REPLACING THIS OLD HOUSE: CERTIFYING AND REGULATING NEW LEGAL SERVICES PROVIDERS

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ABSTRACT

This Article comprehensively examines the decisions that state courts must make, and have made to date, when they certify and regulate new categories of legal services providers: those individuals other than lawyers who are authorized to provide discrete legal services that the laws governing the unauthorized practice of law (UPL) generally reserve to lawyers.

In certifying new categories of legal services providers, courts must make an array of interrelated decisions. These include decisions about the rules for educational and testing requirements, the scope of services that legal services providers may offer, the conditions under which they may provide services, and how they will be regulated once certified. Courts may seek guidance in existing models. Courts might find inspiration in the programs established by federal administrative agencies that employ flexible certification requirements for patent agents, design patent agents, and enrolled agents in tax matters—all of whom may independently render discrete legal services, for a fee, in certain administrative proceedings and seem to have done so to the general satisfaction of their clients and the agencies. Alternatively, courts might be influenced by the familiar example of how lawyers are educated, admitted to the bar, and regulated.

To date, state courts establishing new categories of legal services providers have been overly influenced by the lawyer licensing process. While lawyers may provide any legal services for which they consider themselves competent, nearly all new categories of providers are strictly

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limited in their scope of representation. Those permitted to provide broader help with discrete legal matters are subject to overly rigorous and rigid training and testing requirements that make it expensive and time-consuming to gain certification. Rather than allowing providers to serve clients independently as a viable career, courts often forbid legal services providers from charging a fee for their services and require them to be supervised by lawyers in perpetuity, avoiding the need for more thoughtful regulatory oversight. Taken together, these existing requirements make it unlikely that many people will become, continue, and practice successfully as legal services providers. Consequently, courts' current programs will not fulfill their potential to enable ordinary people to obtain necessary legal help for essential problems concerning their basic human needs.

This Article proposes that state courts collaborate in building certification and regulation processes for new categories of legal services providers from the ground up. The components would include: (1) affordable and flexible training focused on the discrete work that the particular providers will be expected to perform competently; (2) education that continues post-certification; (3) pathways to independent provider practice in association with other legal professionals, including lawyers; and (4) post-certification regulation that is proactive as well as reactive.

INTRODUCTION

Most people cannot afford lawyers when they have legal problems. The result is risk to family, housing, and financial resources when people represent themselves or fail to appear in court, or when they lack legal advice in extrajudicial matters. Problems that could have been resolved can escalate and lead to disastrous consequences.[1] In recent years, evidence has shown that people who cannot access lawyers can benefit from others' help, especially if the others are trained and regulated to assist with their specific

1. *See generally* LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2022) [hereinafter 2022 Justice Gap Study], https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [https://perma.cc/DW7J-3BUR]; *see also* Lois R. Lupica & Lauren Hudson, *Addressing the Failures of the U.S. Legal System*, 28 ROGER WILLIAMS U. L. REV. 118 (2023); Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 UC IRVINE L. REV. 753, 757–58 (2021); Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581, 591 (2019).

types of legal problems.[2] Many are calling for states to certify classes of legal services providers other than lawyers to help people with family law, housing, consumer debt, and other legal matters for which most people cannot afford or otherwise gain access to legal services.[3] Recent lawsuits challenging the breadth of the restrictions on lawyer-only legal practice are creating additional pressure.[4] Some state supreme courts, which in most

2. *See, e.g.*, Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. C. R. & C. L. 283, 308 (2020); Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U.L. REV. 297, 322–23, 328 (2019); UTAH OFFS. OF LEGAL SERVS. INNOVATION, ACTIVITY REPORT: JANUARY 2024, at 6 (2024), https://utahinnovationoffice.org/wp-content/uploads/2024/03/January-2024-Activity-Report.pdf [https://perma.cc/86SL-9FE9] (noting that as of January 2024, there was approximately one complaint per 4,011 services). Regarding client and judicial satisfaction with "alternative legal providers," see MICHAEL HOULBERG & JANET DROBINSKE, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE LANDSCAPE OF ALLIED LEGAL PROFESSIONALS PROGRAMS IN THE UNITED STATES 53 (2022), https://iaals.du.edu/sites/default/files/documents/publications/landscape_allied_legal_professionals.pdf [https://perma.cc/7Y68-9HPZ]. Regarding adjudicators' satisfaction with Limited License Legal Technicians' (LLLT) work product, see JASON SOLOMON & NOELLE SMITH, STAN. CTR. ON THE LEGAL PRO., THE SURPRISING SUCCESS OF WASHINGTON STATE'S LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 12–14 (2021), https://law.stanford.edu/wp-content/uploads/2021/04/LLLT-White-Paper-Final-5-4-21.pdf [https://perma.cc/X7QG-RZQB]; *see also infra* Part V.

3. *See, e.g.*, Amanda Claxton, *Liberty and Justice for Y'all: Allowing Legal Paraprofessionals to Practice Law to Reduce the Effects of Legal Deserts in Rural Georgia*, 74 MERCER L. REV. 339, 374–75 (2022); Gaurav Sen, *Beyond the JD: How Eliminating the Legal Profession's Monopoly on Legal Services Can Address the Access-to-Justice Crisis*, 22 U. PA. J. L. & SOC. CHANGE 121, 147 (2019) ("The only long-term, self-sustaining solution to the accessibility gap is to follow the lead of the medical community and enable legal services to be provided by non-lawyer professionals. Such professionals—such as legal technicians—could enter into their profession with an undergraduate education followed by extensive clinical training."); Mary Catherine Tiernan, Comment, *All That Is Golden Does Not Glitter: A Proposed Pilot Program for Increasing Access to Justice in California in the Face of Legislative Resistance*, 50 W. ST. L. REV. 89, 99–103 (2023); *see* Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. F. 228, 246–47 (2022) ("If a state bar concludes that some other legal-service roles, while not requiring a law degree, nonetheless require a particular level of training and experience, then that state bar can specify necessary prerequisites and processes for those roles, as other states have considered."); *see* Nino C. Monea, *The Administrative Power: How State Courts Can Expand Access to Justice*, 53 GONZ. L. REV. 207, 240 (2017) ("Almost all experts that have examined the issue have recommended increased opportunities for non-lawyer assistance."). This is not to suggest that expanding the availability of legal practitioners would redress all the barriers that people face to obtaining legal assistance. *See, e.g.*, Emily Ryo & Reed Humphrey, *Beyond Legal Deserts: Access to Counsel for Immigrants Facing Removal*, 101 N.C. L. REV. 787, 835–36 (2023); *see also infra* Part VI.A.

4. *See, e.g.*, *In re* S.C. NAACP Hous. Advoc. Program, 897 S.E.2d 691, 692–93 (S.C. 2024) (discussed *infra* at Part IV); Upsolve, Inc. v. James, 604 F. Supp. 3d 97, 103 (S.D.N.Y. 2022) (challenging on First Amendment free speech grounds New York's prohibition on the practice of law as applied to a nonprofit volunteers providing free advice in debt collection lawsuits); *c.f.* Black Polaski v. Lee, No.7:24-cv-00004-BO-BM (E.D.N.C. filed Dec. 26, 2024) (rejecting a First Amendment free speech challenge to North Carolina's prohibition on the unauthorized practice of law as applied to a

states have authority to decide who may practice law in their states, are beginning to respond.[5]

As state courts begin to certify new types of legal services providers to offer discrete legal services, more complex questions arise. For instance, what services will new providers be allowed to perform? How should they demonstrate their ability to provide the permitted services? What training and experience must they acquire, and what tests must they pass, before being certified? How should they be regulated to ensure competent, ethical representation? The components of a process that certifies and regulates new legal services providers will be interrelated and interdependent. For example, post-certification supervision and regulation may justify variable types of pre-certification training, experience, and testing, depending on the services to be provided.

In addressing these complexities, state courts might be guided by lawyer licensing and regulatory processes, which are familiar and time-tested. But that would be a mistake. Replicating the expensive and time-consuming lawyer-certification processes would discourage qualified people from seeking certification to provide legal services. Moreover, the services of those who became certified would be as unaffordable as lawyers' services. Federal administrative agencies have better models for certifying providers other than lawyers, and some agencies have certified such providers for decades.[6] But federal administrative programs lack uniformity, have developed haphazardly, and may not be an ideal fit for state-certified legal services providers.

This Article provides a framework for exploring how new categories of state legal services providers should be certified and regulated. It does not propose a one-size-fits-all solution but suggests that state courts should approach the question afresh and not be overly influenced by past and existing approaches, least of all by the lawyer licensing and regulatory processes. This Article addresses the complexity of state courts' choices, the interdependence of the features of certification and regulatory processes,

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paralegal's pure legal advice on completing common, court-created legal forms).

5. *See* HOULBERG & DROBINSKE, *supra* note 2, at 7–19; Cayley Balser et al., *Leveraging Unauthorized Practice of Law Reform to Advance Access to Justice*, 18 L.J. SOC. JUST. 66, 68 (2024); Monea, *supra* note 3, at 238–44; Stephen Daniels & James Bowers, *Alternative Legal Professionals and Access to Justice: Failure, Success, and the Evolving Influence of the Washington State LLLT Program (The Genie is Out of the Bottle)*, 71 DEPAUL L. REV. 227, 234 (2022).

6. *See infra* Part III.

and the tradeoffs required when constructing a process that increases the availability of legal assistance while ensuring legal services providers act competently and ethically. We conclude that states courts should coalesce in experimentation, with a goal of eventual uniformity to promote and support new legal services providers who: (1) provide independent, full-scope representation in discrete matters; (2) are accessible to those in need of such services; and (3) are fully integrated members of the legal profession.

For context, we begin with four caveats. First, expanding access to personal legal assistance is not necessarily the best way to address the access to justice crisis, much less the only way. Far better would be to prevent legal problems from arising in the first place or to resolve them satisfactorily without resorting to the legal process.[7] Additionally, there is a recognized need to simplify the law and the legal process to make it more easily navigable.[8] And there is a virtue to assistance other than personal legal assistance to facilitate self-representation—including simplified forms, artificial intelligence-driven tools,[9] as well as information and help from individuals such as courthouse "navigators" who do not engage in the practice of law.[10] Second, valuable legal assistance may come from someone who is not a lawyer or otherwise formally trained and licensed to practice law. Where permitted by law, many people can and do receive valuable help with their legal problems from friends, neighbors, and others who are self-educated or entirely untrained in the law.[11] Third, while we

7. *See* Lauren Sudeall, *Delegalization*, 75 STAN. L. REV. ONLINE 116, 119–22 (2023), https://www.stanfordlawreview.org/online/delegalization/ [https://perma.cc/QK2U-6LJL]. *See generally* Larisa G. Bowman, *Eviction Abolition*, 55 LOY. U. CHI. L.J. 541 (2024).

8. *See, e.g.*, Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1233 (2010); Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 847 (2013). *But see* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1213 (2022) ("[I]nformal procedures work to the detriment of the self-represented. Even routinized, 'predictable' informal procedure is extremely difficult for the self-represented to ascertain and navigate.").

9. *See* Drew Simshaw, *Toward National Regulation of Legal Technology: A Path Forward for Access to Justice*, 92 FORDHAM L. REV. 1, 8–11 (2023); Ben Barton, THE LLLT CONUNDRUM, 76 WASH. U. J. L. & POL'Y 5 (2025).

10. *See generally* MARY E. MCCLYMONT, THE JUST. LAB AT GEO. L. CTR., NONLAWYER NAVIGATORS IN STATE COURT: AN EMERGING CONSENSUS (2019), https://www.ncsc.org/__data/assets/pdf_file/0024/53691/Justice-Lab-Navigator-Report-6.11.19.pdf [https://perma.cc/2GRN-LATV].

11. *See, e.g.*, N.J. Comm. on the Unauthorized Prac. of L., Op. 57 (2021),

focus on full-scope legal assistance, it is not the only valuable legal assistance that a licensed practitioner might provide. Lawyers and others trained in the law sometimes provide "unbundled" legal assistance—i.e., partial assistance with a client's legal problem.[12] This may include merely legal advice or assistance in drafting legal documents (but not advocacy), or it may include a limited role in advocacy, such as accompanying and advising the client during a hearing. We do not doubt that partial assistance from someone with legal knowledge, skill, and judgment is ordinarily better than none at all.

Finally, establishing a certification process for new categories of legal professionals is neither the only way, nor necessarily the ideal way, for state courts to allow individuals other than lawyers to provide legal assistance to low- and middle-income clients. Utah has an administrative process called a "regulatory sandbox" to authorize people who are not lawyers to provide legal assistance—typically of limited scope—on an experimental basis,[13] and more experimentation with administrative or judicial oversight, coupled with evaluation, would be valuable.[14] But, at the end of the day, state courts should want to adopt mechanisms to provide full-scope, personal legal assistance to the people with legal problems who lack realistic access to lawyers. And courts are positioned to determine the best way to provide such assistance by certifying and regulating classes of legal professionals who concentrate their practices in discrete areas of law while protecting the public and the legal process from incompetent or unethical providers.

In Part I, we pose the central regulatory problem: namely, whether new legal services providers who address discrete legal problems should be certified and regulated similarly to lawyers, whose general licenses permit

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https://edlawcenter.org/assets/files/pdfs/issues-special-education/UPL_Opinion_57.pdf [https://perma.cc/U79R-C4LL] (authorizing knowledgeable individuals in addition to lawyers to assist others in special education cases without a fee).

12. Matthew Burnett & Rebecca L. Sandefur, *Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation*, 19 REVISTA DIREITO PUBLICO 104, 105 (2022), https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/6604/2692 [https://perma.cc/RJ2W-NJK5].

13. *See* UTAH OFF. OF LEGAL SERVS. INNOVATION, utahinnovationoffice.org [https://perma.cc/9RL6-J4H3]; *see also* Ellen Murphy, *Why We Should Embrace the Regulatory Sandbox*, 38 GPSOLO 36, 36 (July/Aug. 2021).

14. *See* Bruce A. Green, *Should State Trial Courts Become Laboratories of UPL Reform?*, 92 FORDHAM L. REV. 1285, 1290 (2024) (proposing "that state supreme courts . . . authoriz[e] trial judges, in civil cases over which they preside, to allow nonlawyers to provide free legal assistance to unrepresented parties . . . subject to the trial court's oversight and evaluation.").

them to practice in any area of law and to conduct any type of work that they can perform competently. In Part II, we survey lawyer licensing and regulatory processes, which make legal education and licensing so costly that practitioners can recoup their investment only by charging fees ordinary people cannot afford. In Part III, we describe how some federal agencies, to their apparent satisfaction, have expanded the availability of legal assistance by permitting individuals other than lawyers to independently represent parties in administrative proceedings, subject to certification and regulatory requirements that are generally more flexible and less demanding than the processes for lawyers. In Part IV, we describe how state courts, departing from federal administrative models, have adopted various models for certifying and regulating new legal services providers. In many cases, these state processes, while rigid and demanding, simultaneously limit the services the providers may offer and forbid them from functioning independently of lawyers. Unsurprisingly, there is no state in which legal services providers other than lawyers reportedly provide legal services to low- and middle-income clients on a significant scale, meaningfully redressing lawyers' unavailability.

In Part V, drawing on the preceding discussion, we suggest that state courts bring a fresh approach to certification and regulation of legal services providers, adopting the best while avoiding the worst features of the lawyer licensing process. In Part VI, we propose an immediate path forward, calling on the Conference of Chief Judges to lead state supreme courts in establishing programs to train, evaluate, certify, and regulate different types of legal services providers who will address currently unmet legal needs. This would begin with states' robust experimentation in designing programs to build cadres of legal professionals who are capable of addressing discrete legal problems competently and ethically. Ideally, a period of experimentation would culminate in states coalescing around the particular certification programs that are most successful in welcoming new providers as essential members of the legal profession.

A fresh approach necessitates building new certification and regulation processes from the ground up in consultation with a range of stakeholders, including those most in need of legal services. A viable program must attract applicants, which requires that they ultimately be able to provide legal services as a viable, satisfying career. This can best be achieved by authorizing legal services providers to offer full-scope, independent

representation—including for a fee—in discrete areas of law rather than necessarily being subordinate to lawyers and employed in legal services or other not-for-profit settings. Legal services providers might benefit from lawyers' supervision at the early stage of their career, but supervision is not necessary as an ongoing regulatory measure.

State court certification requirements should be directed at the work that providers will perform and should not be unnecessarily costly or rigid.[15] Indeed, an assessment mechanism that accurately tests applicants' practice-readiness would justify the most expansive range of educational options. At the same time, practice-readiness does not necessarily require the capacity to handle every legal matter in the provider's area of law. Legal services providers' educational development will continue post-certification, and meanwhile, like lawyers, other providers can be trusted to decline or refer matters beyond their expertise. At the same time, providers should be encouraged to practice in association with lawyers and other legal professionals who can support their practices and enhance their development. Finally, regulation should be proactive as well as reactive. This can best be accomplished if states come together to experiment, gather and share data, and—based on this data—iteratively refine programs to permit new types of legal services providers, with an eventual goal of uniformity across states.

I. THE PROBLEMS: SHOULD OTHERS BE AUTHORIZED TO PRACTICE LAW AND, IF SO, WHO AND HOW?

In some fundamental ways, the regulation of legal professionals in the United States has barely changed over the past century. State judiciaries continue to play the central role, determining the educational process by which aspirants to the bar study to practice law and overseeing the admissions process for deciding whether an applicant has acquired the requisite knowledge, skill, and character.[16] Once deemed qualified, lawyers

15. In other contexts, "certification" sometimes refers to recognition by private organizations as distinguished from licensure by public agencies. Here, we use the term to refer to state authorization to engage in discrete legal work that would otherwise constitute the unauthorized practice of law under state law. We use the term to distinguish such authorization from a law license, which allows a lawyer to practice law generally.

16. For a brief history of state attorney admissions processes, see Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed*

are judicially authorized to engage in any type of law practice, subject to professional expectations enforced by the judiciary, which reserves the power to revoke lawyers' authority to practice law. Although there are exceptions and limitations, laws regulating the unauthorized practice of law have traditionally permitted only lawyers to provide legal services of any kind—that is, to provide legal advice, draft legal documents, or advocate for others. [17]

There are good reasons to establish new categories of legal services providers. We begin by noting a minor problem presented by doing so: the question of what name to give new categories of providers, individually and collectively. We then focus on the more significant problem: the question of how to certify legal services providers (e.g., the requirements for training, experience, and assessment) and how to regulate them once they are certified.

A. What's in a Name?

One impediment to establishing new categories of legal professionals is the problem of naming. Different jurisdictions have adopted different names for different types of legal services providers who are authorized to practice law to a limited extent, either autonomously or under a lawyer's supervision. Some names, such as Limited Legal License Technician (LLLT), are, perhaps by design—uninviting, nondescriptive, and hard to say or remember. One would not know from the name that LLLTs practice family law, and one might not have confidence in a "technician" to handle a legal problem.[18]

Further, there is no accepted umbrella term for categories of new legal services providers who are not lawyers, and there is no agreement on who would come under the umbrella if there were. But there are many questions:

Alternatives, 45 CASE W. RSRV. L. REV. 1191, 1193–1204 (1995). For studies of the development of state court's discipline of lawyers, see Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001), and Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002). For writings on state courts' adoption of professional conduct rules developed by bar associations to regulate a jurisdiction's lawyers, see Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 161 n.35 (2022) (citing articles).

17. *See generally* M. ELLEN MURPHY & STEVE H. NICKLES, THE UNAUTHORIZED PRACTICE OF LAW FOR NONLAWYERS 23–89 (W. Acad. Publ'g 2018).

18. *See infra* Part IV.B (discussing LLLTs permitted scope of practice).

