Stanford Study highlights that Arizona's reforms have increased access, but primarily to small businesses and middle-income individuals rather than the low-income population.<sup>86</sup>

More significantly, however, the U.K. and Australia do not have UPL provisions like those in the U.S. Instead, those jurisdictions broadly allow nonlawyers to perform tasks that could only be done in the U.S. by lawyers, including advising on and drafting wills.<sup>87</sup> The U.K. experience provides data that demonstrate such services are provided by nonlawyers at lower cost and with no loss in competence.<sup>88</sup> Of course, individuals who wish to hire lawyers are free to do so. The point here, is that at least in a number of areas, individuals do not have to hire lawyers in order to receive quality in exchange for what they pay. In addition, regulatory reform serves as a catalyst for innovation.<sup>89</sup>

None of this data should come as a surprise. Most nonlawyers, like most lawyers, are honest individuals who attempt to do their best for those whom they seek to serve. Given that the purpose of the UPL rules is to protect unsuspecting members of the public from receiving lower quality services, it makes no sense to have rules that prevent members of the public from obtaining competent, needed services from nonlawyers, especially to the extent that those individuals cannot find or cannot afford lawyers.<sup>90</sup>

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83. *Id.* at 7.

84. *Id.* at 47.

85. *Id.* at 48.

86. *Id.* at 7.

87. *Id.* at 21. It is interesting to note that reform began in New South Wales in 1994 and eventually spread across Australia, resulting in a unified approach by 2015. *Id.* at 16. England's significant reforms began in 2007. *Id.*

88. *Id.* at 20.

89. *Id.*

90. Or, as Justice Gorsuch has also noted:

[H]istory reveals that the definitions states have adopted, usually at the behest of local bar associations, are often breathtakingly broad and opaque. . . . The fact is, nonlawyers already perform—and have long performed—many kinds of work traditionally and simultaneously

Available data and experience from other professions are also potentially useful. As previously noted, for example, the 1919 *Alfani* opinion justified UPL provisions, in part, by asserting a need for practice restrictions analogous to those in the medical profession.<sup>91</sup> Thus, when focusing on the practice of medicine or on healthcare more generally, the Authors plainly see a broad array of service providers in a broad array of settings. The U.S. not only has medical offices and hospitals, but also urgent care facilities, pharmacies, dieticians, physical therapists, EMTs, and countless other groups involved in healthcare who are not doctors. Stated another way, the U.S. does not require only the most highly trained individuals in the medical field to provide medical or healthcare services; rather, it allows individuals who are not doctors to give advice doctors might also give because doing so substantially improves overall public access to healthcare services.

One need not believe that the practices of medicine and law are identical to accept the proposition that not all medical problems require doctors, just as not all legal problems require lawyers. The question is not whether pharmacists should be entitled to perform brain surgery any more than it is whether paralegals should be entitled to defend death penalty cases. The question is whether the historically broad UPL rules make sense.

#### IV. THREE RECENT UPL CASES

Before turning to the Authors proposed formulation of what does or should constitute nonlawyer UPL, a discussion of three recent cases further highlights some of the problems discussed above.

##### A. *Florida Bar v. TIKD*

In a 4-3 decision, the Florida Supreme Court in *Florida Bar v. TIKD Services LLC*,<sup>92</sup> held a traffic ticket application operated by nonlawyers constituted

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performed by lawyers. They regularly negotiate with and argue cases before the Internal Revenue Service. They prepare patent applications and otherwise advocate on behalf of investors before the Patent and Trademark Office. And it is entirely unclear why exceptions should exist to help these sort of niche (and, some might say, financially capable) populations but not be expanded in ways more consciously aimed at serving larger numbers of lower- and middle-class clients.

GORSUCH, *supra* note 5, at 255–57.

91. *People v. Alfani*, 125 N.E. 671, 673 (N.Y. 1919).

92. *Fla. Bar v. TIKD Servs. LLC*, 326 So.3d 1073 (Fla. 2021).

