

# Rethinking Unauthorized Practice of Law in Light of the Access to Justice Crisis

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There is an access to civil justice problem in the United States. The US Constitution guarantees a right to counsel in criminal matters, but there is no equivalent right to civil legal assistance. Many in need of legal services in the civil arena simply do without. Others seek the help of untrained and unregulated nonlawyers. In both scenarios, the consequences for the person needing legal help can be dire. The legal profession traditionally has deferred to regulatory enforcement to address the unauthorized practice of law (UPL),<sup>1</sup> but little has been done to address the underlying access to justice problem that feeds UPL violations. There is an emerging sense among those concerned about both problems that state supreme courts and the organized bar cannot effectively address UPL without doing more to close the access to justice gap.

In order to help inform solutions to that daunting justice gap, the legal profession will have to seriously consider whether its bedrock beliefs on essential qualifications of legal service providers continue to serve the public interest. Do traditional, restrictive approaches to UPL enforcement allow broad public access to quality legal services, or are such concepts antiquated? If ensuring access to justice is the highest aspiration, should we not consider whether those traditional approaches to curbing UPL do more to protect lawyers than consumers? And could it be time to shift the regulatory focus from punishing providers who are not lawyers to accepting other legal service provider classes who can competently fill the vast unmet need for legal services. Andrew Perlman, dean of Suffolk University Law School and vice chair of the ABA Commission on the Future of Legal Services, suggests the legal profession should distinguish between the “law of lawyering”, i.e., the law governing lawyers, and the “law of legal services,” a broader concept that encompasses the regulation of lawyers as well as of nonlawyers who deliver legal services.<sup>2</sup>

The relationship between UPL and access to civil justice was explored during the 2nd ABA UPL School held in April 2015 at the Loyola University School of Law in Chicago. At the UPL School, sponsored by the ABA Standing Committee on Client Protection, professionals concerned with the regulation and enforcement of UPL engaged on current trends in UPL violations and enforcement. Bar counsel, federal and state prosecutors, law professors, state and local bar committee members, and private practitioners

also discussed the challenge of narrowing the access to justice gap by expanding availability of legal services, even while guarding against unauthorized practice of law and ensuring that proper public protections remain in place.

### **The Access to Justice Problem**

According to Paula Littlewood, executive director of the Washington State Bar Association and a UPL School keynote presenter, roughly 80 to 85 percent of the US population that is in need of civil legal services is underserved.<sup>3</sup> A number of factors inform that deficit, said Ms. Littlewood:

- Legal aid agencies are overwhelmed and, in some rural communities, nonexistent;
- Middle-class people, and sometimes the working poor, do not qualify for civil legal aid, and yet cannot afford traditional legal services;
- Lawyers are transitioning out of practice at a faster pace than new lawyers are entering;
- Student-loan debt makes it difficult for many lawyers to represent clients at reduced fee rates; and
- Potential consumers of legal services engage in their own cost-benefit analysis, decide that they do not need a lawyer, opt for “self-help” options, or simply do not recognize their issues as legal problems at all.

The Washington State Supreme Court responded to the civil law access gap by creating the Limited License Legal Technician (LLLT) program.<sup>4</sup> The program allows nonlawyers who are properly trained and licensed to independently represent clients. Licensure is currently limited to persons providing family law services, but the Court is expected to expand the LLLT program to other areas of law in the future.<sup>5</sup>

This program is a significant departure from the traditional concept of the practice of law, a concept we lawyers tend to regard as readily grasped, but that on closer examination is ambiguous in key aspects and not easily defined. A lawyer’s standard “all-things-law-related” definition of the practice of law by lawyers effectively excludes any provision of legal services by nonlawyers, unless the nonlawyer is under the direct supervision of a licensed lawyer. In contrast, Washington’s LLLT program legitimizes acts, by individuals who are not lawyers, that would conventionally constitute the unauthorized practice of law. The new program acknowledges that there are aspects of legal representation that do not require the expertise and skills of a lawyer. The LLLT program builds upon the premise that simplified and targeted methods of training nonlawyer legal professionals could provide a better means of assisting certain clients than the profession of law – lawyers – can deliver. Perhaps it is this aspect of the LLLT program that elicits the most fervent opposition from within the bar. It evokes the fear that these programs will eventually render certain traditional lawyers, particularly the sole practitioners, obsolete.<sup>6</sup>