Should an inclusive term encompass anyone who has anything to do with rendering legal services, whether certified to practice law or not; should it refer only to those, including lawyers, who are certified to practice law to any extent; should it include only those other than lawyers who are certified to practice law, whether a lawyer's supervision is required or not; or should the inclusive term encompass only professionals other than lawyers who are certified to practice law independently? The only point on which many, except lawyers, agree is that the word "nonlawyer," which many lawyers use, should be replaced, because it is lawyer-centric and demeaning. "Nonlawyer" and "nonlawyer advocate," once-popular terms,[19] are increasingly disfavored.[20]

Names matter. Suitable terms for individual categories of legal professionals should describe what they are authorized to do, inspire confidence in their ability to do it, and be respectful of them as members of the legal profession. On one hand, terms such as Legal Document Preparer, Qualified Tenant Advocate, and Housing Advocate are descriptive and respectful. On the other hand, vague terms such as LLLT or Community Justice Worker barely hint at what services the legal professional may offer, and terms such "paralegal" or "paraprofessional" suggest that legal services providers are less capable than lawyers of addressing people's particular legal problems.

The legal profession, which encompasses more professionals than lawyers, should settle on respectful umbrella terms. We await the emergence of a term or terms to describe legal providers who are not licensed lawyers. Until then, we opt for "legal services providers," which readers will understand to mean individuals who are state-certified to

19. *See, e.g.*, Anne E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023, 1024 (2017); Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L. J. 1259, 1263 (2014); MURPHY & NICKLES, *supra* note 17.

20. *See, e.g.*, HOULBERG & DROBINSKE, *supra* note 2, at 34–35; Debra Cassens Weiss, *Should ABA Strike 'Nonlawyer' From Its Vocabulary? Petition Says It's Time*, AM. BAR ASS'N J. (Apr. 11, 2024, 11:14 AM), https://www.abajournal.com/news/article/should-the-aba-strike-the-word-nonlawyer-from-its-vocabulary-petition-says-its-time [https://perma.cc/7422-T6KE]; Kenneth A. Adams, *On Better Terms: What Should We Do With 'Nonlawyer'?*, AM. BAR ASS'N J. (Aug. 29, 2023, 8:55 AM), https://www.abajournal.com/voice/article/what-to-do-with-nonlawyer [https://perma.cc/Q2D3-AZWY]. However, the term "nonlawyer" has been codified in some rules and regulations. *See., e.g.*, ARIZ. CODE JUD. ADMIN. § 7-210(A) (2024) (defining "Board" as "Board of Nonlawyer Legal Service Providers"); MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983) (titled "Responsibilities Regarding Nonlawyer Assistance").

provide discrete legal services that one must otherwise be a lawyer to provide.[21] This term would include, among others, the various categories of providers that we envision state courts establishing to address the access to justice crisis, including providers authorized to provide full-scope representation in independent legal practices focused on discrete areas of law.[22]

B. Should New Legal Services Providers Be Certified and Regulated Like Lawyers?

The regulatory process grants lawyers a monopoly over traditional law practice while unifying the profession: It creates a division between state-licensed lawyers, who can practice law generally in their states, and nearly all other individuals.[23] However, these foundational premises of the regulatory process are not inevitable. In many other countries, two or more classes of legal professionals train and qualify in different ways to render different legal services.[24] In these countries, members of the public without professional qualifications are permitted to perform many tasks that we in the United States assign exclusively to lawyers,[25] and associations of legal

21. We opt for "provider" instead of "professional" because it is the more inclusive term, encompassing those whose role or status is something other than that of a legal professional but who may best be situated to provide legal services. For example, social workers might be certified to provide legal services, such as in domestic violence situations, and while they technically would then be both "legal professionals" and "mental health professionals," most clients would see them as "mental health professionals" who are certified to provide legal services. The same is true of Certified Public Accountants (CPAs) who are certified to practice in tax court—the CPA is a tax professional, who provides legal services. Each of these would be a certified legal services provider.

22. We recognize that some people who may be served by these new providers will have multiple legal issues, not all of which will be within the provider's scope of practice. However, there is value is addressing some of the problems, and those who receive such assistance likely will be better off than they would be absent assistance.

23. A lawyer licensed in one state may be restricted from practicing in other jurisdictions or may be required to obtain additional authorization to practice law in certain fora, but a law license generally permits a lawyer to practice in any area of law in the state of licensure without any further certification or authorization.

24. In the United Kingdom, barristers and solicitors are licensed to provide different types of legal services. *See* Harry Cohen, *The Divided Legal Profession in England and Wales—Can Barristers and Solicitors Ever Be Fused?*, 12 J. LEGAL PRO. 7, 7–8 (1987) (describing the differences between barristers and solicitors). In Japan, multiple classes of legal professionals "are licensed to handle matters which in the U.S. would only be handled by licensed lawyers." *See* Richard S. Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL EDUC. 27, 28–29 (1989).

25. In England and Wales, the Legal Services Act permits those who are not lawyers to do the same work as solicitors. *See* Legal Services Act 2007, c. 29, § 18 (UK). Throughout the United Kingdom,

professionals are self-regulating or regulated by government institutions other than courts.[26]

Over time in the United States, features of professional regulation constructed on the early foundational premises have evolved. Law schools have replaced apprenticeship as the principal way in which aspirants train for law practice. Written bar examinations drafted by a nonprofit organization and administered by institutions overseen by judiciaries have replaced oral examinations administered by judges.[27] The definition of law practice, reserved exclusively for lawyers, has expanded beyond its early roots in trial practice. Standards of professional conduct, which are largely derived from nineteenth-century understandings of the common law of agency, contracts, and torts, have been codified by the American Bar Association (ABA), adopted by state judiciaries, and enforced by court-overseen agencies and bar associations.[28] But age-old regulations of the practice of law remain. The legal profession is still largely a unitary profession, subject to state judicial licensure and oversight and clinging to its monopoly to practice law. Consequently, even as law practice has become more complicated, more specialized, and more far-ranging since the

McKenzie Friends, who are not lawyers, can assist others in court. *See* DAME SIOBHAN KEEGAN, PRACTICE NOTE 3/2012 MCKENZIE FRIENDS (2012), https://www.judiciaryni.uk/files/judiciaryni/2024-06/Practice%20Note%2003-12%20%28Revised%207%20June%202024%29%20-%20McKenzie%20Friends%20%28Civil%20and%20Family%20Courts%29.pdf [https://perma.cc/ZNS4-82UP] (revised June 7, 2024). In Russia, at least until recently, anyone could practice law outside court. *See* DMITRY SHABELNIKOV, *The Legal Profession in the Russian Federation*, *in* REFORM OF THE LEGAL PROFESSION AND ACCESS TO JUSTICE WORKSHOP 18 (2008), https://www.osce.org/files/f/documents/9/b/36312.pdf [https://perma.cc/M763-ZADH]; Susan Carle et al., *The Reform of the Russian Legal Profession: Three Varying Perspectives*, 42 FORDHAM INT'L L.J. 271, 274–76 (2018). In China, "barefoot lawyers" can represent others in court. *See* Samuel J. Levine & Russell G. Pearce, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635, 1644 (2009).

26. In France, the bars are self-regulating. *See* Thomas Rouhette & Mathilde Gérot, *Regulation of the Legal Profession in France: Overview*, SIGNATURE LITIG. (Dec. 1, 2022), https://www.signaturelitigation.com/wp-content/uploads/2020/01/Regulation-of-the-Legal-Profession-in-France-Overview.pdf [https://perma.cc/S8TE-E4YY]. In the United Kingdom, solicitors are regulated by the Solicitors Regulation Authority, an administrative agency. SOLICS. REGUL. AUTH., https://www.sra.org.uk/ [https://perma.cc/L8S5-U4B2].

27. *See* Marsha Griggs, *The Serendipity of the NextGen Bar Exam*, 77 WASH. U. J.L. & POL'Y (forthcoming 2025).

28. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53–63 (1986) (tracing the American Bar Association's development of lawyer codes from the 1908 Canons of Professional Ethics to the 1983 Model Rules of Professional Conduct).

nineteenth century, contemporary lawyers, like their earlier counterparts, still train and obtain licenses allowing them to practice in any area of law.

Because law practice is now more complicated and varied, the contemporary processes for training for the bar and for demonstrating one's further qualification for practice are more time-consuming and expensive. Admission to practice law is an early step in a continuum of training needed to practice competently in a lawyer's chosen area of law.[29] Having trained to obtain a license to practice in any area, newly admitted lawyers are incapable of representing clients in more than a few practice areas, if any.[30]

The lawyer regulatory process is like a periodically refurbished old house. It has never been razed and replaced, but it is continually repaired to replace worn out or obsolete parts and to refresh for technological and societal changes. It has received makeovers, but not do-overs, perhaps because starting from scratch would be too costly or because judges and lawyers have grown accustomed to its essential attributes and have built their professional lives around them. If courts built a regulatory process for a different category of legal professionals, should it resemble what we now have?

Although the professional regulation of lawyers will not submit to a do-over any time soon, some courts are now constructing, from the ground up, regulatory processes for new classes of legal services providers. The growing recognition of the unavailability of affordable lawyers for most low- and middle-income Americans, has led to a growing access to justice movement.[31] In response, some states, principally through judicial action, have begun to authorize different categories of providers to render certain discrete legal services, subject to varying regulatory processes.[32]

These new providers may potentially render large-scale legal assistance

29. *See, e.g.*, E. EUGENE CLARK, ILL. AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 234 (1992) [hereinafter MACCRATE REPORT].

30. *See* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 481–89 (1993) (describing the inadequacy of the licensing process to ensure newly admitted lawyers' competence to practice law); *see generally* K. N. Llewellyn, *The Bar's Troubles, and Poultices — and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 129 (1938).

31. *See* Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. F. 228, 229–32 (2022); Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146, 149–52 (2024), https://www.stanfordlawreview.org/online/the-making-of-the-a2j-crisis/ [https://perma.cc/2WQA-TA3T].

32. *See infra* Part IV.

to those who cannot retain lawyers, while providing an alternative career path for individuals interested in providing legal services to ordinary people in discrete areas of law practice. Courts have the opportunity to establish the legal profession's counterpart to medical providers such as nurses, physician assistants, emergency medical technicians, and others who are authorized to perform more discrete or less complex medical tasks than medical doctors typically provide.[33] However, attracting people to this alternative legal career and making their services affordable to clients depends on the requirements of the certification process, the scope of permitted services, and the particular mechanisms of regulation. Establishing a career path for professionals who provide affordable legal services in discrete settings would be undermined by features that make the work unhelpful, unaffordable, or unappealing. These features may include disparate and complicated regulatory licensing programs, burdensome credentialing requirements, resource-intensive pilot programs, as well as provisions denying legal services providers authority to furnish the full scope of representation clients need or forbidding them from providing services independently. Features that undermine such a career path may also include siloing these providers and excluding them from full membership in the legal profession.

Although the viability of alternative categories of legal services providers turns significantly on the certification and regulatory processes, inadequate attention has been given to the question of whether the process for certifying and regulating new providers should mimic the process for

33. *See* Darcy Meals & Leah Ritter, *A Prescription for Increased Access to Justice: Lessons from Healthcare*, 2022 U. ILL. L. REV. ONLINE 45, 49 (2022) ("With the legal profession considering the possibility of expanding access to justice by increasing various types of non-lawyer support, lessons from healthcare may provide a lifeline."). Some medical providers, like physician assistants (PAs), operate under legislatively defined scopes of practice that outline the types of services permitted. Ann Davis et al., *Access and Innovation in a Time of Rapid of Change: Physician Assistant Scope of Practice*, 24 ANNALS OF HEALTH L. 286, 299–306 (2015). For example, PAs are permitted to engage in the practice of medicine under the "direction" and "supervision" of an MD. *Id.* at 291. Practically, however, supervision may not be the best word. In fact, "[p]hysicians are not required to be onsite with the PA, to check every aspect of the PA's work, or approve each treatment plan. In nearly all cases, the decision to engage a physician's input rests with the PA." *Id.* at 30–31. Moreover, Maryland's recent Physician Assistant Modernization Act, which became effective in October 2024, substitutes "collaboration" for "delegation" with respect to the relationship between a PA and an MD. *See Maryland Governor Signs PA Practice Modernization Bill Into Law*, AM. ACAD. PHYSICIAN ASSOCS. (May 16, 2024), https://www.aapa.org/news-central/2024/05/maryland-governor-signs-pa-practice-modernization-bill-into-law/ [https://perma.cc/W9RS-XXHG].

licensing and regulating lawyers or whether it can be better tailored to the limited scope of legal services to be provided. No one thinks the lawyer regulatory process is perfect, but state courts assume that it works reasonably well to ensure competent legal representation and to protect clients, the courts, and the public from harm. One might therefore assume that the regulatory process for new legal services providers should, in essential ways, replicate the process by which law schools educate future lawyers, bar admissions authorities determine whether applicants have the requisite knowledge, skill, and character to practice law, and courts and disciplinary authorities establish and enforce standards of professional conduct. Yet, a moment's reflection suggests that few aspirants could afford an expensive three-year legal education for the privilege of undertaking only discrete legal tasks for clients with minimal assets. Therefore, the question remains whether to adopt a streamlined version of the U.S. regulatory process or something wholly different.

In the next three Parts, we first look more closely at the regulation of lawyers (including the licensing process) and then survey the disparate ways in which legal services providers other than lawyers are certified and regulated, in turn, by federal agencies and state courts. As we show, naming is not the only area where the legal profession falls short. The profession has yet to coalesce around a workable approach to creating and overseeing other providers. We do not recommend a specific approach. Rather, we analyze the necessary considerations in deciding on an approach, concluding that state courts should unite and experiment in certifying new types of legal services providers who can provide independent, full-scope representation in discrete areas of practice.

II. THE REGULATION OF LAWYERS

A. The Unified Bar

In the United States over the past century, the practice of law has evolved very differently from the practice of medicine, another of the traditional three learned professions.[34] Medicine has become stratified in two respects. First, medical doctors (MDs), the traditional medical

34. *See* Bruce A. Green, *Why State Courts Should Authorize Nonlawyers to Practice Law*, 91 FORDHAM L. REV. 1249, 1265–66 (2023).

practitioner, branch off after their initial training, becoming trained and certified in various specialties, such as surgery, ophthalmology, pediatrics, and psychiatry.[35] Second, and more importantly for our purposes, other nationally recognized classes of medical professionals have developed. They have various titles, some of which are descriptive of their work, like osteopaths, chiropractors, nurse practitioners, and nurse midwives. They are trained and certified differently from MDs to perform defined medical tasks subject to different regulatory oversight.[36]

Law, in contrast, is an unstratified, unified profession. Most U.S. lawyers are trained, licensed, and regulated in the same way: They graduate from law school, pass a bar exam, demonstrate suitable character, and receive a general license to practice law.[37] They are subject to mostly one-size-fits-all professional conduct rules,[38] which are adopted, interpreted, and enforced by the courts or by the courts' designees.[39]

Law's status as a unified profession is not inevitable, least of all in the twenty-first century when law practice is highly specialized. Law practice is other countries is stratified. In England, the profession has traditionally been divided between barristers, who advocate in court, and solicitors, who do other legal work.[40] In Japan, there are multiple law-related professionals who are trained and certified separately.[41] In Canada, the Law Society of Ontario has regulated and permitted paralegals to practice law alongside

35. *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 145 (2001) (recognizing that "medical residency is a precursor to specialized medical practice," and recommending family court residencies for lawyers akin to the model of medical residencies).

36. *See* Clyde B. Jensen, *The Continuum of Health Professions*, 14 INTEGRATIVE MED.: A CLINICIAN'S J. 48, 49–50 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4566463/ [https://perma.cc/4SLS-UK9S].

37. There are very limited exceptions still allowing a handful of candidates to read for the bar. *See* Griggs, *supra* note 27. Foreign lawyers may sit for the bar exam in some states without attending U.S. law school or with only one year of U.S. legal education. *See e.g*., New York Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, Rule 520.6. Law graduates in Wisconsin who remain in the state may take advantage of the diploma privilege, obtaining a license without taking a bar examination. *See* Griggs, *supra* note 27. In some states, foreign lawyers may practice foreign law in the role as foreign legal consultants. *See e.g*., New York Rules of the Court of Appeals for the Licensing of Legal Consultants, Part 521.

38. *See* Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527, 527–28 (2016).

39. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L. J. 73, 77 (2009).

40. *See* Cohen, *supra* note 24, at 7.

41. *See* Miller, *supra* note 24, at 28–29.

lawyers for seventeen years, with over 10,000 currently licensed.[42] But in the United States, the only way to practice law has traditionally been by acquiring a law license. Once acquired, this license permits lawyers to provide any legal service.

Law's status as a unified profession has implications for how U.S. lawyers are trained and regulated. Legal education is not oriented toward any particular area of practice, and efforts to make it so would face resistance by the law firm market as well as the ABA, which accredits law schools. While law students who anticipate specializing might choose electives relating to particular areas of practice—and licensed lawyers may develop specialized expertise after entering law practice—most lawyers are not accredited for distinct legal specialties and can practice in any area.[43] If the legal profession were to develop educational and regulatory regimes for lawyers who practice only in discrete areas, such as real estate, trusts and estates, or litigation, these regimes might differ significantly from the existing one.

The unified bar—and with it, U.S. lawyers' "monopoly"[44]—serves lawyers well. Besides restricting competition,[45] it enables national, state, and local bar associations to speak on behalf of larger constituencies, and thereby to exercise more political influence.[46] However, the unified bar was largely an accident of early American history. It was not possible or desirable at that time to replicate English Inns of Court to train a separate class of early American barristers, and there was not enough work for

42. *See* Lisa Trabucco, *Paralegal Regulation in Ontario, Canada: A Northern Experience*, IAALS (Mar. 29, 2023), https://iaals.du.edu/blog/paralegal-regulation-ontario-canada-northern-experience [https://perma.cc/8RC3-KD8S].

43. *See* Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 388 (2019) ("Requiring Juris Doctor degrees and general licenses means even accomplished students who have engaged for two years in specialized study and associated residency cannot qualify to provide legal services in areas in which there are significant access to justice deficits."). Some states certify or permit lawyers to hold themselves out as specialists upon satisfaction of certain requirements. *See, e.g.*, *The Why and How of Becoming a North Carolina Board Certified Legal Specialist*, N.C. STATE BAR LEGAL SPECIALIZATION, https://www.nclawspecialists.gov/for-lawyers/become-a-board-certified-specialist/ [https://perma.cc/CH69-EDBF].

44. *See, e.g.*, Bruce A. Green, *Civil Justice at the Crossroads: Should Courts Authorize Nonlawyers to Practice Law?*, 75 STAN. L. REV. ONLINE 104, 109–11 (2023); Jessica K. Steinberg et al., *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1318–22 (2021); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 4 (1981).

45. *See* Steinberg et al., *supra* note 44, at 1318–20.

46. Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. 1, 15–16 (2020).

separate classes of lawyers.[47] Applicants educated or self-educated in the law were authorized by individual judges or by colonial or state courts to practice law, often after demonstrating only minimal qualifications and ability, and newly minted lawyers tended to become generalists.[48]

The unified bar is reinforced by contemporary state laws, many originating during the Great Depression, governing the unauthorized practice of law (UPL).[49] These laws forbid people from practicing law unless they are legally authorized to do so.[50] Some states even criminalize UPL.[51] Courts interpret and enforce UPL laws to prevent or discourage anyone other than lawyers from rendering most law-related services, including uncomplicated services that others could easily learn to perform competently.[52] Although such laws are subject to exceptions and limitations, they have largely been effective in preventing anyone other than lawyers from giving legal advice, appearing in court, and drafting legal documents for others—especially for a fee.[53] For example, these laws have eliminated the entire business of conveyancing, which predated the American Revolution and was not restricted to lawyers.[54]

Under UPL laws, individuals may *assist* lawyers but may not represent clients or independently give legal advice on discrete issues. Thousands of paralegals employed by lawyers currently support their employers' legal representations by conducting initial client intake, preparing initial drafts of documents, and reviewing documents.[55] While paralegal training programs

47. *See generally* CHARLES WARREN, *Law Without Lawyers, in* A HISTORY OF THE AMERICAN BAR 3–18 (1911).

48. *See generally* CHARLES WARREN, *The Colonial Bar of Virginia and Maryland*, *in* A HISTORY OF THE AMERICAN BAR 39–58 (1911).