UPL.<sup>93</sup> The app, called TIKD, connected qualifying ticketed drivers to Florida lawyers who were hired and paid by TIKD to represent the drivers.<sup>94</sup> If the drivers and lawyers agreed to proceed, TIKD would charge the driver a percentage of the ticket's face value while paying the lawyer a flat fee and paying any court costs or fines assessed to the driver.<sup>95</sup> The court noted: "In defining the practice of law, we have resisted attempts to formulate a singular, all-encompassing definition, as the practice itself 'must necessarily change with the everchanging business and social order.' Nevertheless, in assessing whether certain acts constitute the practice of law, we generally consider the following:

[I]n determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.<sup>96</sup>

The court then went on to find UPL to be present because, in its view, TIKD had gone beyond providing administrative and financial services while delegating substantive legal matters to licensed attorneys in four principal respects.<sup>97</sup>

First, the court was concerned that TIKD's assessment of what constitute cases that might be of interest to lawyers could either take too long or could result in lawyers not getting to evaluate matters rejected by TIKD for themselves.<sup>98</sup> Second, the court was concerned that funds paid by consumers to TIKD did not have to be placed in trust.<sup>99</sup> Third, the court stated that it saw a risk that as a profit-motivated business, TIKD might be

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93. *Id.* at 1073.

94. *Id.* at 1076.

95. *Id.*

96. *Id.* at 1077–78 (first quoting *The Fla. Bar re Advisory Op.—Medicaid Planning Activities by Nonlawyers*, 183 So.3d 276, 285 (Fla. 2015); and then quoting *State ex rel. Fla. Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds by* 373 U.S. 379 (1963)).

97. *Id.* at 1078–79.

98. *Id.* at 1078.

99. *Id.*

less interested in serving its clients than a lawyer or law firm and that conflicts of interest might therefore result.<sup>100</sup> Finally, the court stated that as a nonlawyer, TIKD necessarily lacked the skills needed to evaluate the quality of the services provided by the lawyers to the TIKD customers.<sup>101</sup>

None of the court's reasons survive scrutiny, for the reasons outlined below:

- Suppose, for example, that the lawyers had told TIKD that they were not interested, for reasons of cost and expense, in considering claims of less than a particular dollar amount. Lawyers regularly give such instructions to their nonlawyer staff, and there is no reason to apply a different result here. Indeed, ABA Formal Op. 506 (2023) expressly allows lawyers to use not only employees but also third-party independent contractors for precisely this purpose. Similarly, there is no particular reason to expect that an app which makes its money from the timely pursuit of cases by lawyers would have less of an interest in meeting such deadlines than lawyers who frequently use apps or outsource docketing services.
- While TIKD may not have placed funds into trust, that has nothing at all to do with whether TIKD was or was not providing legal information or services. Moreover, many other businesses which provide legal services (including insurance agents, accountants, and home remodeling contractors) also do not have to put funds in trust.
- The opinion does not explain why TIKD would or should necessarily be more profit-motivated than lawyers or how the TIKD model makes such motivation more likely to occur. Furthermore, whether TIKD is profit-motivated has nothing to do with whether TIKD was providing legal information or services.

Since TIKD was not the client, it was not TIKD's job to evaluate the services of the lawyers. That responsibility could and should properly be left to the lawyers' clients.

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100. *Id.* at 1078–79.

101. *Id.* at 1079.

In evaluating the *TIKD* opinion, it is worth noting that three of the court's seven members joined a strongly worded dissent and would have found no UPL.<sup>102</sup> A fourth member of the court who voted in favor of finding UPL did so after stating that while he agreed with the majority that past Florida decisions required a finding of UPL, he thought the whole matter ought to be subject to study so that the definition of UPL could be updated.<sup>103</sup> At least until that occurs, however, the existence of the *TIKD* decision is likely to deter entrepreneurs from the development of other apps that may help put potential clients into contact with lawyers who can handle their work at a price that the clients are willing to pay.