The stark reality, however, is that the bar in totality has proved incapable of reducing the enormous justice gap in our nation. There is no cause for assuming that licensure of alternative providers for the purpose of addressing that gap will do any harm to the bar on balance. Beyond Washington state, a number

of jurisdictions have begun to actively explore adoption of limited licenses. California was the first to form a committee to seriously examine the issue. The Oregon State Bar's Task Force on Limited Legal Technicians issued its final report to their Board of Governors recommending it consider a legal technician program as part of the overall strategy to address the access to justice problem.<sup>7</sup>

### **Whom Are We Protecting?**

At the UPL School, the tension between protection of the public and the need to regulate legal services came to a head in the session "The Users and Abusers: Technology and the Unauthorized Practice of Law," where an audience member posed the question, "What is our goal in addressing UPL?" The session, originally labeled a review of current technologies deemed the practice of law and a discussion of how to identify and deter such practices, evolved into a broader discussion of whether technology models are truly harmful to consumers or part of inevitable progress in the delivery of legal services.

Dr. Ron Dolin, research fellow at the Stanford Law School Center on the Legal Profession, suggested that as the legal profession discusses infringements on the practice of law, particularly as they relate to technology, it must examine whether software can replace more ministerial types of legal representation, such as completing forms or drafting simple pleadings. He asked attendees to consider whether the use of software to aid pro se litigants through the legal process is preferable to purely pro se representation with no assistance. Dr. Dolin also questioned how well the legal profession regulates the quality of a lawyer's work and whether the legal profession sets standards and minimum thresholds of accuracy for lawyers' work.

Implicit in the argument against alternative delivery methods is the assumption that the distinction of a law license also guarantees the delivery of quality legal services. But the practice of law is broad, and a lawyer's competence to practice within a certain area is not guaranteed. Lawyers are subject to a mandatory continuing legal education requirement in the vast majority of jurisdictions, but that requirement is not specific to the lawyer's practice area.<sup>8</sup> Some lawyers obtain specialist certification. A lawyer who is properly qualified and approved may advertise as a specialist in a particular field of law.<sup>9</sup> Currently, there are approximately 20 recognized specialties in US jurisdictions, with 14 specialties recognized across all jurisdictions. Certification requirements vary by specialty and certifying entity, but each program requires both re-certification and continuing legal education in the area of specialty.<sup>10</sup> Nevertheless, there is no requirement to specialize and, therefore, no requirement that a lawyer maintain current competency in a particular area of practice outside of certification programs.

On the other hand, while the LLLT has a presumptively shorter, and less expensive, road to licensure, the subject matter requirements are extensive.<sup>11</sup> In addition to the general education requirement, LLLTs must complete 45 hours of core curriculum instruction in paralegal studies, as well as a required number of subject hours in the practice area in which the applicant seeks licensure. LLLTs must pass a bar-like exam and complete a total of 3,000 hours of training under the supervision of a lawyer in the specified practice area. Arguably, the extensive and focused requirements of LLLT training better prepare them to enter the legal marketplace in their particular area of training than law school does for

many new lawyers entering the market. In theory, at least, such specialized training, affordably delivered in a narrow scope of representation, would plainly be beneficial to law clients, effectively negating the argument that limited training, in itself, means substandard representation.

Such representation currently exists in various forms and is accepted by lawyers. Nonlawyer practice has long been permitted in the fields of federal tax and patent law.<sup>12</sup> The federal government, recognizing that the need for legal assistance in immigration cases exceeds the number of affordable and qualified lawyers, also allows nonlawyer representatives to provide independent representation to immigration clients. These "accredited representatives" are qualified by the Board of Immigration Appeals (BIA), and may represent individuals before the Department of Homeland Security and the Executive Office of Immigration Review, provided those services are delivered through an approved not-for-profit organization.