49. *See generally* Nora Freeman Engstrom & James Stone, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, 134 YALE L.J. 123; Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 103 (2009).

50. *See, e.g.*, N.C. GEN. STAT. § 84-2.1 (2024).

51. *See, e.g.*, *id.* § 84-4.

52. *See, e.g.*, Green, *supra* note 34, at 1256–57.

53. *See generally* MURPHY & NICKLES, *supra* note 17, at 23–89.

54. *See* Bruce A. Green, *Civil Justice at the Crossroads: Should Courts Authorize Nonlawyers to Practice Law*, 75 STANFORD L. REV. ONLINE 104, 106–11 (2023) (discussing 1919 New York state court decision forbidding nonlawyers from drafting transactional documents); *see also* Joyce Palomar, *The War Between Attorneys and Lay Conveyancers-Empirical Evidence Says "Cease Fire!,"* 31 CONN. L. REV. 423, 427–32 (1999); Margaret Onys Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 298–300 (2005).

55. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 506 (2023); *see* U.S. BUREAU OF

exist, no particular training or certification is required. But even trained paralegals, including those with a bachelor's degree in paralegal studies,[56] are typically forbidden from giving legal advice and advocating in court, and the lawyers who employ them must supervise and take responsibility—including derivative sanctions for UPL—for their work.[57] Given the limitations on paralegals' role, it would be inaccurate to characterize them as a separate class of legal professionals; as the name suggests, they are considered paraprofessionals.

State judiciaries preserve the unified bar not only by enforcing their UPL laws but also through their inaction. State judiciaries, which are authorized to decide who may practice law, could establish additional law-related professions. They could make room for individuals to render discrete legal services independently rather than requiring the time, expense, and ordeal of a three-year legal education and the further time, expense, and ordeal of a memorization-based bar examination to obtain a general law license. Very sparingly do courts use this authority, even though the system of general licensure makes legal assistance unaffordable for low- and middle-income people.[58]

B. The Lawyer Licensure Process

The lawyer licensure process does not ensure competency and, as a result, does not accomplish its purpose. The primary purpose for any professional licensing—whether for doctors, engineers, surveyors, or others—is protection of the public. Courts repeatedly have upheld state licensing requirements as necessary for this protection.[59] Attorney licensing is no different, and we do not suggest that a wholly unregulated market should exist for the delivery of legal services. We suggest the profession take a hard look at the costs, broadly defined, of today's lawyer licensure

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LAB. STAT., *Paralegals and Legal Assistants*, *in* OCCUPATIONAL OUTLOOK HANDBOOK, https://www.bls.gov/ooh/legal/paralegals-and-legal-assistants.htm [https://perma.cc/6WH8-H74N] (last modified Aug. 29, 2024).

56. *See, e.g.*, *Qualified Paralegal Studies Programs*, N.C. STATE BAR PARALEGAL CERTIFICATION, https://www.nccertifiedparalegal.gov/for-paralegals/how-to-get-certified/qualified-paralegal-studies-programs/ [https://perma.cc/VN5K-48Q4].

57. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983).

58. *See generally* 2022 Justice Gap Study, *supra* note 1.

59. *See, e.g.*, 360 Virtual Drone Servs. LLC v. Ritter, 102 F.4th 263, 279 (4th Cir. 2024).

requirements and recognize that the costs far exceed the benefits of protecting the public.

Attorney licensure today generally requires a bachelor's degree, admission to and graduation from an accredited law school,[60] passage of the Multistate Professional Responsibility Exam (MPRE),[61] passage of a state-sanctioned bar examination,[62] and satisfaction of certain state-sanctioned character and fitness standards.[63] One might assume that each of these requirements, save the bachelor's degree, would focus on ensuring the competence of a newly licensed lawyer. Yet, while each of these may contribute to gaining competence, none ensures it.[64]

We begin with the law school graduation requirement. Law schools decide whom to admit, and therefore who ultimately can practice law.[65] Admission to law school demands academic excellence, primarily reflected through numerical factors—including undergraduate grade point averages and standardized test scores. The data are clear that while these metrics may

60. Seven states do not require law school as a precursor to sitting for a bar exam and obtaining a license to practice. *See* Griggs, *supra* note 27. With respect to law school accreditation, states determine what is required. Most states require accreditation by the American Bar Association (ABA), but there are exceptions. For example, graduates of Wisconsin law schools have a diploma privilege in Wisconsin. *Id.* Recently, the Indiana Supreme Court created a path for graduates of non-ABA accredited schools to petition for a waiver to take the bar exam, which it arguably did to allow graduates of Purdue Global Law School to sit for the bar exam. *See* Order Amending Admission and Disciplinary Rules, Cause No. 24S-MS-1 (Ind. Feb. 15, 2024). California has long permitted graduates of non-ABA accredited schools to sit for its exam, if certain other requirements are met. Griggs, *supra* note 27.

61. Wisconsin and Puerto Rico are the only jurisdictions that do not require the MPRE. *See About the MPRE*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mpre/about-mpre [https://perma.cc/3XXT-T2DB].

62. Graduates of the University of Wisconsin Law School and Marquette University Law School may be admitted in Wisconsin via diploma privilege. *See Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS., https://www.wicourts.gov/services/attorney/bar.htm [https://perma.cc/Q3NH-RF8W]. Some states are experimenting with new pathways to licensing, including supervised practice in lieu of a bar exam. *See, e.g.*, *The Oregon Supervised Practice Portfolio Examination*, OR. LICENSURE PATHWAY DEV. COMM. (Aug. 2, 2023), https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf [https://perma.cc/VV53-ZWZB] (detailing the requirements for Admission under the program and providing "[c]andidates who successfully complete the program are eligible for admission to the Oregon State Bar without taking the Uniform Bar Examination or Model Professional Responsibility Examination."). For more on alternative pathways, see Jordan Furlong, *The New Apprenticeships*, SUBSTACK (Nov. 14, 2023), https://jordanfurlong.substack.com/p/the-new-apprenticeships [https://perma.cc/L87J-GJGA].

63. *See* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 598–603 (1985).

64. *See supra* note 29.

65. Jordan Furlong, *The Law School Gatekeepers*, SLAW (Oct. 13, 2022), https://www.slaw.ca/2022/10/13/the-law-school-gatekeepers/ [https://perma.cc/4PSG-W8VF].

predict law school success[66] and even bar exam success,[67] they do not predict competence in the practice of law.[68]

Law schools often resist modifying their required curricula even as studies on what makes a competent lawyer in practice reflect a need for curricular change.[69] And when law schools make curricular charges, most are simply ad hoc additions and not thoughtful integrations or wholesale revisions targeted for practical competency. While every law school purports to teach problem solving, legal research and analysis, and written communication—most do not require (and many do not provide) training in other necessary skills, including alternative dispute resolution, counseling, listening, negotiation, and project management and organization.[70] When these subjects are taught, the courses are electives, frequently taught by under-paid practitioner adjuncts or non-tenure track "skills" faculty who, while perhaps equally or better-qualified to teach, often lack integration in the law school community, including input into curricular decisions.[71] These courses are like adding rooms to our old house that, while inviting and worthwhile, are neither equal in stature nor integrated into the primary living space. The premise is that students will gain basic legal knowledge and the ability to "think like a lawyer" through the required classes and will learn certain other necessary skills through the mosaic of elective courses and experiences. However, there is no evidence that this typically three-year experience produces professionals ready to represent clients independently with even the minimal competence required by the professional rules of

66. *See* Lily Knezevich & Wayne Camara, *The LSAT Is* Still *the Most Accurate Predictor of Law School Success*, LSAC, https://www.lsac.org/data-research/research/lsat-still-most-accurate-predictor-law-school-success [https://perma.cc/5WRP-6LPG].

67. *See* Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205, 215 n.117 (2016).

68. *See, e.g.*, Matt Spencer, *The LSAT and Its Lack of Relevance to Lawyering*, LEGAL MGMT., https://www.alanet.org/legal-management/2023/february/columns/the-lsat-and-its-lack-of-relevance-to-lawyering [https://perma.cc/6XX5-3XFX].

69. *See* JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 61 (2022).

70. *Id.* at 60–65.

71. *See* Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 9 (2013) (observing that law schools "divide[] responsibility for the law school curriculum, significantly outsourcing lawyering skills instruction to adjunct professors or assigning it to faculty members in job statuses that give them less power and authority in faculty governance.").

conduct.[72]

Even if a legal education today could guarantee competence, which it cannot, it is cost-prohibitive for many and contributes to the access to justice gap.[73] The average sticker price for law school today exceeds two hundred thousand dollars, with tuition alone accounting for two-thirds of this amount.[74] Most students pay only some fraction of this total because of tuition discounting by law schools.[75] However, private law school graduates in 2022 borrowed an average of $135,183 for their law degree, while those graduating from public law schools in the same year borrowed an average of $91,643.[76] This cost does not account for the wages lost while attending law school.[77] And these costs are not equally distributed. Debt for African American and Latinx students has increased in the last fifteen years, while that for white students has decreased.[78] Nearly half of all students of color have over $100,000 in law school loans.[79] A graduate with only $100,000 debt, at the current seven percent interest rate, would need to pay $775/month for twenty years to service this debt. This burden is unsustainable and shameful, particularly because studies show that law school fails to equip these students with the skills necessary for competent practice.[80] Instead, higher ranked law schools often focus on narrow academic fields and lower ranked schools focus on bar passage. Neither focus ensures practical competency.

Law schools' focus on bar passage is understandable. Students paying for law school should expect their education to afford them the best chance

72. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

73. *See* 2022 Justice Gap Study, *supra* note 1, at 7–12.

74. *See* Melanie Hanson, *Average Cost of Law School*, EDUC. DATA INITIATIVE, https://educationdata.org/average-cost-of-law-school [https://perma.cc/9F25-F35R] (last updated Aug. 27, 2024).

75. *See Cost of Attendance: Net Tuition for U.S. Law Schools*, LAWHUB, https://www.lawhub.org/trends/net-tuition [https://perma.cc/3K96-BXCZ].

76. *Id.*

77. Law school requires five to six semesters of study, with the majority of schools offering the coursework only in a three-year option, which requires payment of six semesters of tuition and a loss of the equivalent time in lost wages.

78. *See* LAW SCH. SURV. OF STUDENT ENGAGEMENT, THE CHANGING LANDSCAPE OF LEGAL EDUCATION: A 15-YEAR LSSSE RETROSPECTIVE 7 (2020).

79. *Id.*

80. *See* DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 58 (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [https://perma.cc/Y5JQ-GVQL].

to pass any required licensing test. The problem is the licensing tests are misaligned with the practice of law, both in form and substance.[81] Licensing tests for lawyers require extensive memorization, something rarely required today of any lawyer with a smartphone. Law students pay thousands of dollars after graduating from law school to learn test-taking strategies and most forgo paid work and other opportunities for weeks before the test to memorize and practice these strategies. Perhaps most problematic: Data from the ABA show that racial and ethnic minority test takers consistently have lower pass rates than white test takers.[82]

Substantively, these licensing tests do not assess the primary capabilities lawyers need to represent clients competently, including the ability to interact effectively with clients, manage projects, see the "big picture," cope with stress, and learn continuously.[83] Perhaps this is because these skills are difficult, if not impossible, to assess at scale. Not surprisingly, recent data show that bar exam success is not predictive of effectiveness in the practice of law.[84] Early and seasoned lawyers alike anecdotally agree. While the soon to be implemented "NextGen" Bar Exam intends to "test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing profession,"[85] one must wonder whether any standardized test can keep up with the pace of change in today's law practice, where the requirements for competence are not static. The revised test has been in development for years, with task force research beginning in 2018 and final recommendations released in April 2021, followed by a five-year implementation period.[86] The changes in legal practice since implementation, including the last year's onslaught of generative artificial intelligence, will impact what practicing lawyers need

81. *See* Deborah Jones Merritt et al., *Practice-Ready Licensing*, THE PRACTICE (Jan./Feb. 2024), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/rethinking-licensure/practice-ready-licensing/ [https://perma.cc/9EJT-4UQF].

82. *See Summary Bar Pass Data: Race, Ethnicity, and Gender*, AM. BAR ASS'N (2024), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2024/summary-race-ethnicity-gender.pdf [https://perma.cc/JTW4-JB74].

83. *See* HOWARTH, *supra* note 69, at 71–72 (citing MERRITT & CORNETT, *supra* note 80, at 30).

84. *See, e.g.*, Jason M. Scott et al., *Putting the Bar Exam to the Test: An Examination of the Predictive Validity of Bar Exam Outcomes on Lawyering Effectiveness* 2 (AccessLex Inst., Working Paper No. 23-03, 2023).

85. *FAQs About Recommendations*, NEXTGEN, https://nextgenbarexam.ncbex.org/faqs/ [https://perma.cc/DL94-S2DL]; *see also* Griggs, *supra* note 27.

86. *See* TESTING TASK FORCE, NATL. CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE 23 (2021).

to know. The legal profession's method of evaluation lacks the nimbleness to pivot quickly when the skills and knowledge necessary for lawyer competence change, as they increasingly do today.

The licensure process is not only inaccessible, inefficient, and biased, but paradoxically, it also fails to ensure competence, which is its primary justification. That the process is flawed does not mean that all newly licensed lawyers lack competence to provide any legal services. However, a lawyer's general license authorizes practice in all areas of law in the state of licensing, from day one.[87] This is the nature of our unified system: Individuals either have a general license to perform *any* legal service or are prohibited from performing most or *all* legal services. Except for a few bad apples, lawyers typically provide competent representation to their clients, but not as a proximate result of the present licensure system. Rather, they develop competence throughout their careers through varied experiences and limit their practices to matters within their capabilities. And the public is seemingly protected from those who fail to do so through regulatory mechanisms that we discuss next.

C. Regulating Lawyers' Competence Post-Licensure

While the pre-licensure system does not ensure competence, the regulation of generally licensed lawyers incorporates mechanisms purporting to ensure lawyers engage in ongoing training and education, formally and informally. This educational continuum "continues throughout the lawyer's professional life."[88] Indeed, a vast majority of this post-licensure development occurs while the lawyer is actively delivering legal services to clients, beginning with work as a junior lawyer supervised by a more experienced practitioner in the same workplace. It also occurs through collaboration with co-counsel, mentorship, association with other lawyers, and other formal and informal partnerships. Practicing lawyers learn in real time, on the job, and in association with other lawyers how to conduct a representation—including by conducting a representation. They learn by doing.

Traditionally, lawyers have also engaged in self-study by observing other lawyers in court, reading advance sheets while waiting for clients, and

87. *See supra* note 42.
88. MACCRATE REPORT, *supra* note 29, at 3.

engaging with more or differently experienced lawyers in bar associations. While maybe less so today, lawyers still engage in self-study, formally and informally, including through continuing legal education (CLE). These CLE programs help lawyers to stay abreast of changes in their practice areas and in the profession as a whole. Some programs also offer networking opportunities, though the rise in online CLE delivery diminishes this benefit. However, not all states require CLE, and where CLE is mandatory, the content and attendance requirements are typically modest and arguably symbolic. There is little quality control in the provision and delivery of most CLE programs.[89] Furthermore, absent certain requirements for state-certified specialists, lawyers are not required to attend CLEs relevant to their practice area.[90]

Despite the lack of rigorous CLE and other self-study requirements, every lawyer is subject to overlapping mechanisms that help ensure they do not undertake work for which they are unprepared, and that they competently perform the work they undertake. These mechanisms are more effective today than they used to be.

A primary mechanism is self-restraint. Lawyers are trusted to engage in self-restraint, and they usually do. Most lawyers care about their clients and do not want to do harm, and therefore, refuse work they cannot competently handle. However, lawyer regulation does not solely rely on a hope or presumption of voluntary self-restraint. Other mechanisms exist to incentivize self-restraint. First, the professional conduct rules explicitly require lawyers to decline work they cannot competently handle.[91] Lawyers are thereby incentivized to work only within their current abilities because they risk discipline if they fail to competently represent others. Another incentive is the parallel risk of civil liability. Finally, lawyers' interest in protecting their reputations within and outside the legal community encourages self-restraint.

The responsibilities of supervisory lawyers are a second mechanism to ensure competence. Most lawyers begin their practice in office settings

89. *Mandatory CLE*, AM. BAR ASS'N, https://www.americanbar.org/events-cle/mcle/ [https://perma.cc/BV95-XD5E].

90. *See The Why and How of Becoming a North Carolina Board Certified Legal Specialist*, N.C. STATE BAR LEGAL SPECIALIZATION, https://www.nclawspecialists.gov/for-lawyers/become-a-board-certified-specialist [https://perma.cc/C8U4-BZLE]; *Mandatory CLE*, AM. BAR ASS'N, https://www.americanbar.org/events-cle/mcle/ [https://perma.cc/BV95-XD5E].

91. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

working with more senior lawyers.[92] Professional conduct rules require that supervisory lawyers in these settings ensure the work of junior lawyers is competent,[93] and the risk of discipline or malpractice liability incentivizes these supervisors to comply.[94] Supervisory lawyers also have reputational concerns, individually and for their firms; this too incentivizes these supervisory lawyers. Additionally, there are financial incentives to ensure the competent work of junior lawyers, not only in traditional law firm settings that seek to maximize profit, but also in non-profit organizations that rely on outside funding which could be jeopardized by disciplinary actions against the junior or the supervising lawyer, malpractice claims, or reputational harm.

A third mechanism is the market itself, which contributes in diverse ways across client demographics to ensure competence. Clients who can afford lawyers frequently hire the best lawyers. Organizational clients and other highly sophisticated parties are usually capable of selecting capable representatives and overseeing their work.[95] For other prospective clients, there are more lawyers and more information available about them than ever before. Those who are aware they need legal assistance can find this information.[96] While the market imperfectly protects the interests of individuals, especially the most vulnerable, it is an additional backstop that protects the public from some, if not most, incompetent providers.

Beyond these mechanisms are other incentives that drive competency. Other entities, in addition to state regulators, may have jurisdiction over the lawyer's services. These bodies, such as a federal or state agency before

92. *See* NAT'L ASS'N FOR L. PLACEMENT, CLASS OF 2023 NATIONAL SUMMARY REPORT (2024), https://www.nalp.org/uploads/Research/Classof2023NationalSummaryReport_final.pdf [https://perma.cc/68D5-CXSK] (revealing that 98.2% of reporting 2023 law school graduates went to firms of at least one other lawyer).

93. MODEL RULES OF PRO. CONDUCT r. 5.1(b) (AM. BAR ASS'N 2020) (providing that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.").

94. *See* MODEL RULES OF PRO. CONDUCT r. 5.1(c)(2) (AM. BAR ASS'N 2020).

95. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 872 (1992) ("[C]orporate clients, with their superior ability to monitor and control lawyer conduct, have the power both to press their lawyers to act in ways that jeopardize systemic norms and the rights of third parties, and to protect themselves against any loss of zealous advocacy or individual autonomy that might otherwise follow from an increase in external regulation.").

96. *Cf.* 2022 Justice Gap Study, *supra* note 1, at 49 (noting "[a]mong low-income Americans with at least one reported problem, only 5% knew that a legal professional could help resolve all of the types of problems they experienced").

whom the lawyer is appearing, help ensure competence through their own regulations. In addition, judges have inherent power to sanction lawyers who engage in misconduct, including incompetence, in proceedings over which the judges preside.[97] Sanctions by government agencies or judges would not only harm the lawyer's reputation but could also put the lawyer's license to practice at risk and enhance the risk of malpractice claims. Malpractice insurers may also, through the contractual terms of the insurance policies, provide incentives or require actions that promote competence.[98]

All of these overlapping regulatory mechanisms, which are not mutually exclusive, contribute to developing practicing lawyers' competency. Most importantly for our purposes, the profession's general acceptance of this regulatory system suggests confidence that it protects the public by discouraging lawyers from taking responsibility for work that they cannot perform competently.