B. *Upsolve, Inc. v. James*

The recent case of *Upsolve, Inc. v. James*<sup>104</sup> involved a longstanding and highly qualified non-profit organization, that sought to educate individuals about their legal rights and to assist them in exercising those rights. With the assistance of several lawyers and law professors, Upsolve developed a training guide to teach nonlawyer volunteers the legal information needed to help unrepresented defendants in consumer debt collection cases.<sup>105</sup> The assistance involved filling out a simple check-the-box form that New York courts had approved in lieu of filing a formal answer.<sup>106</sup> Some of the boxes called for purely factual information, having such selections as “this is not my debt,” or “I have paid part or all of this debt,” while other boxes required a basic understanding of legal concepts, such as “unjust enrichment,” or “unconscionability.”<sup>107</sup>

Upsolve learned that a large percentage of debtor-defendants were not only unable to complete and submit the form on their own but also were

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102. *Id.* at 1082–83 (Couriel, J. dissenting).

103. *Id.* at 1082 (Canady, C.J. concurring). The UPL issues raised in that case were studied by a Florida Supreme Court appointed committee, the Special Committee to Improve the Delivery of Legal Services, but the Court declined to adopt the recommendations for change, which were opposed by many members of the Florida Bar and the Florida Bar Board of Governors. See Mark D. Killian, *Supreme Court Declines to Adopt Recommendations on Nonlawyer Ownership, Fee Splitting, and Expanded Paralegal Work*, FLORIDA BAR (Mar. 8, 2022), <https://www.floridabar.org/the-florida-bar-news/supreme-court-declines-to-adopt-recommendations-on-nonlawyer-ownership-fee-splitting-and-expanded-paralegal-work/> [https://perma.cc/QD28-G89K].

104. *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022).

105. *Id.* at 103.

106. *Id.*

107. *Id.* at 104.

unaware of the existence of the form or even of the fact that actions had been commenced against them.<sup>108</sup> Thus, Upsolve decided to train nonlawyer volunteers to go out into the community and work with debtor-defendants.<sup>109</sup>

The nonlawyer volunteers were instructed to make clear to debtor-defendants that: the volunteers were not lawyers; they could only answer limited questions about completing and submitting the form; and, they could not and would not represent the defendants in court.<sup>110</sup> The nonlawyer volunteers also offered to put the defendant debtors in touch with pro bono lawyers who might be able to provide further assistance.<sup>111</sup> The nonlawyer volunteers were also trained in and agreed to abide by the conflict of interest and confidentiality rules that apply to lawyers.<sup>112</sup>

After the New York Attorney General threatened UPL prosecution, Upsolve and its nonlawyer volunteers brought suit in US District Court on the ground that their activities constituted speech protected by the First Amendment, and the District Court agreed.<sup>113</sup>

The Attorney General has since appealed, however, alleging not only that the First Amendment does not protect the plaintiffs, but also that the volunteer program constitutes UPL.<sup>114</sup> Regardless of how the Second Circuit or the U.S. Supreme Court resolves the First Amendment issue,<sup>115</sup> the underlying premise—that a state would assert such programs constitute UPL—is extremely troubling given not only the non-profit no-fee nature of the program (thus eliminating the profit-making concerns that bothered the

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108. *Id.* at 103–04.

109. *Id.* at 104.

110. *See id.* (stating the volunteers were required to “[confirm] the limited scope of representation with the client”).

111. *See id.* (explaining the volunteers were required to “promise to refer clients to lawyer organizations if those client’s needs exceed the scope of the advice authorized”).

112. *Id.*

113. *Id.* at 97.

114. Reply Brief for Appellant at 1, 2, *Upsolve, Inc. v. James*, No. 22-1345 (2d Cir. Feb. 8, 2023).

115. In reaching its decision in the plaintiffs’ favor, the District Court held that the plaintiffs had Article III standing, that their challenge to the UPL rules was an as-applied challenge, that the UPL rules did not prevent plaintiffs from expressing their political beliefs as a part of their First Amendment right of association, that the legal advice to be given was content-based speech and that the UPL rules were not narrowly tailored to promote legitimate government interests as applied to the plaintiffs. *Upsolve, Inc.*, 604 F. Supp. 3d at 97.