Immigration advocacy services that promote the protection of clients in immigration not only support these authorized accredited representatives, but also guide non-profit service organizations on how to become accredited under the BIA.<sup>13</sup> The support of nonlawyer service providers by those who advocate on behalf of clients in immigration matters seems to support the conclusion that limited nonlawyer representation, when regulated, is preferable to no representation. So, why is the provision of immigration services by nonlawyers more acceptable than licensure of LLLTs or equivalent alternative legal providers?

### **Not So Fast**

Some who attended the UPL School voiced opposition to expanding the field of alternative legal service providers. They challenged the assumption that the justice gap is a function of "too few lawyers," noting the high incidence of unemployed lawyers. Additionally, some noted that many of the safeguards in place to protect law clients in the client-lawyer relationship do not currently exist for nonlawyer representatives. Washington has established a disciplinary system for LLLTs, but it is untested. And although LLLTs are allowed to hold client funds, some voice concern that there is not yet a system to reimburse losses to clients in case of theft. And some who oppose LLLTs strongly asserted the belief that it is not the job of the legal profession to take business away from licensed lawyers. Instead, the goal should be to develop ways in which the legal profession can better respond to the access gap, they maintain.

It is also important to distinguish between representation and assistance. Representation assumes there is an individual who is considering the client's particular needs and providing services to that client accordingly. Assistance, particularly as applied to technology-based models, implies a lesser standard. As Jason Abrams, chair of the New York chapter of the American Immigration Lawyers Association, pointed out, when the consequence of inadequate representation is, for example, deportation, properly trained legal representation takes on greater importance. The use of technology without the benefit of an authorized professional who has the ability to apply independent analysis can have catastrophic consequences.

**Doing the Most with Limited Resources**

Those on both sides of the alternative-provider debate agreed on the importance of effective enforcement against the unauthorized practice of law. But the challenge of limited enforcement resources is as universal as the access to justice gap. Jurisdictions are struggling to allocate financial and personnel resources in a way that will impart maximum deterrent effect. Participants suggested that, in making this determination, it is necessary to distinguish between intentional bad actors who unlawfully hold themselves out as able to practice law and those who reasonably believe that their actions are within the bounds of the law, or are only working outside the bounds of the law due to what many believe are overly broad UPL regulations.

According to Ghunise Coaxum, Branch UPL Counsel at The Florida Bar, most of the UPL complaints that her office receives come from judges, bar associations, and private practitioners, not members of the public.<sup>14</sup> This does not negate the importance of effective UPL enforcement, and there are several contributing factors to the dearth of public complaints, including the public's lack of knowledge, but it does raise a question as to whether spending resources on enforcement where no harm is reported is truly protecting the public interest. Would a more practical approach to UPL enforcement that specifically targets harmful conduct allow for increased public protection, and also address the access gap?

**Lawyers Can Make a Difference**

There are opportunities to expand the provision of legal services by lawyers. Law schools can look for ways to lower the cost of legal education so that new lawyers have the option of rendering low-cost legal services. Law schools can expand legal clinics to allow third-year law students to provide free or low-cost legal assistance for school credit under the supervision of a licensed lawyer. Bar associations can develop incubator programs where licensed lawyers without employment can be matched with and represent clients at a reduced rate, thus providing income to the lawyer and representation to the client. The legal profession can find ways to expand funding to legal service organizations, and those organizations can then add staff and other resources. More lawyers can provide unbundled legal services to clients, who would benefit from limited assistance.<sup>15</sup>

One of the more inventive solutions, offered by Ann Cosimano, General Counsel of the ARAG Group and past president of Group Legal Services Association, is legal insurance. The concept is similar to medical insurance. Consumers purchase a policy in anticipation of potential legal issues. At the time that an issue arises, the consumer would receive the services of a properly vetted lawyer under the plan. The services provided under legal insurance plans are generally more expansive than those offered under traditional pre-paid legal service plans. This is not a new concept, but many people who would benefit from such policies are unaware of their existence or don't understand how such policies would specifically benefit them. This option would be particularly helpful to middle-income persons who would not necessarily qualify for other legal assistance programs. Bar associations could develop public educational initiatives to better educate consumers not only on the existence of legal insurance policies, but also on the ways in which having such a policy would be beneficial.