III. FEDERAL ADMINISTRATIVE AGENCIES' INROADS INTO THE UNIFIED BAR

Some of the most significant inroads into the lawyer's monopoly have been made by federal administrative agencies. For decades, many have adopted regulations allowing individuals who are not lawyers to practice law before the agency, in some cases pursuant to certification requirements.

97. *See, e.g.*, Gardner v. N.C. State Bar, 341 S.E.2d 517, 519 (N.C. 1986) (recognizing the "court's inherent power to deal with its attorneys" and noting that the power is held concurrently with the State Bar.) While judges do not often sanction lawyers, as compared with disciplinary agencies, their ability to so may serve as a deterrent. That said, we regard trial judges' more important regulatory function as a pedagogic one, rather than disciplinary one—namely, to point out legal services providers' errors and failings, so that providers can improve their work. This is a function that many trial judges have traditionally served when inexperienced advocates appear before them. *See, e.g.*, United States v. Copening, 34 M.J. 28, 31 (C.M.A. 1992) (the military court's training program for advocates provides that "[t]rial judges are encouraged to critique inexperienced counsel after each of their first few trials as lead counsel until the judge concludes that no further critique is needed."); Cal. Sup. Ct. Comm'n on Jud. Ethics Ops., Formal Op. 2021-18 (2021) (within limitations, judges may critique the trial lawyers after the proceeding ends).

98. James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 72 (2006) ("Proactively, insurers encourage lawyers to participate in law office audits. These audits serve to identify the practices the lawyer actually has in place and once those practices are identified, to replace deficient practices, i.e., those that raise the risk of a malpractice claim, with practices that reduce that risk. Alternatively, insurers refuse to insure lawyers who fail to use or implement law office procedures demanded by insurers as a condition to extending coverage.").

Under the United States Constitution's Supremacy Clause, these federal regulations supersede state UPL laws.[99] As we will explain here and in Part IV, when compared with the current state models for certified legal services providers, the federal agency regulations and the state court rules differ in fundamental ways. The following descriptions and critiques of existing models will serve as the point of departure in Part V for our discussion and analysis of the interrelated considerations that should shape the establishment of new types of certified providers.

A. Federal Administrative Agency Models

At a time when state courts were uniformly hostile to the idea of certifying individuals other than lawyers to offer discrete legal assistance, federal administrative agencies pioneered the establishment of alternative categories of legal services providers to represent parties in agency proceedings. The reason was either because the alternative providers might be better qualified than lawyers (as in patent and tax matters) or because lawyers were unaffordable or in low supply (as in immigration and benefits matters).[100] State UPL restrictions posed no barriers. Although the Administrative Procedure Act does not itself determine who may represent parties in agency proceedings, it allows an individual agency to promulgate regulations governing representation before the agency, and these regulations preempt states' UPL laws.[101]

Dozens of agencies currently allow parties to be represented by someone who is not a lawyer.[102] Among them are the Social Security

99. U.S. CONST. art VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land").

100. Some state agencies also permit representation by individuals other than lawyers before certain administrative agencies. *See, e.g.*, Harkness v. Unemployment Comp. Bd. of Rev., 920 A.2d 162, 169 (Pa. 2007) (holding that "non-attorney employer representatives at unemployment compensation proceedings are not engaging in the practice of law").

101. 5 U.S.C. § 555(b) (1966); Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 384–85 (1963).

102. While it is nearly impossible to identify all of the agencies that permit representation by individuals other than lawyers, a 2023 Legal Aid Interagency Roundtable (LAIR) report identified the following LAIR member agencies (which have relevant administrative proceedings) as permitting individuals to be "represented or otherwise assisted by nonlawyers as well as lawyers": Department of Homeland Security, Department of Labor, Department of Transportation, Department of Education, Equal Employment Opportunity Commission, Department of Justice, Department of Health and Human Services, Department of State, Department of Treasury, Department of Agriculture, Department of Veterans Affairs, Department of the Interior, Social Security Administration, the U.S. Agency for

Administration (SSA), the Department of Agriculture (USDA), the National Labor Relations Board (NLRB), the Patent and Trademark Office (USPTO), the Internal Revenue Service (IRS), and the Department of Homeland Security (DHS).[103] This does not mean that everyone who cannot afford a lawyer will receive someone else's assistance in federal administrative proceedings.[104] But parties in agency adjudications benefit when they do secure assistance, including from individuals who are not lawyers.[105]

In establishing mechanisms for individuals other than lawyers to represent parties in agency proceedings, agencies have essentially the same concerns as courts when they license lawyers. Agencies have an interest in ensuring that legal services providers represent parties competently and in accordance with applicable rules and norms. They therefore generally require other providers to adhere to the same or similar rules and procedures as lawyers.[106] Some regulations demand even more of other legal services providers than courts generally demand of lawyers. For example, the SSA allows "non-attorney representatives" to assist parties in disability proceedings, but only if they satisfy continuing education requirements and carry professional liability insurance.[107]

International Development, and Environmental Protection Agency; it is an incomplete list. LEGAL AID INTERAGENCY ROUNDTABLE, U.S. DEP'T OF JUST., ACCESS TO JUSTICE IN FEDERAL ADMINISTRATIVE PROCEEDINGS: NONLAWYER ASSISTANCE AND OTHER STRATEGIES 75 (2023).

103. *See* 20 C.F.R. § 404.1705(b) (2024); 7 C.F.R. § 1.26 (2024); 29 C.F.R. § 102.38 (2024); 37 C.F.R. § 11.5(a) (2024); 31 C.F.R. § 10.3 (2024); 8 C.F.R. § 1292.1 (2024), respectively.

104. *See* PAMELA HERD ET AL., ADMIN. CONF. OF THE U.S., IDENTIFYING AND REDUCING BURDENS IN ADMINISTRATIVE PROCESSES 18, 45–46 (2023), https://www.acus.gov/sites/default/files/documents/Identifying-and-Reducing-Burdens-in-Administrative-Processes-Final-Report-2023.12.05_2.pdf [https://perma.cc/N7G7-HST8] (noting the need for increased representation, process simplification, and informational access strategies).

105. *Id.* at 14 (citing Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 52 (2010)). Legal aid providers who have assisted others with agency proceedings have noted the burdens for those without representation, and studies have shown that representation in the initial stages of disability benefits determinations result in better outcomes, including earlier disability awards. *See id.* at 42–43 (citing Hilary W. Hoynes et al., *Legal Representation in Disability Claims* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29871, 2020), https://www.nber.org/papers/w29871 [https://perma.cc/LJ5D-ZX8B]).

106. Nearly fifty agencies have professional conduct rules in their regulations. While these rules vary in form and substance, most focus on the advocate's actions in the agency adjudication. GEORGE M. COHEN, ADMIN. CONF. OF THE U.S., REGULATION OF REPRESENTATIVES IN AGENCY ADJUDICATIVE PROCEEDINGS 11–13 (2021), https://www.acus.gov/sites/default/files/documents/Cohen%20Final%20Report%20December%202021%20GY%20formatted.pdf [perma.cc/JT2T-7964].

107. *See Direct Payment to Eligible Non-Attorney Representatives*, SOC. SEC. ADMIN. (2024), https://www.ssa.gov/representation/nonattyrep.htm?tl=23%2C24 [https://perma.cc/U326-WD6X].

Federal administrative agencies have not adopted a uniform approach to authorizing and regulating these providers of legal assistance.[108] Some agencies carve out areas where anyone can assist or represent another, without special training or certification.[109] Other agencies have certification or accreditation requirements for those providing legal assistance;[110] and some agencies even extend these requirements to lawyers.[111] That these agencies take different approaches is unsurprising, since administrative agency proceedings vary. Agencies' adjudicative proceedings range from written submissions to evidentiary hearings to appellate arguments, and not all are adversarial proceedings. These variations in process and substantive specialties make it difficult to determine whether agencies' certification requirements correspond to the complexity of the applicable law or processes, to clients' sophistication and ability to oversee their representatives, to the significance of the stakes, or to other potentially relevant considerations.

B. Federal Agency Mechanisms for Ensuring Competence

Federal agencies have adopted three predominant types of mechanisms to promote competent and ethical representation: (1) market and administrative regulation; (2) certification; and (3) institutional regulation. These mechanisms are not mutually exclusive. All agencies rely on the first. Some do so exclusively. In such instances, clients and the agency regulate

108. While we are focused on individuals representing others in agency proceedings, it is worth noting that agencies may also permit "non-representational assistance" by social workers, case managers, community volunteers, and others. *See* LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 102, at 31. These individuals help with forms, information access, navigating proceedings, and more. The presumption seems to be that they are not practicing law. *Id.* We believe the lines between these roles—representational and non-representational assistance—are blurred. We do not address this distinction more fully, as our focus is on individuals clearly engaging in the practice of law.

109. *See, e.g.*, 29 C.F.R. § 1614.605 (2024), which provides that a complainant in an Equal Employment Opportunity Commission hearing "shall have the right to be accompanied, represented, and advised by a representative of complainant's choice."

110. *See, e.g.*, 31 C.F.R. § 10.3 (2024).

111. While some agencies accredit anyone who is a licensed lawyer, not all do so. For example, the Department of Veterans Affairs accredits three types of representatives to assist benefits claimants: (1) Veterans Service Organization representatives, (2) attorneys, and (3) agents. *See VA Accredited Representatives FAQs*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/vso/ [https://perma.cc/FPR9-RBJR]. The accreditation requirements for licensed lawyers include an application, character and fitness requirements, and specific continuing education requirements. *See* 38 C.F.R. § 14.629(b) (2022).

legal services providers, who in some cases do not need to meet any education or testing requirements.[112] Many other agencies combine regulation with market forces and agency certification requirements. Generally, these requirements limit those who may provide legal assistance to persons who have demonstrated the requisite knowledge and skill. Immigration proceedings use an additional regulatory mechanism, requiring that all legal services providers other than lawyers, be employed in a not-for-profit setting approved by the Department of Justice (DOJ), presumably so that the employer can help ensure the providers' provision of competent and ethical services.[113]

i. Agencies that Permit Representation Solely with Client and Administrative Oversight

Some federal administrative agencies permit anyone to represent a party, without regard to their qualifications and without a lawyer's supervision. For example, the SSA allows claimants to "appoint any person who is not an attorney" to represent the claimant before the agency.[114] Similarly, the NLRB permits representation by an "attorney or other non-attorney representative;"[115] and the USDA allows parties to appear "by counsel or other representative" in certain matters.[116] These representatives are not required to be certified and may include family, friends, or others, whether or not they have experience or routinely provide such assistance.

Implicitly, agencies that allow unaccredited providers to provide legal assistance use many of the same regulatory mechanisms that apply to lawyers, aside from the licensing processes. First, parties themselves have a role in selecting and overseeing their providers. Presumably, those who are not friends or family but who provide recurring assistance in the community develop a reputation, so that parties will not select representatives with a bad reputation. Parties also can vet potential representatives before entrusting them with their administrative matters.

112. *See infra* Part III.B.i.
113. *See infra* Part III.B.iii.
114. 20 C.F.R. § 404.1705(b) (2024).
115. 29 C.F.R. § 102.21 (2024); *see also id.* §§ 102.38, 102.66(a).
116. 7 C.F.R. § 1.26 (2024). The USDA expressly excludes from this provision certain formal adjudicatory proceedings, which permit representation "in person or by attorney of record." 7 C.F.R. § 1.141(c) (2024).

Parties can oversee those providers and can discharge, and later criticize, those who neglect the matter or perform poorly. There is nothing to indicate that parties to federal administrative proceedings routinely sue unaccredited representatives who perform poorly, but the theoretical possibility of civil liability may be an incentive to perform well.

Agencies also oversee the providers who appear before them. Dozens of agencies have their own rules of conduct and procedure that apply to all representatives, including family, friends, and others, even if they do not regularly represent others.[117] These requirements go beyond requiring competent representation, and in some cases, include nearly all the protections of the client-lawyer relationship. Most agencies—including the USDA and the NLRB, which allow anyone to represent claimants—incorporate by reference the state's rules of professional conduct, as well as other applicable standards, including statutes, executive orders, and regulations.[118] Other agencies promulgate their own rules. For example, the SSA rules, while less robust than the Model Rules of Professional Conduct, require representatives to "faithfully execute their duties as agents and fiduciaries," requiring representatives to act in the best interests of the claimant and implying that the relationship is comparable to that of client and lawyer.[119] The SSA rules expressly provide that the representative provide competent representation,[120] as well as satisfy other duties that are analogous to those of a lawyer. These duties include acting promptly and diligently, maintaining timely communications with the claimant, avoiding disruptive withdrawal from representation, and disclosing potential

117. *See* COHEN, *supra* note 106, at 11 (noting that "[n]early fifty agencies have published professional conduct rules in the Code of Federal Regulations (CFR), and these rules appear in twenty-six of CFR's fifty titles.").

118. *Id.* at 17; 7 C.F.R. § 1.26(b)(1) (2024) (providing that in USDA matters "[p]ersons who appear as counsel or in a representative capacity in any hearing or proceeding must conform to the standards of ethical conduct required of practitioners before the U.S. District Court for the District of Columbia, and to any applicable standards of ethical conduct established by statutes, executive orders and regulations."); 29 C.F.R. § 102.177(a) (2024) (providing that in NLRB matters "[a]ny attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.").

119. 20 C.F.R. § 404.1740(a) (2024).

120. *See* 20 C.F.R. § 404.1740(b)(3)(i) (2024) (defining competence as having the "knowledge, skill, thoroughness, and preparation reasonably necessary for the representation," including knowledge of "the significant issue(s) in a claim" as well as "reasonable and adequate familiarity with the evidence in the case" and "a working knowledge of the applicable [law]").

character and fitness issues to the agency.[121] The rules even protect privileged communications between the claimant and the representative and define what is subject to this privilege.[122] These SSA rules apply to all representatives, even if the claimant chooses an inexperienced family member to serve as representative.

Agency rules of conduct and procedure, whether incorporated by reference or drafted by the agency, provide a standard of conduct by which the agency and its adjudicatory officers can serve a regulatory function. Agency lawyers, administrative law judges, and others who interact with a party's representative or who review the representative's written work can judge whether the work is incompetent or otherwise violates the agency's rules. They may intervene and seek to bar the representative from serving in that matter or in the future. Especially when the agency's interest in a fair adjudication is jeopardized, agency representatives may be motivated to intervene.

We are unaware of any studies questioning the adequacy of this combination of market forces and administrative rules and oversight. Perhaps the reasons are simply because agencies are not reporting problems and there are few studies of these providers' work.[123] Presumably, any problems would have been reported. Moreover, a 2023 report issued by the Department of Justice (DOJ) and a host of other federal agencies indicates that from the government's perspective, these providers have earned high marks. The report surveys the agencies that permit individuals other than lawyers to represent others, including those that do not require certification through education, prior experience, or testing, and observes that "federal agencies have also long recognized the importance of nonlawyer assistance in administrative proceedings."[124] The government's resounding support

121. *See* 20 C.F.R. § 404.1740(b) (2024).

122. *See* 20 C.F.R. § 404.1513(b) (2024).

123. *See, e.g.*, COHEN, *supra* note 106, at 13 (noting that a "question that would be useful to study is how the quality of representation provided by non-attorney representatives compares to that of attorney representatives."). Furthermore, it is not clear how frequently agencies discipline the representatives appearing before them, even when the representatives violate the rules of practice or procedure. *Id.* at 27–31.

124. *See* LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 102, at 25. The report stated:

> Expanding nonlawyer assistance is also important because in many communities it may be the only form of assistance available due to the lack of available lawyers, particularly in remote or rural areas or areas without law schools. Nonlawyer assistance can also increase the representation of the community

belies the UPL laws' assumption that one needs a law license to represent parties competently in legal matters, including adjudicative proceedings.

ii. Agency Certification of Legal Services Providers

Unlike the agencies discussed above, some agencies permit individuals who are not lawyers to represent clients only if the representative is certified—in effect, creating a new category of legal services provider. Such agencies independently determine their certification requirements, and most also subject certified providers to their rules of practice and procedure, whether they incorporate other entities' rules or draft their own.

The Patent and Trademark Office (USPTO), for example, has two tracks for certification—one for patent agents and the other for design patent agents. Patent agents are permitted to prepare, file, and prosecute patent applications, and design patent agents may do the same regarding design patents.[125] Applicants must satisfy educational requirements that are designed to ensure that patent agents have relevant scientific or technical knowledge and expertise, and that design patent agents have relevant artistic knowledge.[126] While the educational pre-requisites are relatively flexible, the requirement of a subject matter focus for each type of agent may help promote competence. That said, neither the USPTO nor any other agency requires a course of study that is as rigidly circumscribed as the legal profession, which generally requires a JD degree as a condition of entry. For example, patent agents may have a post-secondary degree or acceptable study in a recognized discipline or, in the alternative, successful completion of the Fundamentals of Engineering Exam.[127] Additionally, all applicants,

> served by those providing legal help, because the time and cost of attending law school and bar exam requirements can often create difficulty for members of a community to become licensed lawyers. When nonlawyers have close ties to the community, they can also be instrumental in helping people overcome any distrust for public institutions, potentially further increasing access to legal help and government programs.

Id.

125. *See* 37 C.F.R. § 11.5(b)(2) (2024); *see also* David Hricik, *Patent Agents: The Person You Are*, 20 GEO. J. LEGAL ETHICS 261, 262, 276 (2007).

126. *See* 37 C.F.R. § 11.7(b)(1) (2024).

127. *See* OFF. OF ENROLLMENT AND DISCIPLINE, U.S. PATENT & TRADEMARK OFF., GENERAL REQUIREMENTS BULLETIN FOR ADMISSION TO EXAMINATION FOR REGISTRATION TO PRACTICE IN PATENT CASES BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE 7–9 (2024), https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf [https://perma.cc/L3M4-VG47].

including lawyers, must pass a patent law exam.[128]

The USPTO has promulgated its own professional conduct rules governing all agents.[129] These rules, which apply to USPTO "practitioners," closely track the Model Rules of Professional Conduct for lawyers in both form and substance, including those regarding competence, confidentiality, conflicts of interest, safekeeping of client funds, and truthfulness to others.[130] Patent practitioners have their own member association, the National Association of Patent Practitioners (NAPP), with hundreds of members, including patent agents and patent lawyers.[131] The organization aims to "foster professionalism in the patent practitioner community, enhance day-to-day practice of practitioners, and to aid patent agents and patent attorneys in staying current."[132] NAPP serves the same function for patent practitioners as do the lawyer associations that provide educational, networking, and mentorship opportunities, all of which assist with lawyers' professional development.

The Internal Revenue Service (IRS) requires certification for individuals who are not lawyers to represent taxpayers before the agency, but its certification requirements are more open-ended than the USPTO's requirements. The agency certifies "enrolled agents" to represent taxpayers if they receive a passing score on a Special Enrollment Examination.[133] Unlike the USPTO, the IRS has no educational requirement, leaving it to applicants to obtain the education and training they need to pass the exam. The absence of an educational requirement places greater importance on other aspects of the certification and regulatory processes. It may presuppose that those incapable of providing competent representation will be denied certification, either because of self-restraint or failing the examination, or that enrolled agents who are not fully capable will limit themselves to work they can competently perform or will not be hired for work beyond their capability. Those who become enrolled agents (and

128. *Id.* at 1.

129. *See* 37 C.F.R. §§ 11.101, 11.901 (2024); *see also* Jon J. Lee, *Double Standards: An Empirical Study of Patent and Trademark Discipline*, 61 B.C. L. REV. 1613, 1617 (2020).

130. *See* 37 C.F.R. §§ 11.101, 11.901 (2024).

131. *See History*, NAT'L ASS'N OF PAT. PRACS., https://www.napp.org/history [https://perma.cc/E9V7-3LEZ].