TIKD court) but also given two additional aspects of the matter as described in the District Court opinion:

- The program volunteers are trained through a program designed by lawyers and professors, and there is no apparent reason to believe that this training is deficient, inadequate, or incomplete for the purpose at hand.<sup>116</sup> The advice to be given to debtor-defendants is strictly limited, and the volunteers are instructed to refer anything beyond the basics to licensed lawyers.<sup>117</sup>
- It is highly likely that many of the debtor-defendants who would avail themselves of the program need help to protect their rights and to avoid potentially severe consequences, yet according to the court, there is no cadre of affordable, licensed lawyers available to provide that assistance in the absence of the program.

### C. *In re* Peterson

The recent case *In re* Peterson<sup>118</sup> also involved Upsolve. At issue was whether Upsolve’s computer software, provided free of charge to individuals potentially seeking personal bankruptcy relief, and Upsolve’s assistance to software users constituted UPL under Maryland law.<sup>119</sup> Upsolve offered the software and the assistance to users at no charge but stated that it was willing to accept donations from those who wished to make them.<sup>120</sup>

After conducting an extremely detailed review, the court held that certain aspects of the software went beyond presenting users with neutral choices from which to make their own decisions.<sup>121</sup> The court concluded that “the software directed users towards some legal paths and away from others since

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116. *Id.* at 104.

117. *Upsolve, Inc. v. James*, 604 F.Supp.3d 97, 104 (S.D.N.Y. 2022). *Cf. Jiggets v. Maryland*, No. SAG-23-63, 2023 WL 170423, at \*2 (D. Md. Jan. 11, 2023) (rejecting a nonlawyer plaintiff’s claim of a right to provide legal advice and distinguishing *Upsolve* on the ground that unlike that plaintiff’s situation, *Upsolve* “involved an existing non-profit organization with written procedures detailing how non-lawyers would be trained to advise people on a specific area of law”).

118. *In re* Peterson, No. 19-24045, Case No. 19-24551, 2022 WL 1800949 (Bankr. D. Md. June 1, 2022).

119. *Id.* at \*1.

120. *Id.* at \*7.

121. *See id.* at \*50, 52, 54 (explaining *Upsolve’s* limitation on choice of exemptions and other options constituted the practice of law).

the software interprets and applies the law to the user's particular facts to determine the exemption law options to present—in other words, [the software] provides advice to users as to the exemption schemes to use.”<sup>122</sup> However, the court also concluded that the very limited nonlawyer review of user-completed forms (to determine completeness and consistency) was not problematic.<sup>123</sup> The court noted that other software programs have not been considered UPL and that one aspect of whether UPL may be found to exist may be whether the forms have been reviewed by counsel.<sup>124</sup> The court commended Upsolve for its willingness to work with the U.S. Trustee and with the court to come up with a version of its software that would pass UPL muster.<sup>125</sup>

By contrast, or perhaps in addition to *In re Peterson*, it is worth noting the long history of holdings to the effect that the publication of “fill in the blanks” forms or of articles about the law do not constitute UPL. Many apps are sufficiently like “fill in the blanks” forms plus basic instructions and may be clear enough that they will not raise UPL questions. As noted by the *Peterson* court:

The Court would be remiss if [*In re Boyce*] . . . was not also discussed here. Predicting Utah law, the Bankruptcy Court found that a bankruptcy petition preparer's use of pre-packaged computer software to complete bankruptcy petitions and schedules, including Schedule C using preprogrammed, assigned exemptions that required no human decision making, did not constitute the practice of law. The Court found little distinction between a bankruptcy petition preparer utilizing specialized bankruptcy software for the preparation of the debtor's schedules and statements, and a retail software package that performs the same function for the debtor on the debtor's home computer.<sup>126</sup>

In contrast to *Peterson*, there are also authorities to the effect that a purely computer-based app or program in which the user does not come into contact with any individual is per se not UPL because no individual is

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122. *Id.* at \*47. Of course, it can be said that most if not all “fill in the blanks” forms, which are not considered to be UPL, necessarily involve directing users of the form towards some legal choices and away from others.

123. *Id.* at \*55.

124. *Id.* at \*39–42.

125. *Id.* at \*50.