### What Is the Answer?

Participants agreed that the answer is not to provide unfettered access to nonlawyers who are interested in entering the legal service marketplace. There is a place for proper UPL enforcement to protect the public, and those efforts should be encouraged. But enforcement efforts must make sense in light of both the public's need for access to the civil justice system and the public's right to have meaningful choices in civil legal representation.

Just as there is no single reason that those in need of legal assistance will not or cannot receive those services, there is no single approach that will solve the problem.

But in crafting solutions, regulated alternative legal service models must be a part of the conversation. In order for the legal profession to maintain credibility and fulfill its professional responsibility, it is incumbent upon the profession to take an honest look at current models of the delivery of legal services, and make some potentially difficult choices to address the access to justice gap, lest the profession lose its voice altogether.

### Endnotes

1. Since the US Supreme Court decision in *North Carolina Board of Dental Examiners v. FTC*, 574 U. S. \_\_\_\_ (2015), many jurisdictions are evaluating, and when appropriate amending, enforcement procedures to ensure compliance with the Court's decision. See, for example, proposed amendments to Article 20 of the Oregon State Bar Bylaws: [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/oregon\\_article20\\_unlawful\\_practice\\_of\\_law\\_redlined\\_amendments.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/oregon_article20_unlawful_practice_of_law_redlined_amendments.authcheckdam.pdf)
2. Perlman, Andrew M., *Towards the Law of Legal Services*, Suffolk University Law School Legal Studies Research Paper Series, Paper 15-5.
3. See also, Sandufor, Rebecca L., *Accessing Justice in the Contemporary USA: Findings From the Community Needs and Services Study* (August 8, 2014). Available at SSRN: <http://ssrn.com/abstract=2478040>
4. See, Rule 28, Washington Supreme Court, Admission and Practice Rules
5. See, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians>
6. Elefant, Carolyn, *Future Fridays: Will Limited Licensed Technicians Kill Solos & Smalls?*, My Shingle.com (September 27, 2013)
7. Final Report of Oregon State Bar Task Force on Limited License Legal Technicians, See: [http://bog11.homestead.com/LegalTechTF/Jan2015/Report\\_22Jan2015.pdf](http://bog11.homestead.com/LegalTechTF/Jan2015/Report_22Jan2015.pdf)
8. The continuing education requirements for lawyers are significantly lower than those required of doctors in most jurisdictions. See, for example, Washington State Board of Health Physician and Surgeon Continuing Education Requirements, <http://www.doh.wa.gov/Portals/1/Documents/3000/657-128.pdf>
9. See, Rule 7.4 (d), ABA Model Rules of Professional Conduct
10. See, ABA Standing Committee on Specialization at: [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/specialization/resources/resources\\_for\\_lawyers.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers.html)
11. Rule 28, *supra* note ii

12. See, 37 CFR §11.6 (b) Agents: “Any citizen of the United States who is not an attorney, and who fulfills the requirements of this Part may be registered as a patent agent to practice before the Office.” See also, 31 C.F.R. § 10. Practice Before the Internal Revenue Service.

13. See for example, Catholic Legal Immigration Network, Inc., Managing an Immigration Program: Steps for Creating and Increasing Legal Capacity, Ch. 4, Authorization for Non-Attorneys to Practice Immigration Law (BIA Accreditation and Recognition), at: <https://cliniclegal.org/resources/guides-reports-publications/managing-immigration-program-steps-creating-and-increasing>

14. See also, Rhode, Deborah L. and Lucy Buford Ricca, *Protection the Professional or the Public? Rethinking Unauthorized Practice Enforcement*, Fordham L. Rev., Vol. 82, p. 2587. (Article includes an empirical analysis of UPL enforcement activity, including a comparison of complaints received by clients/consumers and those received by other lawyers.)

15. For more information on innovation within the legal profession, see “Be the Change,” ABA Legal Access Job Corps at: [http://stream.americanbar.org/services/player/bcpid2059188277001?bckey=AQ~~,AAABSp7SiCE~,aEBLYbQyvvDzG\\_ilsy3VR1brzH8RuBIr&bctid=3192987496001](http://stream.americanbar.org/services/player/bcpid2059188277001?bckey=AQ~~,AAABSp7SiCE~,aEBLYbQyvvDzG_ilsy3VR1brzH8RuBIr&bctid=3192987496001)