132. *Id.*

133. *See Enrolled Agent Information*, INTERNAL REVENUE SERV., https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information [https://perma.cc/LKA2-PTER] (last updated Aug. 19, 2024).

others who practice before the agency, including lawyers and certified public accountants) are subject to the Regulations Governing Practice before the IRS, commonly known as Circular 230. These regulations are extensive—they cover admission to practice, duties owed to clients (many of which are analogous to duties of lawyers), and the rules and procedures for disciplinary proceedings.[134] These tax practitioners also have their own member association, the National Association of Enrolled Agents, which functions much like the NAPP for patent practitioners and serves as a mechanism to promote competence.[135]

In one of the most robust examples, continuing an administrative practice initiated in 1958 by the now-superseded Immigration and Naturalization Service (INS),[136] the Department of Justice (DOJ) certifies "accredited representatives" to represent a particularly vulnerable client population.[137] These DOJ-certified representatives may assist parties in certain immigration matters before the Department of Homeland Security (DHS) and/or the Executive Office of Immigration Review (EOIR).[138] Accredited representatives may be either partially or fully accredited.[139] Partially accredited representatives' services are limited to preparing immigration application forms and representing parties in interviews for asylum protection and visas; they are permitted to represent others before

134. *See* 31 C.F.R. §§ 10.20–10.38 (2024); *see generally* Michael Hatfield, *The Rise of Law and the Fall of Circular 230: Tax Lawyer Professional Standards, 1985–2015*, 24 FLA. TAX REV. 828, 841–847 (2021) (discussing legislative history and changes over time of professional ethics standards for tax lawyers).

135. *See* NAT'L ASS'N OF ENROLLED AGENTS, https://www.naea.org/ [https://perma.cc/KMQ3-KXT4].

136. *See* COHEN, *supra* note 106, at 4.

137. *See* 8 C.F.R. § 1292.1(a)(4) (2024).

138. *See* 8 C.F.R. § 1292.1 (2024); *see also* Brittany Benjamin, Note, *Accredited Representatives and the Non-Citizen Access to Justice Crisis: Informational Interviews with Californian Recognized Organizations to Better Understand the Work and Role of Non-Lawyer Accredited Representatives*, 30 STAN. L & POL'Y REV. 263, 306 (2019) ("[A]ccredited representatives have unique positions in their communities. They are strong, mission-driven, and thoughtful to their capabilities and limitations . . . . [W]ith proper support and collaboration, accredited representatives could become increasingly powerful champions of non-citizens' rights, and increasingly woven into the fabric of immigration law."); Beenish Riaz, *Envisioning Community Paralegals in the United States: Beginning to Fix the Broken Immigration System*, 45 N.Y.U. REV. L. & SOC. CHANGE 82, 117 (2021) (advocating for expanding the availability of accredited representatives).

139. *See* 8 C.F.R. § 1292.1(a)(4) (2024). For more on the program, see Michele R. Pistone, *Expanding the Legal Services Ecosystem: An Educational Model to Improve Access to Immigration Justice Through Legal Paraprofessionals*, 49 J.L. & EDUC. 487, 510–512 (2020).

DHS only.[140] Fully accredited representatives may provide a broader range of services and may represent clients in the Immigration Courts, before the Board of Immigration Affairs and DHS.[141]

Both classes of accredited representatives must satisfy character and fitness requirements and possess "broad knowledge and adequate experience in immigration law and procedure."[142] Those who seek full accreditation must also have "formal training, education, or experience related to trial and appellate advocacy."[143] There is no specific educational path or examination for either type of representative, provided they can show the necessary skills and knowledge. How the agencies should decide whether applicants have made the necessary showing is not specified. Both classes of representatives, whether they are practicing before DHS or EOIR, are subject to the EOIR Professional Conduct for Practitioners—Rules and Procedures, a robust set of rules that include many of the requirements for lawyers under the Model Rules of Professional Conduct, as well as a provisions for disciplinary proceedings and sanctions.[144]

The absence of a fixed educational requirement—in marked contrast to lawyer licensing—allows educational institutions flexibility to develop distinct training programs that may appeal to people with diverse backgrounds, experiences, and learning preferences; and to experiment with various combinations of classroom or remote teaching, simulation work, clinical teaching, and testing. Utilizing the flexibility afforded by the administrative regulations, Michele Pistone has designed an online program at Villanova University that trains students to become accredited representatives in immigration proceedings.[145] The program can evolve to account for graduates' experience and changes in the law, proceedings, and social conditions. The absence of a fixed education requirement allows other institutions to design alternative programs.

The DOJ has nothing but praise for federal administrative agencies'

140. *See* 8 C.F.R. § 1292.12(a) (2024).
141. *Id.*
142. *See id.* § 1292.12(a)(1)–(6).
143. *See id.* § 1292.12(c).
144. *See id.* § 1003.102 (EOIR); 7 C.F.R. § 292.3 (2024) (DHS). For an explanation of the coordination between these agencies, see COHEN, *supra* note 106, at 19.
145. *See VIISTA — Villanova Interdisciplinary Immigration Studies Training for Advocates*, VILL. UNIV., https://www1.villanova.edu/university/professional-studies/academics/professional-education/viista.html [https://perma.cc/QA84-YMZR].

certification requirements and the work of accredited representatives.[146] In contrast with the bar's intuition that representatives other than lawyers will exploit immigrant clients,[147] the report specially praises the work of these providers even in the most complex immigration cases, observing: "In [certain] proceedings, nonlawyer assistance is highly technical and complex, such as representation in a removal proceeding in immigration court, delivered by a highly trained professional."[148]

iii. Non-Profit Organization Oversight of Legal Services Providers

In immigration proceedings, the DOJ employs a unique regulatory mechanism for promoting competence: Both partially and fully accredited representatives must work for "recognized organizations," specifically non-profit or non-governmental organizations that DOJ finds acceptable.[149] Indeed, an individual cannot apply to become an accredited representative; an institution must apply on behalf of the individual.[150] These organizations are better qualified than noncitizen clients to ensure that the accredited representatives are capable and perform competently. They are positioned to support the accredited representatives' work.[151] Both the accredited

146. *See* LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 102, at 25.

147. *See* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92346, 92351–53 (Dec. 19, 2016) (summarizing comments on the proposed rules for DOJ accredited representatives). Lawyers opposed to legal practice by others have long pointed to immigrants' susceptibility to exploitation at the hands of non-lawyer "notaries." *See, e.g.*, Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 250–51 (1991). And it is undoubtedly true that immigrants are vulnerable to scams, including notario fraud. *See* Juan Manuel Pedroza et al., *Insurgent Citizenship: How Consumer Complaints on Immigration Scams Inform Justice and Prevention Efforts*, 37 GEO. IMMIGR. L.J. 369, 370 (2023). But the argument from notario fraud overlooks that notaries are *not* authorized to practice law in immigration matters or any other matters. Accredited representatives, who *are* authorized to represent parties in immigration proceedings, reportedly serve their clients well. *See* Benjamin, *supra* note 138, at 30; Riaz, *supra* note 138, at 116. Moreover, immigrants are more susceptible to exploitation by notaries precisely because of the limited availability of assistance from those who are legally authorized to provide it. *See* Mary Dolores Guerra, *Lost in Translation: Notario Fraud—Immigration Fraud*, 26 J. C.R. & ECON. DEV. 23, 36 (2011).

148. *See* LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 102, at 25.

149. 8 C.F.R. § 1292.11 (2024). A list of current recognized organizations may be found at: DEP'T OF JUST. RECOGNITION & ACCREDITATION PROGRAM, RECOGNIZED ORGANIZATIONS AND ACCREDITED REPRESENTATIVES ROSTER, https://www.justice.gov/eoir/page/file/942301/dl [https://perma.cc/RJ6B-VMES] (last updated on Oct. 21, 2024) (listing currently Recognized Organizations).

150. 8 C.F.R. § 1292.12(a) (2024).

151. *See* Michele R. Pistone, *The Crisis of Unrepresented Immigrants: Vastly Increasing the Number of Accredited Representatives Offers the Best Hope for Resolving It*, 92 FORDHAM L. REV. 893,

representatives and the recognized organizations are subject to sanction by the Board of Immigration Affairs, which provides the represented parties an additional protective mechanism.[152]

The DOJ encourages but does not require these organizations to have a licensed lawyer on staff; instead the organization must only establish "proof of knowledge, information, and experience" at the institution.[153] During the rulemaking process, some suggested that attorney supervision or mentoring within recognized organizations be required to deter the "improper handling of cases" and protect the public from "unscrupulous individuals" seeking accreditation.[154] The DOJ rejected this concern outright, noting that such requirements would increase the non-profits' costs and therefore frustrate the goal of increased access.[155] As Part IV shows, the DOJ's position is in marked contrast to the many state certification programs that require all providers who are not licensed lawyers to work in law offices or be supervised by a licensed lawyer.

IV. INROADS INTO THE UNIFIED BAR THROUGH STATE CERTIFICATION PROGRAMS

The access to justice crisis is nudging some state courts to take modest action. State courts could emulate the federal administrative agencies that certify classes of legal professionals to provide full-fledged legal

910 (2023).

152. *See* 8 C.F.R. § 1003.1(d)(5) (2024); Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92346, 92362 (Dec. 19, 2016).

153. 8 C.F.R. § 1292.11(e) (2024). Such evidence may include:

> a description of the legal resources to which the organization has access; an organizational chart showing names, titles, and supervisors of immigration legal staff members; a description of the qualifications, experience, and breadth of immigration knowledge of these staff members, including, but not limited to resumes, letters of recommendation, certifications, and a list of all relevant, formal immigration-related trainings attended by staff members; and any agreement or proof of a formal arrangement entered into with non-staff immigration practitioners and recognized organizations for consultations or technical legal assistance.

Id.

154. Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92346, 92350 (Dec. 19, 2016).

155. *Id.* at 92351.

representations in discrete areas of law or procedural settings.[156] However, state courts have largely rejected these administrative agency models, instead basing their new provider schemes on the current lawyer licensing model. Each state has its own requirements, processes, and nomenclature. The result is a hodgepodge of new legal services providers with different titles in different states who now occupy a tiny corner of the legal field, including some certified under pilot programs at risk of sunsetting. Some of these providers are merely guides who do not provide the kinds of legal services—legal advice, document drafting, and advocacy—that are considered the practice of law. For example, the "navigators" who provide legal information at the courthouse are expected to assiduously avoid giving legal advice.[157] Our focus is on new types of providers who are expressly certified by state courts to engage in the practice in the law, providing assistance for which one generally needs legal authorization.

Among these new types of legal services providers are Community Justice Workers in Alaska (and the analogous Limited Court-Access Advocates, currently proposed in Texas), Legal Document Preparers in California, Qualified Tenant Advocates in Delaware, and Housing Advocates in South Carolina. In Arizona, Colorado, New Hampshire, Oregon, and Utah, and in Texas's recent proposal, the title of new certified providers includes "paraprofessional" or "paralegal."[158] Most of these providers' work is limited to one or more areas of civil law, such as family law, eviction proceedings, consumer debt actions, domestic violence, or estate and probate law. No model of legal services provider is nationally recognized in the way that osteopaths, nurse practitioners, and others have become recognized alternatives to MDs in the medical field.

As discussed below, most existing state programs to certify new legal services providers have one or both of the following limitations: (1) most providers cannot provide the full range of services needed to address a client's particular legal problem; and (2) most providers are, despite their

156. *See* LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 102, at 25.

157. For a description of these programs, see MCCLYMONT, *supra* note 10.

158. On August 6, 2024, the Texas Supreme Court preliminarily approved rules allowing these Licensed Legal Paraprofessionals. The court order also preliminary approved rules permitting Licensed Court-Access Assistants, which function much like the Community Justice Workers in Alaska. *See* Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633 (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U]; *see also infra* Appendix A.

certification, subject to lawyer supervision, in perpetuity. Both features hinder access to justice, increase costs, and create dependency on lawyers. And both are unnecessary to protect the public from harm, as the federal administrative agency models show.

A. The Spectrum of Current State Programs

The current state programs exist on a spectrum, with a variable range of permitted services and supervision requirements. At one end of the spectrum are state programs that strictly circumscribe the provider's scope of service and independence; at the far other end are state programs that permit full-scope legal representation by independent certified providers. We begin with the most circumscribed programs, including South Carolina's Housing Advocates. The state court provisionally approved these advocates in 2024 to resolve a lawsuit brought by the South Carolina State Conference of the NAACP challenging the reach of the state's UPL law.[159] The Housing Advocates in the pilot program are allowed to serve only a very limited role in eviction cases: They may encourage unrepresented tenants to ask for a hearing and identify common defenses, but they may not offer more extensive advice, draft an answer, or negotiate or advocate on tenants' behalf.[160] The work of California's Legal Document Assistants is similarly circumscribed: They may prepare documents at the client's direction in a range of civil legal areas, but they may not suggest what the client needs or what forms the client must file.[161] Both groups in South Carolina and California must be supervised by licensed lawyers.[162] Alaska's Community Justice Worker and Texas's proposed Limited Court-Access Assistant programs are also limited in scope and require supervision.[163]

In the middle of the spectrum, there are two types of programs. The first type of program limits the scope of services but allows providers to practice

159. *See In re* S.C. NAACP Hous. Advoc. Program, 897 S.E.2d 691, 693 (S.C. 2024).

160. *Id.*

161. *See What Is a Legal Document Assistant?*, CAL. ASS'N OF LEGAL DOCUMENT ASSISTANTS, https://www.calda.org/What-is-a-Legal-Document-Assistant-(LDA) [perma.cc/V9K6-C3BE].

162. *Id.*; *see also S.C. NAACP*, 897 S.E.2d at 697.

163. *See* ALASKA BAR R. 43.5; *Advocate Training Brochure*, ALASKA LEGAL SERVS. CORP., https://www.alsc-law.org/wp-content/uploads/2022/10/Advocate-Training-Brochure-v922.pdf [https://perma.cc/UEH6-PE82]; Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633 (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U].

independently. Examples include Colorado's Licensed Legal Paraprofessionals, Utah's Licensed Paralegal Practitioners, and Oregon's Licensed Paralegals. Colorado providers can, without supervision, advise clients about their family law matters, prepare relevant documents, and accompany clients to court for emotional support and to answer factual questions.[164] They may not, however, advocate or make legal arguments on clients' behalf.[165] Likewise, Oregon's Licensed Paralegals and Utah's Licensed Paralegal Practitioners may independently accompany clients to court proceedings but may not provide full-throated advocacy.[166] A final example is Washington's Limited License Legal Technicians (LLLTs), which the state supreme court established to independently represent clients in family law matters, but not advocate in many court proceedings.[167] Although the program was sunset in 2020, LLLTs who were certified may continue to practice.[168]

The second type of program in the middle of this spectrum permits full-scope representation but only with supervision. Examples include Minnesota's new Legal Paraprofessional Pilot Project, which allows providers to offer a range of legal assistance in family court and landlord-

164. *See* COLO. R. CIV. P. 207.1.

165. *Id.*

166. *See* RULES FOR LICENSING PARALEGALS r. 11.1–11.2 (OR. STATE BAR 2023), https://www.osbar.org/_docs/rulesregs/RulesforLicensingParalegals.pdf [https://perma.cc/872F-EGWL]; UTAH CODE OF JUD. ADMIN. r. 14-802(c)–(d); *see also Licensed Paralegal Practitioner*, UTAH STATE CTS., https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html [https://perma.cc/8BV6-7BEU].

167. *See* WASH. ADMIN. & PRAC. R. APR 28(H)(5), https://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_28_00_00.pdf [https://perma.cc/5SBS-LKDR] (prohibiting LLLTs from representing "a client in court proceedings, formal administrative adjudicative proceedings, or other formal dispute resolution process," unless otherwise permitted).

168. *Limited License Legal Technicians*, WASH. STATE BAR ASS'N, https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians [https://perma.cc/K4XU-E3PX] (last updated Sept. 25, 2024). *See* Daniels & Bowers, *supra* note 5; *see generally* Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L. J. SUPRA 75, 114–16 (2013). It has been pointed out that LLLTs' authority is sufficiently limited that, even though they may provide full representation regarding a particular family law matter, their clients may have a range of related legal problems for which only lawyers may provide legal assistance. *See* Julian Aprile, Comment, *Limited License Legal Technicians: Non-Lawyers Get Access to the Legal Profession, But Clients Won't Get Access to Justice*, 40 SEATTLE U.L. REV. 217, 221–22 (2016) (LLLTs may not "advis[e] clients about various financial matters, including the division of real estate, business entities, retirement assets, benefit plans, or contribution plans, . . . about bankruptcy issues, . . . [or] about anti-harassment or anti-stalking orders, no contact orders, or sexual assault protection orders.").

tenant matters, albeit under supervision,[169] and New Hampshire's approved Legal Paraprofessional program,[170] which permits a similar scope of services and requires supervision.[171] Delaware's Qualified Tenant Advocate program is a third example that permits full-scope representation but requires supervision.[172]

At the opposite end of the spectrum from programs in which providers offer limited scope representation subject to lawyer supervision, one existing state program and one proposed state program permit legal services providers to render full-scope representation in discrete matters without supervision. In Arizona, Legal Paraprofessionals currently may charge clients for giving legal advice, preparing legal papers, negotiating, and advocating in family law court, administrative proceedings, and low-level civil and criminal litigation.[173] Under a current Texas proposal, Licensed Legal Paraprofessionals may represent clients in justice court programs without supervision, as well as provide certain full-scope representation in family, estate planning and probate, and consumer-debt cases.[174]

States courts for the first time are facing these questions about what services new legal services providers can offer and whether they must be supervised. Traditionally, anything that included giving legal advice, drafting legal documents, or advocating for the legal rights of others, no matter how simple, was the practice of law and therefore required one to have specialized training, experience, and judgment. The only state-sanctioned path to achieve these attributes was by obtaining a law license. Now that courts are open to the possibility that others can become capable of providing certain legal services, there are new questions for the courts to

169. *See, e.g.*, SUPERVISED PRAC. R. 12.01–12.03 (MINN. STATE BD. L. EXAM'RS 2024); *see also Legal Paraprofessional Pilot Project*, MINN. JUD. BRANCH, https://mncourts.gov/lppp [https://perma.cc/XF2L-K4SP] (last updated Sept. 16, 2024).

170. New Hampshire's Legal Paraprofessionals will be allowed to engage in full-scope representation in January 2025 in three New Hampshire cities; until then, their scope of practice is limited. *See, e.g.*, *infra* Appendix A and accompanying note 33.

171. *See, e.g.*, N.H. SUP. CT. R. 35(2)(a).

172. *See* DEL. SUP. CT. R. 57.1.

173. *See Legal Paraprofessionals*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/cld/Legal-Paraprofessional [https://perma.cc/B588-FSMS].

174. *See* Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633, at Art. XV §7(C)–(F) (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U]. Under the proposed rules, there are certain complex family matters that require review by a lawyer or lawyer supervision. *Id.* at Art. XV § 7(D)(2)–(3).

answer, including how to train, certify, and regulate other providers.

B. Training and Certification: A Moat Around This Old House?

While U.S. lawyers are subject to most of the same licensing requirements, regardless of their state, there is less consistency across states in the requirements for legal services providers. These differences may reflect the differing extent to which these providers may practice law, whether they may practice without supervision, and whether they may charge for their services. The more onerous requirements may also reflect the economic self-interests of the lawyers who are the primary stakeholders establishing the requirements for legal services providers. Perhaps driven by an anticompetitive motivation, lawyers may persuade courts to adopt requirements that are unnecessarily rigorous, functioning as a moat around the practice of law, albeit with a narrow bridge. Such requirements discourage people from pursuing careers as legal services providers. While lawyers express concern whether new providers are competent to perform the work for which they are authorized, an equal concern is whether state courts demand too much to make these roles economically viable career paths.

An example of a certification that may have been too demanding was Washington State's program to certify Limited License Legal Technicians (LLLTs) to practice independently in certain areas of family law. When the state supreme court launched the program in 2015 after many years of study, it was envisioned as a separate career path for legal professionals, "akin to nurse practitioners in medicine."[175] But just five years later, there were fewer than fifty licensed LLLTs, and the court sunset the program in 2020, citing its cost and a lack of interest.[176] This was controversial—the board overseeing the program urged reconsideration, touting the program's success, the anticipated increase in the number of LLLTs, and the possibility for expanding the program into other areas of law.[177] A Stanford student study agreed that the program had succeeded and attributed the court's

175. SOLOMON & SMITH, *supra* note 2, at 4.

176. *See id.* at 28–31.