126. *Id.* at \*42 (first citing *In re Boyce*, 317 B.R. 165, 168–69 (Bankr. D. Utah 2004); and then quoting *In re Boyce*, 317 B.R. at 176).

involved. For example, Oregon Formal Ethics Opinion 2005-137 unequivocally states:

The sale by nonlawyers of self-help legal software, whether through a program to be run on the purchaser's own computer or through a program to be run online, simply is not the practice of law, unauthorized or otherwise. When coupled with a clear indication to customers that there is no human interaction to be had, the absence of human interaction between a person seeking legal information, or advice on the one hand and a person providing that advice, is dispositive.<sup>127</sup>

In addition, few if any authorities appear to contend that an extraordinarily complex app or computer program such as TurboTax inherently constitutes UPL even though it plainly walks users through multiple potentially critical legal issues.<sup>128</sup>

Of course, “extraordinarily complex” fails to describe the impact of the recent debate about the use of ChatGPT or Generative Artificial Intelligence (“AI”) in the practice of law.<sup>129</sup> While a full exploration of AI is beyond the scope of this Article, the Authors admit they would be remiss not to note that UPL plays a significant role in the AI discussion. However, similar to the Oregon opinion and the Second Circuit's observation that activity engaged in solely by a machine is not the practice of law, AI without a lawyer's involvement should not be considered UPL.<sup>130</sup> This is not to say that AI should not be regulated—it must be regulated, but regulations should be developed with input from the AI industry rather than by the courts or state bars alone who do not possess the training to do so.

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127. OSB Formal Ethics Op. No. 2005-137.

128. For an ALR annotation including software-as-UPL cases, see Marjorie A. Shields, Annotation, *Validity, Construction, and Application of Statutes Directly or Indirectly Proscribing Unauthorized Practice of Law on Internet*, 87 A.L.R. 6th 479 §§ 8–9 (2013) (comparing differences in authorities that have and have not held preparation of legal documents as UPL).

129. See, e.g., Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, HARVARD LAW SCHOOL, CENTER ON LEGAL PROFESSION: THE PRACTICE (March/April 2023), <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/#:~:text=One%20such%20concern%20is%20the,false%20or%20misleading%20legal%20documents> [https://perma.cc/F8ZE-B5KU].

130. See *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed. App'x 37, 45 (2d Cir. 2015).

## V. A MORE COMPLETE DEFINITION OF UPL

All three of the UPL cases mentioned above discuss in some detail the likely benefits or burdens caused by imposing UPL limitations. Whether one agrees with the results reached in any of these cases, their approach is both appropriate and consistent, if not at least required, by the “protect the public” justification for UPL. As recently noted in *Sullivan v. Max Spann Real Estate & Auction Co.*,<sup>131</sup> evaluation of a UPL question requires consideration of the need for public protection in a realistic manner. The question whether UPL is present thus “involves more than an academic analysis of the function of lawyers . . . . It also involves a determination of whether nonlawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.”<sup>132</sup> Indeed, one of the criticisms of many older (and some not so old) UPL decisions is that while courts begin by stating that the answer must turn on the specifics, the opinions then resort to generalities to justify their decisions.

The Authors now turn to what they believe to be an appropriate set of rules to currently govern UPL along with corresponding “Official Comments” provided in the footnotes. The Authors employ the modifier “currently” because they accept that future developments, including but not limited to evolving technology, will likely require further updates.

### **PREAMBLE**

1. The law and its application are essential aspects of our political, business, and personal lives. The law and its application also vary in many respects, including but not limited to, the degree of complexity and the level of education and experience needed to explain or understand the law.
2. Although many legal matters are sufficiently complex that lawyer involvement or control can reasonably be required, many others are not. In addition, many individuals either cannot find or cannot afford to hire lawyers when needed. For these individuals, a blanket prohibition against nonlawyer services is particularly harmful.

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131. *Sullivan v. Max Spann Real Est. & Auction Co.*, 276 A.3d 92 (N.J. 2022).

132. *Id.* at 101.

3. Decisions on what should be regarded as the unauthorized practice of law therefore requires a balanced approach which assesses factors including but not limited to: the legal complexity of the matter or matters in question; the ready availability of lawyers willing to handle such matters at a price that the recipients of those services can afford; the likelihood that nonlawyers will provide competent representation and assistance; respect for client choice; potential cost savings as a result of the using nonlawyers; and potential effects on the legal system.
4. Limitations on the provision of legal services by nonlawyers should only be imposed if, after careful analysis, it appears reasonably certain that in the circumstances under consideration, the harm to the public from allowing nonlawyer involvement exceeds the benefits of allowing it.

#### **SUBSTANTIVE PROVISIONS**

1. Except to the extent authorized by law, nonlawyers engage in the unauthorized practice of law when they seek to represent others in litigation, arbitration, mediation, or administrative proceedings.<sup>133</sup>
2. Subject to the limitations contained in paragraph 5 below, a nonlawyer does not engage in the unauthorized practice of law if the legal advice or assistance being given:
  - a. is provided in a pro bono or other non-commercial setting;<sup>134</sup> or
  - b. is provided in a business setting by an individual or entity engaged in an otherwise lawful business that reasonably requires the giving of legal advice or assistance to others if the legal advice or assistance in question:

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133. Substantive Provision (“SP”) 1 Official Comment: This paragraph prohibits nonlawyers from representing others in those areas which have generally been considered the most likely to give rise to the problems which the unauthorized practice rules are intended to prevent. Where, by contrast, statutes or administrative regulations permit nonlawyer involvement, such as is true in many administrative or lower-level proceedings, nonlawyers may do so without engaging in UPL.

134. SP 2(a) Official Comment: In addition to permitting bona fide pro bono efforts, this paragraph permits personal or social communications in nonbusiness/noncommercial settings.

- i. is reasonably well known to and understood by the general public;
  - ii. is not reasonably well known to and understood by the general public but is reasonably well known to and understood by the individuals or entities giving the advice or assistance and can reasonably be understood by the recipients of the advice or services; or
  - iii. is not in either of the above categories but is provided as a part of a separate lawful business which requires a degree of ancillary legal advice or services;<sup>135</sup> or
- c. is provided by employees to their employer in order to allow the employer to address the employer's business or legal matters.<sup>136</sup>
3. Computer programs or apps that address legal issues do not constitute the unauthorized practice of law if the program or app:
  - a. provides clear and conspicuous disclosures sufficient to inform a reasonable user of the limitations and potential adverse effects of using a program or app rather than consulting counsel;
  - b. is the product of reasonable efforts to assure the legal accuracy and completeness of the program or app and to update it as needed;
  - c. requires users, rather than the program or app itself, to make pertinent legal choices; and
  - d. is monitored on at least an annual basis to assure that it is being appropriately and reasonably being used.<sup>137</sup>

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135. SP 2(b)(iii) Official Comment: This paragraph covers other instances in which the risk of harm from allowing nonlawyer involvement is low.

136. SP 2(c) Official Comment: This paragraph allows employees of a business to, for example, negotiate a contract or give advice about the meaning or implementation of a contract to their employer regardless of whether the contract involves questions of law.

137. SP 3 Official Comment: The key requirement under paragraph 3(a) though 3(d) is reasonableness under the particular circumstances. For example, the explanations and instructions given in the program or app must be reasonably complete and understandable to anticipated users of

4. The offer or provision of live assistance regarding the use of a program or app pursuant to paragraph 3 if the assistance is limited to ensuring that users have provided the needed information in a manner consistent with what the program or app requires or is permissible under paragraph 2 above.
5. Notwithstanding paragraphs 2 through 4 above, a jurisdiction<sup>138</sup> may impose reasonable requirements on the following:
  - a. disclosures about potential limitations, risks, or consequences of consulting nonlawyers rather than lawyers;
  - b. education, training, monitoring and other requirements on the nonlawyers offering the legal advice or services;
  - c. reasonable review of the substance of the program or app to assure accuracy and completeness; and
  - d. limitations on the scope and complexity of the legal advice or assistance that nonlawyers may provide.<sup>139</sup>

## VI. FOUR QUESTIONS

In the course of discussing drafts of this Article with others, we have been asked four questions which we address here.