177. *See* LTD. LICENSE LEGAL TECH. BD. REP., LLLT BOARD REPORT TO WASHINGTON SUPREME COURT, APRIL 21, 2021, at 3–4 (Apr. 21, 2021), https://www.wsba.org/docs/default-source/about-wsba/lllt-board-report-to-court-04212021.pdf?sfvrsn=c59a14f1_0 [https://perma.cc/NVS5-P6W8].

decision to political and structural concerns.[178]

Any lack of interest in the Washington LLLT program may have been because its certification requirements substantially narrowed the pool of people for whom becoming an LLLT was viable, either as a career path or as an intermediate step to another law-related career. Applicants needed either an associate degree (at minimum) with forty-five credits (i.e., two years) of paralegal coursework or 3,000 hours (i.e., around two years) of experience as a paralegal under a lawyer's direction.[179] Applicants meeting this threshold then took fifteen credits of coursework followed by licensing exams in paralegal core competencies, ethics, and family law.[180] This rigorous certification process may have been attractive for paralegals seeking advancement, despite its resource-intensive requirements. But for a college graduate interested in a law-related career, the amount of time and effort required to become an LLLT—around two-and-a-half years of combined coursework and paralegal experience followed by three exams—was only slightly less than the requirements for a law license and arguably vastly disproportionate to the value of certification. Furthermore, career LLLTs would have to charge fees high enough to recoup the high cost of their education and training, limiting their clientele and, therefore, their impact in closing the justice gap.

In other state programs, too, the qualification and practice requirements for legal services providers are too demanding to make being a provider a viable career path. To qualify in some states, one must acquire training as a paralegal, either before or while fulfilling the certification requirements.[181] In most states, one must be supervised even after becoming certified.[182] The implication is that the program is principally envisioned as a way for law offices, particularly legal services and other not-for-profit law offices, to leverage their lawyers' time more effectively by expanding the work existing paralegals may perform under lawyers' supervision.[183]

178. *See generally* SOLOMON & SMITH, *supra* note 2.

179. *See id*. at 8; Daniels & Bowers, *supra* note 5, at 263–64.

180. *See* SOLOMON & SMITH, *supra* note 2, at 7; Daniels & Bowers, *supra* note 5, at 247–48.

181. *See, e.g.*, RULES FOR LICENSING PARALEGALS r. 4.2–4.3 (OR. STATE BAR 2023), https://www.osbar.org/_docs/rulesregs/RulesforLIcensingParalegals.pdf.

182. *See infra* Appendix A and accompanying notes 7–37.

183. *See* Emily S. Taylor Poppe, *Law Jobs: Professional Regulation, the Division of Legal Labor, and Institutional Change*, FORDHAM L. REV. (forthcoming 2025) (discussing the new divisions of legal labor that could arise from regulatory reform).

In fact, in some states, the rules explicitly envision the program as essentially a lawyer-supervised paralegal program. In South Carolina, for example, Housing Advocates are volunteers trained and supervised by the South Carolina NAACP Housing Advocate program.[184] They receive a manual and twelve hours of training, divided into four subjects—advocates' responsibilities, eviction law and process, substantive guidance for tenants, and mandatory referrals to lawyers.[185] Applicants must pass an exam on each subject as well as a final cumulative exam and, after being certified, they must periodically review the training material.[186] Likewise, in Alaska, Community Justice Workers must be employees of or volunteers for the Alaska Legal Services Corporation and be supervised by that office.[187] The relevant bar rule generally requires the training to address professional conduct, substantive areas of practice, and procedures of the appropriate tribunal.[188] After training the worker, the legal services office must get a waiver from the state bar's board of governors allowing the worker to provide limited legal services.[189] Because they assist clients in remote areas of Alaska, Community Justice Workers necessarily have greater autonomy than traditional paralegals, and probably more than certified paralegals who work under supervision in other states. However, the state program provides no path for them to eventually provide legal services independently or for a fee, no matter their eventual experience and proficiency.

There are also disincentives in the few states with programs for legal services providers who may practice law independently. For example, Utah's Licensed Paralegal Practitioners must meet demanding entry requirements.[190] An applicant must: (1) successfully complete a legal education program, such as a law school's JD or LLM program, an accredited college's bachelors-degree, an accredited college's associate-degree program in paralegal studies, or a certified paralegal training

184. *See In re* S.C. NAACP Hous. Advoc. Program, 897 S.E.2d 691, 693–95 (S.C. 2024).
185. *Id.*
186. *See id.* at 694–95.
187. *See* ALASKA BAR R. 43.5 § 1(b). Texas's proposed rule for Licensed Court-Access Assistants, if approved, would permit providers who function much like the Community Justice Workers in Alaska. *See* Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633 (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U].
188. *See* ALASKA BAR R. 43.5 §1(a).
189. *See id.*
190. *See* UTAH STATE CTS., *supra* note 166.

program; (2) obtain, in most cases, 1,500 hours of substantive law-related experience within three years; and (3) pass exams in professional ethics and their chosen practice areas.[191] While statistics regarding the number and demographics of the corps of Licensed Legal Practitioners are unavailable, it seems unlikely that many graduates of JD or LLM programs will pursue this career if they can pass the bar exam and obtain a general law license. This career path may seem attractive to licensed paralegals who want to obtain experience in a law office and then, after having worked for years, strike out on their own. But even for licensed paralegals, there are substantial barriers to entry and the road to certification, which requires first obtaining legal employment and experience, and may be too onerous to justify the reward.

C. Supervision Requirements: Regulation or Restriction?

One feature that distinguishes many of the state programs from the federal administrative agency models is the requirement of lawyer supervision. Unlike IRS enrolled agents and USPTO patent and design patent agents under federal administrative law, most state-certified legal providers may not provide legal assistance unless they have lawyer supervision, regardless of their eventual experience and proficiency. The exceptions are paraprofessionals in Arizona and Colorado (although the scope of advocacy is limited in Colorado), Washington's LLLTs, and most of the proposed providers in Texas.

Presumably, certified providers who limit their full-time law practices to one or, at most, two or three areas of law will eventually become very good—and certainly minimally competent—at their work. They may even become as proficient as lawyer-generalists who, as permitted by a law license, could practice in the area even if the practice is intermittent. But it is easy to see why most courts require lawyer supervision.[192] From a

191. *See id.*

192. Supervision requirements have been defended as a way to ensure that legal providers comply with professional conduct rules. *See* Tiernan, *supra* note 3, at 109–10 ("[R]equiring lawyers to oversee these paraprofessionals may deter any unethical conduct on the part of paraprofessionals."); *see also* Gregory Zlotnick, *Inviting the People Into People's Court: Embracing Non-Attorney Representation in Eviction Proceedings*, 25 MARQ. BEN. & SOC. WELFARE L. REV. 83, 90 (2023) (proposing that "non-attorney advocates, working at accredited organizations or under attorney supervision, [be allowed to] appear in eviction proceedings."). But the administrative models show that this is an unnecessary

regulatory perspective, a supervision requirement has significant advantages over the traditional lawyer regulatory process, which relies on professional discipline, supplemented by judicial sanctioning and civil liability, all of which are reactive.[193] Imposing responsibility on a lawyer or law office to oversee a legal services provider means that, in addition to whatever mechanisms are established for sanctioning or decertifying unethical or incompetent legal services providers, regulation is proactive.[194] Supervision also provides a source of recovery for possible civil liability through the supervising lawyer or the firm.

State laws do not define lawyer supervision, and supervisory lawyers seem to have broad discretion.[195] Presumably, they will be motivated to avoid blame and liability should those under their supervision go astray, especially if the legal services providers are their employees. But supervising lawyers cannot reasonably be expected to constantly look over the providers' shoulders or to review all their work and documents. Particularly as legal services providers gain experience and demonstrate their ability over time, supervision will likely become lighter and more sporadic than what is required by professional conduct rules for the supervision of paralegals and other employees who are not authorized to practice law. But supervising lawyers will surely be expected to do more than simply respond to complaints and failures. They may spot-check the legal services providers' work and/or initially accompany them when they provide services to assess their competency. They may limit the providers to working within their perceived competence and allow increased authority over time within legally permitted limits. Supervising lawyers can also assist or instruct when these providers encounter complexities, thereby effectuating a more extensive and flexible form of regulatory oversight

requirement. Legal providers can be subject to professional conduct rules whether they are employed by lawyers or practicing independently, and regulatory bodies can decertify independent providers or otherwise discipline or sanction them for violating applicable rules. *See supra* Part III.

193. *See supra* notes 29–35.

194. *See* Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 765–70 (2016).

195. *Cf.* Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633, at Art. XV § 1.F (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U]. The Texas proposed rules for Licensed Legal Paraprofessionals define "lawyer supervision" as "a lawyer reviews all documents before they are filed, is identified in all filings, and is available to answer any questions relating to the tasks being completed. It does not mean that the supervising lawyer is required to appear, whether in person or electronically, for court proceedings." *Id.*

better tailored to legal services providers than the lawyer disciplinary system. Such supervision would replicate the de facto regulatory process for junior lawyers who are employed in law offices with supervisory lawyers.[196]

At the same time, however, requiring legal services providers to work under lawyers' supervision is limiting. The requirement presupposes that legal services providers will be supervised as employees of non-profit agencies, and primarily, of non-profit law offices. As a result, providers can meet only a portion of unmet legal needs, because they can serve only those clients who are financially eligible for the services their employer agency offers.[197] It means that legal services providers cannot establish an independent commercial practice but must find a place willing to employ them. It also unnecessarily increases clients' costs, as there is no compelling reason to require supervision once legal services providers become competent in their discrete areas of practice.

Some state programs require previous supervised work for certification, apparently assuming that only paralegals who have been employed for a considerable time by non-profit agencies will seek certification. For example, to become a Licensed Legal Paraprofessional in Colorado, applicants must complete 1,500 hours of substantive law-related practical experience, including 500 hours of experience in Colorado family law,[198] a level of experience that would be hard to achieve unless one were employed as a paralegal. The proposed Texas Licensed Legal Paraprofessional program also has extensive requirements, including that the applicant for licensure: (1) be a certified paralegal; and (2) have experience in the subject matter of representation, or in the alternative, complete an approved training.[199] Elsewhere, the non-profit agencies' role as gatekeeper to entry

196. *Cf.* MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2020) (establishing the responsibilities of lawyers with direct supervisory authority over another lawyer).

197. Solo and small firm lawyers appear to be disciplined more frequently than lawyers who work in other settings. Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 851 (2001). Based on that perception, courts might hesitate to allow legal services providers to establish independent for-profit practices and instead limit the providers to employment by legal services offices and social service agencies whose clients are not charged a fee. But such a restriction would significantly limit the number of people with legal problems who would benefit from legal services providers' assistance. We are unaware of reported evidence that the few legal services providers in commercial practices generate a higher percentage of complaints than private lawyers who serve low- and middle-income clients in fee-generating matters.

198. *See* COLO. R. CIV. P. 207(8).

199. Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633, at Art. XV §§ 2, 4 (Tex. Aug. 6, 2024),

is explicit. The Alaska Legal Services Corporation controls eligibility and training of Alaska's Community Justice Workers,[200] while the South Carolina State Conference of the NAACP controls eligibility and training of Housing Advocates.[201] The same is true of the proposed program for Texas Licensed Court-Access Assistants, who must be sponsored by an "approved legal assistance organization," similar to the accredited representatives in immigration proceedings.[202]

Supervision requirements curtail the development of a separate category of legal professionals who can provide more affordable legal assistance because their training is less extensive than that of a lawyer. There are several obvious reasons. Legal services offices may be limited in their capacity to train and supervise providers, or they may simply prefer to direct their resources elsewhere. They may lack a consistent, reliable funding source or resource allocation to support their supervisory role. The supervision requirement, which requires a candidate to find a willing supervisor, may replicate some of the deficiencies of nineteenth and early twentieth century apprenticeship requirements for legal practice, including that supervising lawyers may not be qualified to undertake this responsibility and may be biased in selecting whom to supervise.[203]

The supervision requirement also discourages interest in a legal services provider career because working without autonomy is less fulfilling and can dull entrepreneurship. It is effectively a requirement that these providers work as employees, generally for a non-profit agency, at whatever salary is available. It preserves the idea that individuals without a law license can serve only as paraprofessionals—essentially as appendages of lawyers or of law offices—thereby diminishing the position's status and value. Even in the state programs that allow legal services providers to provide a wider range of services with lighter oversight, the providers still may not be recognized members of the legal profession.

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https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/GF49-MMMP].

200. *See* ALASKA BAR R. 43.5 § 1(a).

201. *See In re* S.C. NAACP Hous. Advoc. Program, 897 S.E.2d 691 (S.C. 2024).

202. Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633, at Art. XVI § 2 (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/GF49-MMMP].

203. MACCRATE REPORT, *supra* note 29, at 289.

D. Regulation or Self-Regulation?

In some respects, the regulation of legal services providers in states that allow for them is like the regulation of lawyers. Just as lawyers are subject to formal regulation by disciplinary bodies under the auspices of the state judiciary, some categories of legal services providers are subject to regulation by the state disciplinary authority or another body that presumably can decertify those who act unlawfully, unethically, or incompetently. Most state programs subject legal services providers to rules of conduct and procedure. Moreover, just as subordinate lawyers are regulated by lawyers who employ them,[204] legal services providers employed by lawyers are regulated by the lawyers who supervise them. Wholly apart from programs' supervision requirements, the Model Rules of Professional Conduct require all lawyers to supervise any "nonlawyer employed or retained by or associated with a lawyer," although the rules omit specific guidance about the substance of the supervision.[205]

Self-regulation is a principal means by which all professionals are expected to conform to professional expectations. Like lawyers, legal services providers will regulate their own professional conduct, whether or not a rule expressly requires them to do so.[206] For both lawyers and other providers, self-regulation will play a central role in ensuring competence. Just as a law license provides no assurance that a lawyer can competently handle any matter, a certification will not ensure other providers' competence in all legal matters within their area of practice. While a general license authorizes a lawyer to practice in any area of law, it neither signifies nor ensures that a lawyer can do any particular work capably. Inexperienced lawyers can sometimes handle a matter competently by conducting further study during the representation or relying on a mentor or co-counsel, but if that is not possible, Rule of Professional Conduct 1.1 requires them to decline the matter.[207] State programs for legal services providers require the same, at least implicitly. Some providers receive training specifically

204. *See* MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 1983).

205. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983).

206. *See* Meals & Ritter, *supra* note 33, at 53 ("If we concentrate non-attorney assistance in areas of greatest need and impact, with clear training on when and how to direct clients to an attorney when the case or issue extends beyond the scope of the paraprofessional's practice, we are taking best practices from the healthcare field's training, oversight, and limitations on scope of care.").

207. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

designed to help them recognize when a matter is too complex to handle, and some of the rules specifically require them to decline or refer such matters.[208] And providers employed by lawyers must adhere to the professional conduct rules governing lawyers, including the competence rule's requirement to decline work that is beyond their capabilities.[209]

However, the regulation of legal services providers diverges from the regulation of lawyers in one significant respect. The legal profession is self-regulating, meaning that institutions of the legal profession (including courts) have the principal responsibility for regulating lawyers, to the exclusion of other government institutions.[210] The same cannot be said of the various categories of legal services providers. It does not appear that the courts establishing new legal careers considered it important to give the providers themselves a role in the processes for certifying and regulating them, much less anything approximating regulatory independence. Instead, conversations about reform have been dominated by lawyers, many of whom fear wholesale deregulation of the practice. Excluding the providers silences key voices that should be heard.[211]

E. State Rejection of the Federal Agency Models

Notwithstanding the seeming satisfaction of federal agencies, state courts that have certified legal services providers have either failed to consider or rejected these agency models. A comparison of the current state certification programs with those of federal agencies reveals several key differences. First, while both require certification for some providers, the processes are different. Overall, federal agencies appear more accepting of providers other than lawyers, and the certification processes reflect this acceptance.

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208. The Oregon Rules of Professional Conduct for Licensed Paralegals Rule 1.1 is substantively identical to the analogous rule for lawyers, in Oregon and beyond. *See, e.g.*, OR. RULES OF PROF. COND. FOR LICENSED PARALEGALS r. 1.1 (OR. STATE BAR 2024), https://www.osbar.org/_docs/rulesregs/orpc-lp.pdf [https://perma.cc/ZK33-EJZT]; *see also Licensed Paralegals*, OR. STATE BAR, https://www.osbar.org/lp [https://perma.cc/BW8T-9GPM].

209. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

210. *See* Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 603 (2013).

211. NAT'L CTR. FOR ACCESS TO JUST., "WORKING WITH YOUR HANDS TIED BEHIND YOUR BACK" NON-LAWYER PERSPECTIVES ON LEGAL EMPLOYMENT 3, 22 (2021), https://ncaj.org/working-your-hands-tied-behind-your-back [https://perma.cc/SQ5Z-8EHV].

The federal agency and state certification models also differ in the nature and extent of services that providers may render and whether the providers may practice independently or only under lawyer supervision. Most federal agency providers can render the full range of legal services to parties in agency proceedings. In contrast, most state providers may conduct only limited parts of a full representation, again indicating federal agencies' greater acceptance of diverse types of providers, not just lawyers. Further, federal agencies do not typically require lawyer supervision, while many states' certifying programs do. Finally, federal agencies are generally more open to permitting certified providers to charge a fee (although DOJ's program for immigration advocates, like some states' programs, requires providers to work in non-profit or legal service entities).[212]

Even though legal services providers, unlike lawyers, are authorized to perform only discrete legal work, such as representation in family or housing court, some rules impose unnecessarily demanding and rigid certification requirements for training. Some rules also include testing requirements, none of which involve evaluation of actual or simulated legal work. Other rules rely less on credentialing requirements than on post-certification regulation to ensure that certified providers work competently and to stop those who do not.

V. TOWARD A SYSTEM OF INDEPENDENT, FULL-SCOPE REPRESENTATION BY STATE CERTIFIED LEGAL SERVICES PROVIDERS

The processes for certifying and regulating legal services providers must understandably take account of interests that push in opposite directions. The interest in protecting clients from incompetent or unscrupulous providers pushes in favor of high barriers to entry and strict regulatory oversight. The interest in access to justice pushes in the opposite direction: High barriers and strict regulation limit the number of providers and increase the cost of their services. No single model seems ideal for all settings. Clearly though, the current landscape of disunified, overly rigorous, and complicated state systems curbs the ability to create lasting solutions to the access to justice crisis through new types of certified

212. *See generally supra* Part III.

providers. While lawyers cling to the belief that a unified bar is the only way to protect clients from incompetent providers, there is evidence that having any representation, including from providers other than lawyers, improves outcomes when compared with no representation.[213] The data also show that trained providers who are not lawyers can perform as well or better than lawyers in some matters, and consumers rate these providers' services highly, in some cases higher than lawyers.[214] The unified bar's preoccupation with risk elimination, instead of mitigation or minimization, not only ignores this data but disregards that access to the legal system is an important aspect of protecting the public, as public harm results when entire groups of people with legal needs lack assistance from someone with sufficient legal knowledge and skill in the relevant area of law.[215]

This preoccupation with risk elimination also disregards the voices and the documented preferences of people most in need of the services that reform can make available. Studies show that while many legal consumers regard lawyers as expensive, a waste of time, and out of touch with their community, they would seek advice from an advocate who knows the system and could provide direction.[216] These same studies show that these consumers want: (1) help from the same provider throughout the course of a legal matter; (2) assurances that the provider is trained and certified; and (3) providers who are representative of their experiences and community.[217]

These consumers would benefit from access to help from members of a nationally recognized class or classes of legal services providers authorized to provide full-scope representation in independent practices, focusing on

213. *See* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 920–24 (2015); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 69–71 (2010).