### A. *Will Nonlawyer Legal Information and Service Providers be Fiduciaries?*

Lawyer-client relationships are among, but are certainly not the only, fiduciary relationships.<sup>140</sup> Additionally, lawyers are not fiduciaries in

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the program or app. The required extent of disclosure or clarity may therefore vary inversely with the complexity and importance to users of the matters addressed in the program or app.

138. SP 5 Official Comment: The statement that “a jurisdiction” may impose limits reflects that depending on the jurisdiction, such limitations may be made by one or both of the legislature and the courts.

139. SP 5 Official Comment: The key requirement under paragraph 5(a) through (d), as under paragraph 3(a) through (d) is again reasonableness under the particular circumstances.

140. See RESTATEMENT (THIRD) AGENCY §§ 1.01, 8.01 (2006); *Hodges v. Cnty. of Placer*, 41 Cal. App. 5th 537, 546–47 (2019) (“A fiduciary relationship is any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person

negotiating their fee agreements or when interacting with non-clients. In other words, lawyers sometimes are and sometimes are not fiduciaries.

The same will necessarily be true with nonlawyers who provide legal information or services. For example, in *Jones v. Allstate Insurance Company*,<sup>141</sup> the Washington Supreme Court held an insurance claims adjuster who was preparing legal documents for and advising unrepresented claimants about how to resolve third-party claims owed the same duties to those claimants that a lawyer in such a position would have owed.<sup>142</sup> By contrast, in *Singleton v. Nationwide Insurance Company of America*,<sup>143</sup> the court held *Jones* did not apply to a situation in which a nonlawyer adjuster was not giving advice with regard to the insureds' rights against third parties but simply advised the insureds (as required by law) of the coverage and limits of the policy which the insureds had purchased.<sup>144</sup>

These same kinds of distinction will have to be made as the nature and number of nonlawyer service providers increases. Courts and legislatures are no less able to decide when "the punctilio of an honor" rather than the mere "morals of the marketplace" should apply in this kind of context than they have long been in others.<sup>145</sup>

B. *Will Individuals Who Consult Nonlawyers Be Entitled to Claim Attorney-Client Privilege?*

Although attorney-client privilege is the oldest and perhaps best recognized of the common law or statutory privileges, it certainly is not the only one. Whether someone who obtains legal services from a nonlawyer should be entitled to claim attorney-client or some other form of privilege is again something that can and should depend on context. For example,

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in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent.") (internal citation and quotations omitted).

141. *Jones v. Allstate Ins. Co.*, 45 P.3d 1068 (2002).

142. *Id.* at 1077–78.

143. *Singleton v. Nationwide Ins. Co. of Am.*, No. C20-5688 BHS, 2020 WL 6287124 (W.D. Wa. Oct. 27, 2020).

144. *Id.* at \*3.

145. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

case law has established a nonlawyer patent agent privilege<sup>146</sup> and Congress has established a privilege for the nonlawyer practice of “tax.”<sup>147</sup>

*C. Aren't Lawyers More Likely to Provide Competent Legal Services than Nonlawyers?*

Not necessarily. For example, and as noted earlier in this paper, data from the U.K. suggest that individuals who consult nonlawyers rather than lawyers to prepare wills receive equally competent services but at a lower cost.<sup>148</sup> There are a great many legal or law-related issues that do not require someone who has gone to law school and passed a bar exam. The Authors rule also permits reasonable regulation of nonlawyers and reasonable limitations on what nonlawyers can do. What they oppose is the blanket prohibition that current UPL laws too often provides.

This question also reflects what is often a factually false situation. As already noted, there are far too many situations in which individuals who, objectively speaking, could benefit from legal services but are unable to find lawyers to help them or, if they can find a lawyer, are unable to pay what the lawyer would want to be paid.<sup>149</sup> For individuals in such situations, the choice between a lawyer who could theoretically provide better services and a nonlawyer is not one that they can make. All too often, their choice is between the nonlawyer and no help at all.