214. *See* Sandefur, *supra* note 2, at 301–04 ("[E]vidence shows that nonlawyer advocates can perform as well or better than lawyers in social security appeals, state tax courts, and unemployment compensation appeals in the United States, and in a range of government tribunals in the United Kingdom."); see HOULBERG & DROBINSKE, *supra* note 2, at 52–53 for more on client and judicial satisfaction with alternative legal providers.

215. *See, e.g.*, Fast Tracked: Emergent Issues in the Legal Profession, *The Future of Regulatory Reform and Lawyer Licensure*, PRACTISING L. INST. (June 10, 2024), https://www.pli.edu/catalog/other/podcast-root/fast-tracked-emergent-issues-in-the-legal-profession/the-future-of-regulatory-reform-and-lawyer-licensure-49e9a37b [https://perma.cc/V3S2-SKPV]; Sandefur, *supra* note 2, at 308–09.

216. *See* Balser et al., *supra* note 5, at 97–98.

217. *Id.* at 98–100.

discrete areas of law.[218] While the federal agency model is attractive for its flexibility, and, in some agencies, its notable inclusivity, the unified bar is not likely to allow friends and family to represent the most vulnerable parties anytime soon, even if they are subject to the lawyers' professional conduct rules. States must therefore create new systems—raze the old and build new houses—to certify and regulate new classes of providers.

We do not recommend a single model for this fresh construction. Our aim is foundational and focuses on the building process—to encourage states to define some model through a collaborative process that considers: (1) what these providers will do; (2) the requirements for certification; and (3) how certified providers will be regulated post-certification. The legal profession should not answer these questions in a vacuum. Instead, it should ask the full range of stakeholders, including members of legally vulnerable communities and those who work with them.[219] The answers to these questions should drive the training and education requirements, as well as the components of any necessary regulatory system, balancing minimum competence with access for all, while simultaneously considering the desires of those who will serve as providers and those who will be served by them.

218. Some have observed that even if a provider is permitted to fully address a client's discrete legal problem, the client will be disadvantaged in cases where a lawyer, but not another provider, would be capable of challenging the underlying law. *See* Colleen F. Shanahan et al., *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367, 1374–75. (2016). However, for at least three reasons, we do not regard this as a serious objection to certifying other providers. First, the client's choice in most civil cases will not be between having a lawyer and having another provider, but between having another provider and having no legal assistance whatsoever. Second, certified legal providers are more likely than parties themselves to recognize that a lawyer should be retained to challenge the underlying law and, in such cases, can assist clients in retaining a lawyer. Third, even if civil parties were routinely provided lawyers (rather than other legal services providers), it is uncertain whether the lawyers would themselves recognize the utility of challenging the underlying law and be willing and able to do so effectively.

219. Lois R. Lupica & Lauren Hudson, *Addressing the Failures of the U.S. Civil Legal System*, 28 ROGER WILLIAMS U. L. REV. 118, 124 (2023) (citing *Vulnerable Consumers in Regulated Industries*, NAT'L AUDIT OFF. (UK) (Mar. 31, 2017), https://www.nao.org.uk/reports/vulnerable-consumers-in-regulated-industries/ [https://perma.cc/C7R7-MS4A]) (defining legal vulnerable communities).

A. Requirements for Court Certification

i. Retrofitting the Lawyer Licensing System

To develop a model for new providers who can competently assist with discrete legal problems, state courts must first decide which legal problems can be competently handled by legal services providers. Robust data exists on this issue, and state courts could also look to the areas in which their states have the most acute access to justice needs, balanced by where there is the greatest risk of harm.[220] It would have been a mistake, prior to *Gideon v. Wainwright*,[221] to address the problem of unrepresented felony defendants by creating a corps of alternative providers to defend them. Experience suggests that more than just a law license is needed to provide a quality criminal defense, not less.[222] But not all legal work is equally complex or high stakes. Further, in most civil areas, there is no realistic prospect that, as in criminal cases, the government will publicly fund lawyers for those who cannot afford to hire one. In determining where new providers can provide meaningful legal assistance to those who might otherwise be unrepresented, state courts, or those deputized to examine the issue, must understand the specific knowledge and skills providers need to deliver competent representation—from start to finish—to resolve the legal problem.

Once state courts precisely articulate the scope of legal services providers' work, the next step is to determine the certification requirements, which could include education, experience, assessments, and character and fitness requirements. In establishing the requirements for certification, state courts should begin with the end in mind: assisting the client to resolve their specific legal problem. The requirements should not be designed to develop providers who understand the full scope of every legal problem; instead, they should narrowly focus on the specific legal issues the providers will handle.

State courts should start by asking what the provider will do. Educators often employ a method of curricular design that begins with a focus on

220. *See, e.g.*, HOULBERG & DROBINSKE, *supra* note 2.
221. Gideon v. Wainwright, 372 U.S. 335, 339–41 (1963).
222. *See* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 481–89 (1993).

outputs—the end goal. Known as "backward design," a teacher begins by asking what the student should be able to do at the end of a lesson.[223] This straightforward three-stage process requires: (1) identifying the desired results; (2) determining the acceptable evidence for the desired results; and (3) planning the learning experiences and instruction accordingly.[224] Much like competence-based licensing,[225] the process is driven by the end goal.

State courts could employ backward design to determine the certification requirements. The goal will always be competent representation for a specific, discrete legal problem. In determining what is acceptable evidence of competence, states should: (1) narrowly focus on the services to be provided; and (2) account for and rely on all of the mechanisms that will help protect the public. Finally, states can determine whether specific educational or other experiences are necessary to achieve this competence.

States should approach requirements to certification as inclusively as possible, with lower barriers to entry than our current lawyer licensing system, access to which today is within the sole discretion of law schools, as we have discussed.[226] Rigid educational and testing requirements will limit the ability of otherwise qualified individuals to become providers and therefore, unlike for lawyer licensing, should be required only if there is an identifiable, direct link to the actual knowledge or skills necessary for minimal competence. Flexible paths for satisfying any necessary requirements will increase access for prospective providers and therefore increase the availability of providers for those needing legal assistance.

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223. GRANT WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 17–19 (2d ed. 2005). The ABA's 2014 shift to measuring "outputs" of legal education instead of "inputs" is form of backward design: Schools are now evaluated based on what students can do post-graduation, requiring schools to identify the desired results through their "learning outcomes" and design their curricula and assess their students accordingly. *See* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, TRANSITION TO AND IMPLEMENTATION OF THE NEW STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2 (2014), https://www.nafsa.org/sites/default/files/ektron/files/underscore/2015colloquia/2015_legal_implementation_of_new_standards.pdf [https://perma.cc/J2BU-3AUF]; SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, MANAGING DIRECTOR'S GUIDANCE MEMO 3 (2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf [https://perma.cc/2WBU-G6UV].

224. WIGGINS & MCTIGHE, *supra* note 223, at 17–19.

225. *See* Jordan Furlong, *Why Competence-Based Licensure Would Make the Law Degree Unnecessary*, LAW21 (Oct. 5, 2022), https://www.law21.ca/2022/10/why-competence-based-licensure-would-make-the-law-degree-unnecessary/ [https://perma.cc/R9CZ-N4MX].

226. *See supra* Part II.

There may be areas of potential representation by legal service providers where experience can be an alternative to education or testing. For example, Oregon's Licensed Paralegal program, which licenses paralegals to perform limited-scope services in family and landlord-tenant law, has multiple pathways to satisfying the educational requirements, including a waiver for those with extensive experience.[227] Similarly, in its proposed program for Licensed Legal Paraprofessionals, Texas includes seven distinct pathways for satisfying its educational requirements.[228]

If competence demands knowledge or skill that can come only from formal education, the education should be "laser-focused" on the work that the provider will perform.[229] In considering the means of education, states should look beyond the obvious traditional law school route for delivery, as the financial interests of law schools today directly conflict with the goal of efficiently empowering new types of legal services providers to increase access to justice.[230] While dozens of law schools offer master's programs and certificate programs beyond their JD programs, these programs do not focus on independent representation in discrete areas of law. While valuable for many, such programs are not designed to provide individuals with the types of tailored skills necessary to serve those who most need legal services.[231] Community colleges and other similarly situated schools are possible homes for this education. Member associations could also be key players. Whatever entity delivers any formal education deemed necessary should follow best practices for adult learners and thoughtfully consider the method of delivery.[232] An analysis of the prospective providers' needs may suggest that coursework should be available in an asynchronous, online

227. RULES FOR LICENSING PARALEGALS r. 4.2, 4.3 (OR. STATE BAR 2023).

228. Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633, at Art. X § 2 (Tex. Aug. 6, 2004), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/GF49-MMMP].

229. *See* HOWARTH, supra note 69, at 3.

230. There may be exceptions. For example, Villanova University's Interdisciplinary Immigration Studies Training for Advocates (VIISTA) program provides training to become a fully accredited representative for approximately $4,000, while partially accredited representatives can get the education they need for less than $3,000. *See* VILL. UNIV., *supra* note 145.

231. *See, e.g.*, *Overview of Post J.D and Non-J.D. Programs*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/ [https://perma.cc/AW9U-NQZ7].

232. *See generally* MALCOLM S. KNOWLES ET AL., THE ADULT LEARNER: THE DEFINITIVE CLASSIC IN ADULT EDUCATION AND HUMAN RESOURCE DEVELOPMENT (9th ed. 2020).

format.[233] This would satisfy the demands of working professionals, minimize the need for excessive broadband capacity, negate geographic constraints for teachers and learners, thereby decreasing costs, and perhaps even support an increase in legal services providers in rural legal deserts.[234]

In addition to formal education, state-administered certification exams are another possible requirement. If a certification exam is needed to satisfy a particular goal, like measurement of knowledge retrieval, the public will be protected only to the extent that there is alignment between what is tested and what the provider will do in practice.[235] The limitations of traditional licensing exams, including the bar exam, are well-documented, and every effort should be made to develop better assessments in the certification process.[236] Given the discrete nature of the services these providers will furnish, hands on training or in situ supervised work may be better aligned with what the provider will do and therefore a better means of demonstrating competence than traditional licensing tests.

Supervised practice in a real-world setting, or "clinical residencies" as Joan Howarth calls them,[237] are used in many educational settings for licensure or certification, like residencies for medical providers and student teaching for educators. Supervised practice also figures into privileges granted to everyday citizens, such as the process for obtaining a driver's license. Supervised practice may also be a bridge between any necessary training and independent practice. Post-certification supervision should not, however, be required in perpetuity, as discussed. Instead, supervision should be a means to achieving competence and readiness to work pre-certification, or a means to provide additional training post-certification.

States should approach the establishment of certification requirements as a series of dependent variables—any one of which may or may not work for a particular type of practice, geographical region, or prospective

233. Alaska's Community Justice Worker Project has partnered with Alaska Pacific University and Alaska Native Tribal Health Consortium to provide free, asynchronous online trainings to those who make a commitment to assist others with their training. *Community Justice Worker Program*, ALASKA LEGAL SERVS. CORP., https://www.alsc-law.org/cjw/ [https://perma.cc/EJ84-GX7N].

234. *See, e.g.*, Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 121 (2018); *see also Access to Justice*, RURAL JUST. COLLABORATIVE, https://www.ruraljusticecollaborative.org/__data/assets/pdf_file/0031/64696/Access-to-Justice.pdf [https://perma.cc/7TFJ-WPG2].

235. *See* HOWARTH, *supra* note 69, at 127.

236. *See, e.g.*, *id.* at 140.

237. *See id.* at 110–112.

provider. In some practice areas, supervision may be the ideal requirement during the provider's training or early stage of practice. However, given the resource-intensive nature of supervised work and its reliance on lawyers, there may be geographical areas, like legal deserts, where supervised practice is not feasible. In such cases, other requirements, like training and assessment, might be a better fit. If the requirements for certification focus on the knowledge and skills the provider needs for competent representation, while excluding extraneous or overly protective requirements, it is not necessary for one size to fit all, either within a state or across providers.

ii. Razing and Building Anew

Traditional certification requirements may seem to offer an easy and therefore attractive path. But the preferable requirement may be a performance-based assessment delivered by a practicing lawyer or other trained individual observing the prospective provider in an actual or simulated work setting. This assessment would differ from a supervisory lawyer working with a prospective or certified provider over an extended period of weeks or months. Such a performance-based assessment would necessitate observation of the candidate over a short assessment period, for example several days, delivering the services for which the candidate would be certified. The observer would be able to spot and correct behavior that poses a risk of harm to the public and decide whether the candidate is prepared to practice alone.

If a performance-based assessment could be designed to effectively measure practice-readiness—or whatever knowledge and skill providers need to have achieved before being certified—other specific requirements for certification would become unnecessary. It would not matter how applicants achieved the necessary skill and knowledge as long as one was confident that they had done so. The IRS essentially adopted this approach.[238] Developing and implementing an assessment that precisely aligns with the providers' future work would allow state courts to focus their resources on regulating legal services providers post-certification—that is, the courts could focus on the outputs of the providers' work, not the inputs.

238. *See supra* Part III.

Recognizing that legal services providers' professional development is ongoing, one can envision a process that assesses providers twice—first, to ensure that they are able to practice law in a discrete area under supervision, and later to ensure that they are able to practice in that area on their own. Assessments based on observation and review of applicants' actual or simulated work could measure practice readiness more accurately than the lawyers' bar exam. In that event, requirements for training and experience could be more flexible, or left entirely to the applicants. Once providers show that they are capable of practicing independently, they should be allowed to do so. Rather than remaining supervising lawyers' subordinates, they should be allowed to become lawyers' colleagues and to join and work in member associations with other legal professionals. This will allow such associations to serve the same informal regulatory function for other providers as they do for lawyers.[239]

There is an additional benefit to establishing flexible paths to certification: They may also increase the possibilities for training and certifying professionals other than lawyers who are well-situated to recognize and assist with the most vulnerable clients' legal problems. These other professionals might include social workers, members of the clergy, mental health professionals, other medical providers, or librarians.[240] Several years ago, a New York working group tasked with exploring innovations to "more effectively adjudicate cases and improve the accessibility, affordability and quality of services for all New Yorkers" recommended that trained and certified social workers be permitted to provide certain legal services, including limited court appearances.[241] The working group noted that social workers' clients often have adjacent legal problems with which trained social workers could assist.[242] While the New

239. *Cf.* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 729 (1994) ("In many ways, the most elusive but also the most important strategy for institutionalizing professional ethics involves professional socialization.").

240. *See, e.g.*, Sara R. Benson, *Assisting Rural Domestic Violence Victims: The Local Librarian's Role*, 108 L. LIBR. J. 237, 245–47 (2016).

241. COMM'N TO REIMAGINE THE FUTURE OF N. Y.'S CTS., REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON REGULATORY INNOVATION 3 (2020) [hereinafter 2020 Reimagine Report], https://www.nycourts.gov/LegacyPDFS/publications/RWG-RegulatoryInnovation_Final_12.2.20.pdf [https://perma.cc/M535-FBEA]; *cf.* NAT'L CTR. FOR ACCESS TO JUST., *supra* note 211, at 23–24.

242. *See* 2022 Reimagine Report, *supra* note 241, at 3. Alaska's Community Justice Worker program operates under a similar premise, "[p]artnering legal, social services, medical, and information providers" to increase access to legal assistance. ALASKA LEGAL SERVS. CORP., *supra* note 163.

York working group noted that not all of this assistance would constitute the unauthorized practice of law, state certification would have removed any doubt.[243] Thus, flexible pathways to and focused requirements for certification may incentive professionals in other disciplines to become certified legal providers, increasing the positive impact on access to justice without increasing the risk of harm to the public.

B. Regulating Providers Post-Certification

i. Retrofitting the Lawyer Regulatory System

State courts can promote legal services providers' competence without overly burdening providers, the clients they serve, or the state itself and without requiring supervision in perpetuity as a primary means of regulation. As discussed earlier, the legal profession has accepted that the lawyer licensing process does not ensure that newly licensed lawyers are able to competently do everything the law theoretically permits them to do, or firms may want them to do. The licensure process prepares them only for entry into the profession. Ongoing development along the educational continuum and other post-licensure mechanisms protect the public by discouraging newly admitted or otherwise unqualified lawyers from doing work they cannot do competently. The profession's acceptance of this system reflects confidence that these protections are sufficient. Structured correctly, states can rely on analogous post-certification mechanisms to regulate new types of legal services providers while maximizing their positive impact on access to justice.

Instead, many state courts seem to rely on post-certification supervision as the primary means of ensuring competence and ethical conduct. However, this regulatory choice limits the number of people who can access legal services providers, curtails development of additional categories of legal services providers, and decreases the likelihood that would-be providers will see this as a viable career path. Instead of adopting ongoing supervisory requirements, state courts could limit supervision to the early stages of the legal services provider's ongoing post-certification education—recognizing that operating in discrete areas will likely make

243. *See* 2022 Reimagine Report, *supra* note 241, at 3.

them more adept than lawyer-generalists in providing these specific services. Furthermore, there are available methods and frameworks which states could adopt to evaluate provider competence post-certification.[244]

Permitting legal services providers to practice independently will also allow them to develop professional relationships and community more easily, including through member associations and other analogous groups.[245] The likelihood increases if some measure of national uniformity can be established. These provider groups could offer and promote formal and informal learning opportunities, networking, and mentorship programs, much like those for lawyers and for the patent agents and tax professionals who practice before the USPTO and the IRS. Just as nurse practitioners and others have been legitimized as valuable medical providers, legitimizing legal services providers as valuable members of the legal profession will solidify the public's understanding of and confidence in them as professionals who can assist more affordably, yet just as competently and effectively as lawyers.

Analogous formal and informal regulatory mechanisms that aim to ensure lawyers' post-licensure competence can likewise ensure other legal providers' post-certification competence. Legal services providers can be expected to exercise the same self-restraint as lawyers, limiting their work to matters in which they are, or can become, competent. Self-restraint may be driven by reputational concerns, the risk of civil lability, and the simple desire to do good and help others. Enforceable professional conduct rules also encourage self-restraint and serve as the standards of conduct for legal services providers, just as they do for lawyers and agency representatives. In adopting such rules, state courts have several obvious options: (1) a wholesale incorporation, without modification, of the rules of professional conduct that apply to lawyers, as the majority of federal agencies and some states have done; (2) original, comprehensive rules of conduct, like those of the IRS, the EOIR, and those proposed by Texas in their Licensed Legal Paraprofessional program; or (3) rules like those of USPTO that nearly mirror the Model Rules of Professional Conduct but are different in key ways tailored to patent agents and design agents.[246]

244. *See, e.g.*, Tanina Rostain & James Teufel, *Measures of Justice: Researching and Evaluating Lay Legal Assistance Programs*, 51 FORDHAM URB. L.J. 1481, 1490–1501 (2024).

245. *See supra* Parts II.C, III.B.ii, and V.A.i.

246. *See supra* Part III (discussing the various administrative agency approaches); *see also*

Regarding the applicable professional conduct rules, state courts should consider loosening the grip of the Rule 5.4 restrictions on partnership and fee sharing with legal services providers.[247] While the debate over a wholesale elimination of the partnership and fee sharing restrictions of Rule 5.4 is ongoing,[248] the smaller step of exempting legal services providers from such restrictions will potentially promote competence, assist with assimilating these new providers as members of the legal profession, and increase the viability of certified legal providers as an attractive career path.[249] In its failed attempt to license "paraprofessionals, " California proposed an amendment to Rule 5.4 that would have permitted these providers to partner and share fees with lawyers in the state.[250] Without such an exception to Rule 5.4, legal services providers will be siloed—able to partner with professionals like accountants or mental health professionals, but unable to do so with members of the legal profession. This is the reality for patent agents today—they are currently unable to form such partnerships with lawyers, despite their extensive training and regulation by professional conduct rules that largely mirror those to which lawyers are subject.[251] It is

Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633 (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U] (citing the Texas proposal); *see also* Taylor Poppe, *supra* 183, at 7 (noting that new legal services providers likely will "seek to establish and defend their own areas of competence" instead of simply relying on lawyers to do so).

247. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 1983).