We do not mean to say, however, that nonlawyers should only be permitted to provide legal services to individuals who cannot afford lawyers. Individuals (and entities) in need of legal services should also be allowed to make reasonable choices. For example, consider the analogy to the provision of urgent care services discussed earlier in this paper.<sup>150</sup> It is reasonable to suppose that individuals who go to urgent care centers are aware that the service providers that they will see are not doctors and may miss something that a doctor would diagnose. On the other hand, individuals who go to urgent care centers are entitled to and no doubt do assume that the service providers that they see will be appropriately licensed and supervised—albeit not by the same entity that licenses and supervises doctors. Legal matters are not so completely unlike healthcare matters that

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146. *In re Queen's Univ. at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016).

147. 26 U.S.C. § 7525 (2006).

148. See STANFORD STUDY, *supra* note 81, at 7, 20.

149. See *supra* note 3.

150. See *supra* note 93 and accompanying text.

it must be impermissible to allow nonlawyer involvement with the former but permissible to allow nondoctor involvement in the latter.<sup>151</sup>

D. *Do You Really Expect State Supreme Courts to Regulate Nonlawyers?*

In point of fact, a number of state supreme courts appear willing to take on the regulation of nonlawyer paralegals as independent service providers.<sup>152</sup> And the Arizona Supreme Court has established a regulatory regime to control Alternative Business Structures.<sup>153</sup>

We doubt, however, that most if any state supreme courts would want to turn themselves into regulatory bodies to govern any and all forms of the provision of legal services by nonlawyers. We also do not believe that it is necessary for them to do so. For example, to the extent there are law-related businesses such as insurance agents that are already subject to separate regulation, there is no *a priori* reason why that regulatory system could not be expanded to include the kinds of activities we have discussed. And to the extent that it is felt that new and independent regulatory bodies should be created to cover certain kinds of nonlawyer activities in certain areas, the rule outlined by the Authors above, permits it.

## VII. CONCLUSION

As noted in the Stanford Study, “[t]he central premise of regulatory reform is that the existing rules governing delivery of legal services create high and often insurmountable barriers around the supply of legal services, raising prices, stymieing innovation, and yielding a dysfunctional market that cannot optimally deliver legal services to those who need them.”<sup>154</sup> UPL exists as one of the main culprits among the rules requiring reform.

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151. The Authors rule also does not prohibit anyone who wishes to consult a lawyer rather than a nonlawyer from doing so.

152. See Debra Cassens Weiss, *Colorado Will License Paraprofessionals to Perform Limited Legal Work*, ABA JOURNAL (Mar. 30, 2023) <https://www.abajournal.com/news/article/colorado-will-license-paraprofessionals-to-perform-limited-legal-work#:~:text=The%20Colorado%20Supreme%20Court%20has,divorce%20and%20child%2Dcustody%20matters> [https://perma.cc/C844-PT3T]; Tara Hughes & Joyce Reichard, *How States are Using Nonlawyers to Address the Access to Justice Gap*, ABA: STANDING COMMITTEE ON PARALEGALS AND APPROVAL BLOG (Sept. 2, 2022), <https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/> [https://perma.cc/BM5G-HK7E].

153. See *Alternative Business Structures*, ARIZONA COURTS, <https://www.azcourts.gov/cld/Alternative-Business-Structure> [https://perma.cc/4JZ7-B48C].

154. STANFORD STUDY, *supra* note 81, at 13.

Admittedly, defining both the practice of law and the corresponding unauthorized practice in a cogent and universal manner has eluded the legal profession since its early attempts to do so in the twentieth century. The historical tensions that arise between the desire to protect the legal profession's turf and the need to protect the public have added to the chaotic attempts to reach consensus.

Nevertheless, the ever-growing access-to-legal-services dilemma that exists simultaneously with an unprecedented period of technological innovation requires a newly focused attention. The definition of UPL must be changed to increase the public's access to legal services. Furthermore, lawyers should be in the forefront of these efforts in order to uphold the profession's mandate to protect the rule of law and equality in our society.

*“There are risks and costs to action.  
But they are far less than the long range risks of comfortable inaction . . .”*<sup>155</sup>

—John F. Kennedy

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155. *John F. Kennedy Quotes*, BRAINYQUOTE, [https://www.brainyquote.com/quotes/john\\_f\\_kennedy\\_109216](https://www.brainyquote.com/quotes/john_f_kennedy_109216) [<https://perma.cc/3MTY-YL3W>].