248. *See* Engstrom & Stone, *supra* note 49; Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1116–18 (2000).

249. *Cf.* McKay Mitchell, *Access to Justice Laboratories: Reregulating Legal Services with a Sandbox*, 96 CHI.-KENT L. REV. 431, 446–50 (2023) (proposing that state courts amend Rule 5.4 to permit regulatory "sandboxes" to allow legal services providers to implement new mechanisms for providing legal services on a trial basis).

250. Despite three years of study and subsequent recommendation from the State Bar Task Force on Access Through Innovation of Legal Services, the California legislature passed, and the Governor signed a bill in September 2022 prohibiting the working group from continuing its work on licensing paraprofessionals or a regulatory sandbox. RULES OF PRO. CONDUCT FOR LICENSED PARAPROFESSIONALS r. 1.0 (CAL. BAR ASS'N 2021), https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/Appendix-B-Proposed-Paraprofessional-Rules-of-Professional-Conduct-Redline.pdf [https://perma.cc/E2W9-PCZH]; *see also* Natalie Anne Knowlton, *Will Governor Newsom Kill California State Bar Efforts to Explore Regulatory Innovation?*, IAALS (Sept. 9, 2022), https://iaals.du.edu/blog/will-governor-newsom-kill-california-state-bar-efforts-explore-regulatory-innovation [https://perma.cc/65EC-ZZP4].

251. *See* MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 1983). One bar association's ethics committee has recognized an exception when the work of the partnership between the lawyer and the patent agent "is devoted solely to patent law before the USPTO." Virginia Legal Ethics Op. 1843

now common in multinational law firms for U.S. lawyers to partner and share fees with lawyers licensed in other countries on the theory that their education and regulation are similar enough to ensure that foreign attorneys will not disclose clients' confidential information or pressure U.S. lawyers to engage in misconduct in pursuit of profit.[252] One might expect legal services providers to exhibit comparable competence and professionalism if they were to work in partnership and collaboration with lawyers and other providers of legal services.

State courts also can assume that the market and the workplace will play some role in promoting the competence of legal services providers, just as it does with lawyers and federal administrative agency representatives today. Judges and others associated with these legal services providers, including opposing and collaborating lawyers, will witness and be able to act or recommend action to the appropriate regulator, when necessary. Additionally, those who seek assistance will have access to market information about legal services providers. As with lawyers and others service providers, market mechanisms can assist in protecting the public—even if imperfectly.

Finally, for providers whose work brings them to court, judges can serve a supervisory role as well as pedagogic and socializing functions. In many settings—and particularly in small communities, including legal deserts where alternative providers are most needed—these providers will appear in the same courts on a recurring basis and their professional community will include members of the judiciary who have an interest in their competent performance. When providers are irredeemably incompetent or unethical, judges can sanction them or set in motion their decertification.[253] More importantly, judges can point out their errors, communicate professional expectations to help them improve, and connect them to other members of the professional community who can also do so.

Most states today prohibit advocacy by legal services providers, instead limiting them to advocacy-adjacent work like preparing judicial documents or accompanying the client and providing advice in court. However, state courts should be open to allowing providers to engage in advocacy. From a

(2008).

252. *See* N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1246 (2022).

253. *See* Green, *supra* note 14, at 1305 ("Judges can exclude nonlawyers who are not competent or who disrespect regulatory responsibilities or require these nonlawyers to obtain further training.").

regulatory perspective, advocacy may be precisely the context in which providers' shortcomings present the lowest risk.[254] Trial judges can observe and correct providers' mistakes when they occur in the courtroom, and, at least once the proceedings end, judges can advise providers how to improve,[255] whereas judges cannot perform this function when providers assist outside of court.

At the same time, the plausible rationales for forbidding legal services providers to question witnesses, make factual and legal arguments, and engage in other courtroom advocacy rest on unproven assumptions. Courts may assume that, even with training and experience, providers other than lawyers cannot provide competent representation in adversary proceedings or that their participation will make the proceedings more burdensome for the opposing party or the judge. But administrative law judges have not reported that pro se parties, or the judges themselves, fare better when parties represent themselves rather than benefiting from certified providers' assistance. Likewise, courts have not reported particular problems when police prosecute low-level cases in states where they may do so, or when other lay representatives provide authorized courtroom advocacy.[256] Indeed, we are unaware of any studies showing that only lawyers can become competent courtroom advocates.

Alternatively, courts may assume that even if legal services providers can be trained to advocate in court, parties will be better served if they advocate on their own behalf, with the benefit of whatever solicitude the trial judge may elect to offer. But this assumption is counter-intuitive—a trained, experienced provider is almost certain to advocate more effectively than an untrained party appearing in court for the first time, and there is no reason to believe that trial judges will make up the difference.[257] Further,

254. *See* Green, *supra* note 44, at 104 (noting that in People v. Alfani, 125. N.E. 671, 673 (N.Y. 1919), the court reasoned that nonlawyers are less dangerous in judicial proceedings than when they "draft legal documents because there is no judge available to undo the damage").

255. *See supra* note 96 and accompanying text; Green, *supra* note 14, at 1290.

256. For examples of where lay representatives may appear in state judicial proceedings, see Green, *supra* note 14, at 1294–95 nn.56, 61.

257. Trial judges are not obligated to provide any assistance to pro se parties. *See* Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 243 (3d Cir. 2013) ("[T]here is *no* case law requiring courts to provide general legal advice to pro se parties. In a long line of cases, the Supreme Court has repeatedly concluded that courts are under no such obligation.") (citing authority). They are also limited in what assistance they are permitted to provide, assuming they are so inclined. *Id.* at 244 ("Aside from . . . two exceptions . . . federal courts treat pro se litigants the same as any other litigant. This rule makes sense. Judges must be impartial, and they put their impartiality at risk—or at least might appear to become partial to one

the prospect of having to present their cases on their own may discourage parties from appearing altogether. And other conceivable motivations to forbid advocacy by legal services providers—such as a desire to preserve the status of lawyer-advocates or to favor represented defendants' interests—are simply illegitimate.

ii. Razing and Building Anew

State courts designing regulatory processes for legal services providers need not be limited by the predominant lawyer regulatory mechanisms utilized today. Instead, states could create a proactive post-certification regulatory system that serves a preventive role.[258] Proactive systems are used to regulate lawyers outside the U.S. and, in some states, certain aspects of them have been adopted for U.S. lawyers.[259] These systems may be ideal for newly established categories of legal services providers who lack the informal support of law firms and other established institutions, including bar associations.

Components of such a proactive system can include elements that currently exist for lawyers—such as law practice management assistance provided by state bars and adjacent entities, ethics hotlines specifically designed for these providers, and other analogous resources. Just as lawyers are protected by these organizations, which offer assistance that is confidential and non-punitive, legal services providers should be protected as well. And such protections need not stop there. State courts can establish systemic proactive regulation of new providers.[260] For example, states can implement systems to solicit client feedback, without penalizing the legal services providers for the results. Whatever proactive tools states implement, a post-certification regulatory process that is more proactive than reactive could protect the public better than a replication of lawyer regulation.

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side—when they provide trial assistance to a party."). Further, trial judges may be less inclined to be helpful when parties receive limited assistance from legal services providers, even if those providers are forbidden from providing courtroom advocacy.

258. *See* Terry, *supra* note 194, at 754–63.

259. PROACTIVE REGUL. COMM., NAT'L ORG. OF BAR COUNS., PROACTIVE REGULATION FREQUENTLY ASKED QUESTIONS 2–3 (2017), https://www.coloradosupremecourt.com/PDF/PMBR/FAQs%20NOBC%20Proactive%20regulation%20Committee.pdf [https://perma.cc/5W3S-8TVX].

260. *Id.* (citing Terry, *supra* note 194).

VI. THE POLITICS OF REFORM

A. Increasing Pressure to Act

While the impact of the lawyer monopoly on access to justice has long been front of mind for many, recognition of the problem and calls for reform are increasing.[261] Proposals for excepting particular acts and tools from the definition of the practice of law are also not new. But today, they are front and center.[262] Research by social scientists and others—and data from existing programs, including Washington's LLLT program—have weakened the unified bar's entrenched belief that the public will necessarily suffer harm if anyone other than lawyers deliver legal services.[263] Pressure is mounting from advocates, practitioners, academics, and even some judges and legislators, to mitigate the historic "overreach of [the] limits on 'legal advice'" to advance access to justice for all.[264] Meanwhile, the United States stands shamefully at 115 out of 142 counties in the World Justice Project's Rule of Law measure of accessibility and affordability of civil courts.[265]

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261. *See, e.g.*, Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1214–23 (2016); David Udell, *Building the Access to Justice Movement*, 87 FORDHAM L. REV. 142, 146–153 (2018); Bruce A. Green & David Udell, *What's Wrong with Getting a Little Free Advice?*, N.Y. TIMES (Mar. 17, 2023), https://www.nytimes.com/2023/03/17/opinion/lawyers-debt-monopoly-advice.html [https://perma.cc/D7S5-HFT7]. *See generally* Rhode, *supra* note 44.

262. *See, e.g.*, Comm. on the Unauthorized Prac. of L., Op. 57 (2021) (reversing a prior opinion and permitting individuals not licensed to practice law to "advise, represent, and/or speak on behalf of parents and children" at Individualized Education program meetings and formal conferences); Unauthorized Prac. of L. Comm. v. Parsons Tech., Inc., No. 3:97V-2859-H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1999) (holding that the sale of Quicken Family Lawyer software was the unauthorized practice of law), *vacated as moot*, 179 F.3d 956 (5th Cir. 1999) (per curiam) (vacating on grounds that shortly after the district court decision, the Texas legislature amended its definition of the practice of law to exclude such software if proper disclaimers were in place).

263. *See, e.g.*, Sandefur, *supra* note 2; Chambliss, *supra* note 2; UTAH OFF. OF LEGAL SERVS. INNOVATION, ACTIVITY REPORT: JANUARY 2024, at 6 (Feb. 20, 2024), https://utahinnovationoffice.org/wp-content/uploads/2024/03/January-2024-Activity-Report.pdf [https://perma.cc/895X-N6MH] (noting that as of January 2024, there was approximately one complaint per 4,011 services); SOLOMON & SMITH, *supra* note 2, at 28–30 (noting that judges and family lawyer commissioners found LLLT work product "often higher quality and easier for the court to consume than attorney work product" and noting increased efficiency as well "improved outcomes for people who would otherwise go unrepresented").

264. *See* Lauren Sudeall, *The Overreach of Limits on "Legal Advice"*, 131 YALE L. J. FORUM 637, 647–651 (2022) (discussing dangers imposed by broad limitations of legal work that may "actively obstruct just outcomes.").

265. *WJP Rule of Law Index: Civil Justice in the United States 2023*, WORLD JUST. PROJECT,

Technological advancements, too, have put pressure on courts to rethink the boundaries of the practice of law. Whatever actions the profession takes regarding generative artificial intelligence (Gen AI) or future technologies, an issue on which we take no position here, the promise of these tools should neither impair nor delay states' acceptance of legal services providers. From the days of Quicken Family Lawyer in the late 1990s[266] to the Legal Zoom challenges in the 2010s,[267] the question of whether software can be engaged in the practice of law has plagued courts and entrepreneurs alike (assuming software *can* practice law[268]). Today, Gen AI has the potential to run afoul of UPL regulations,[269] create a two-tiered system of justice,[270] and further exacerbate inequalities.[271] Simultaneously, Gen AI may offer opportunities to help close the access the justice gap, including by contributing to the existing tools for pro se clients.[272] However, in the near future some clients, perhaps especially the most vulnerable, are likely to want and/or need humans to assist them in advising on legal problems and asserting their rights.

B. A Possible Path Forward

A path forward seems uncertain considering the disparate state approaches to new types of legal services providers, coupled with the

https://worldjusticeproject.org/rule-of-law-index/factors/2023/United%20States/Civil%20Justice/ [https://perma.cc/3PP8-2ZND].

266. *See* Unauthorized Prac. of L. Comm. v. Parsons Tech., Inc., No. 3:97V-2859-H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1999), *vacated as moot*, 179 F.3d 956 (5th Cir. 1999) (per curiam).

267. *See, e.g.*, LegalZoom.com, Inc. v. N.C. State Bar, No. 11-CVS-15111, 2014 N.C.B.C. LEXIS 9 (N.C. Super. Ct. Mar. 24, 2024).

268. *See* Ed Walters, *Re-Regulating UPL in an Age of AI*, 8 GEO. L. TECH. REV. 316, 318 (2024).

269. *See id.*

270. *See* Drew Simshaw, *Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J.L. & TECH 150, 170–180 (2022).

271. Ashwin Telang, *The Promise and Peril of AI Legal Services to Equalize Justice*, JOLT DIG. (Mar. 14, 2023), https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice [https://perma.cc/C22Z-V7UW].

272. *See* Colleen V. Chien & Miriam Kim, *Generative AI and Legal Aid: Results from a Field Study and 100 Use Cases to Bridge the Access to Justice Gap*, LOYOLA L. REV. (forthcoming 2025) (manuscript at 27) (finding that participants, who were legal aid practitioners, reported "significant efficiency gains on a wide range of tasks, such as translating legal text into a more accessible form or language, document summarization or analysis, brainstorming and ideation, getting to a first draft for legal writing, drafting and editing nonlegal writing, and carrying out associated non-legal or operations-related tasks").

different definitions of the practice of law—and the exceptions—that are maddeningly ambiguous to lawyers, other professionals, and the public alike.[273] Not only is the unified bar unlikely to welcome new providers, but states are unlikely to cede their jurisdiction over the regulation of the practice of law. However, as the data continue to show that the access to justice problem is growing and harm has not resulted from new legal providers, the unified bar will almost surely lose its grip on the monopoly, as it should. As this occurs, eventual measures of uniformity will be important, not only in nomenclature to promote inclusivity and clarity, but also programmatically. Such uniformity, including in the form of guides and models for states to follow, will assist smaller, less resourced state bars by obviating the need to create programs from whole cloth.

Additionally, some standards of uniformity in the types of work that new legal services providers are permitted to do—and how they are trained, certified, and regulated—will help establish these providers as essential members of a legal profession comprised of a range of providers. Commonalities across the states will more easily allow providers to come together, including in member associations and the like. Externally, these groups can promote awareness of the availability and ability of these new types of providers, while internally promoting professionalism among provider members. The groups also can make available educational, mentoring, and other opportunities that will help ensure competence and mitigate public harm. Eventual uniformity will necessitate some consensus among state supreme courts, which ultimately decide and regulate who can practice law.[274]

However, the existence of state legal services providers and the data on the risks and benefits are new and untested. Therefore, an appropriate, immediate step towards eventual uniformity is for state supreme courts to coalesce around a national experiment or series of experiments. Instead of proscribing or adopting a single method today, state courts should come together and first publicly commit to permitting new providers to assist those most in need—those who would otherwise go without representation, suffer a default judgement, or the like. If these courts coalesce and make clear that this objective can be achieved, affordably and feasibly, states are more likely to act. Then, state courts should commit to experimentation and

273. *See* MURPHY & NICKLES, *supra* note 17.
274. *See* Rigertas, *supra* note 49, at 69–70.

the collection and sharing of data from these experiments. Once the data make clear what works and what does not, including what corrections should be made to minimize public harm and promote access, states courts should iteratively refine their programs. The ultimate objective should be to establish relatively similar programs that promote and support new legal services providers who provide independent, full-scope representation in discrete matters, whose services are accessible to those in need of such services, and who can be integrated into the legal profession.

State supreme courts are uniquely suited to lead this effort.[275] And an ideal venue for such coalescence and direction is the Conference of Chief Judges (CCJ). Promoting access to justice initiatives is within the CCJ's scope of work. In fact, in 2020, the CCJ urged states to consider regulatory innovations that could improve "access, affordability, and quality of civil legal services."[276] The National Center for State Courts and the Conference of State Court Administrators, which also have urged states to act to improve access to justice, could collaborate with the CCJ in promoting immediate experimentation and eventual uniformity for legal services provider certification and regulation.[277] Such uniformity across programs could take various forms, including:

- model training and certification guidelines that create efficiencies in program development;
- model rules of conduct governing these legal services providers (which, as the rules governing patent agents practicing before the USPTO show, need not differ significantly from the Model Rules of Professional Conduct); and

275. *See* Monea, *supra* note 3, at 227–31.

276. Conf. of Chief Justices, Resolution 2: Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services (2020), https://www.ncsc.org/__data/assets/pdf_file/0010/23500/02052020-urging-consideration-regulatory-innovations.pdf [https://perma.cc/9QUF-C9MS].

277. *Access to Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice [https://perma.cc/7AWE-KS63]; *see, e.g.*, Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All, Conf. of C.Js., Conf. of State Crt. Adm'rs (2015).

- model disciplinary processes and sanctioning guidelines.

Finally, a key to the success of any group developing a program for state legal services providers, including one within the CCJ, is diverse stakeholder participation and consideration and integration of their insights and experiences—beginning with representatives of the population of prospective clients.[278] Lawyers, judges, other members of the legal profession, along with prospective providers, those who the providers will serve, and those who serve these individuals in other capacities today should be included.[279] The bench and bar must hear from—and act on—the opinions and interests of those other than their own members and affiliates. While some groups that have explored these issues have welcomed the voices of various stakeholders, the features and requirements of many programs suggest little sway from those who are not lawyers. Limited stakeholder participation risks a lack of confidence and trust in these new legal services providers. This assumption that lawyers know best is indicative of the problems inherent in the bar's monopoly.

Despite challenges, a path forward is possible. Politics need not impede progress. We believe that most members of the legal profession agree that all who need legal services should have access to them; the differences lie in how to provide such access. The access to justice problem has plagued the profession—and more importantly those who need but lack legal services—for too long, and the data are now clear that our current model cannot provide the necessary tools or people to serve the most vulnerable parties. Furthermore, flaws in the current model of lawyer licensing and regulation should not be replicated by programs for certifying other

278. *See* Alice Woolley & Trevor Farrow, *Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges*, 3 TEX. A&M L. REV. 549, 565 (2016) ("In the case of new legal service providers . . . [t]he approach must instead be to determine how such service providers can be licensed and deployed so as to best address the justice needs of the public that are as yet unmet. A first step will be to view legal problems, and the services that are required to address those legal problems, from the perspective of those who need those services."). The Institute for the Advancement of the American Legal System has a People-Centered Legal Regulation project, one of the objectives of which is to "provide a roadmap and recommendations for states to facilitate meaningful public participation in the development of reforms that increase access to justice." *See People-Centered Legal Regulation: Grassroots Engagement with the Public*, IAALS, https://iaals.du.edu/projects/people-centered-legal-regulation [https://perma.cc/ZM6F-BVRH].

279. *See* Balser et al., *supra* note 5, at 85–89 (advocating for the inclusion of diverse voices in developing reforms to promote access to justice).

categories of legal services providers. State courts can and should bring a fresh approach to the task.

CONCLUSION

The United States faces an access to justice crisis that is only getting worse. State courts increasingly recognize that part of the solution is to create new categories of legal services providers who are authorized to provide legal assistance to clients in discrete areas of the law where lawyers are generally unavailable. State courts that go this route must decide how to certify and regulate new providers. They may be tempted to adopt watered-down versions of the licensing and regulatory processes that have long been used to mint new lawyers. But courts should resist this temptation.

The lawyer licensing process seems better designed as a sorting process that weeds out aspirants with less potential to become competent lawyers rather than making new lawyers ready for practice. Law schools do not prepare graduates to practice law in any area, much less in all areas in which law licenses allow lawyers to practice. Graduates devote considerable time and expense to prepare for the bar exam, the courts' assessment tool, which also does not require graduates to demonstrate practice readiness. At best, it sorts out those who are less capable of learning on the job. The saving grace is that almost all newly licensed lawyers go to work in law offices under more senior lawyers' supervision where they train to practice law at the expense of the employer and, ultimately, the employer's clients. Lawyers ultimately become capable of practicing law independently, and some do, although most continue to practice with colleagues, and almost all maintain informal associations with other lawyers who can provide support. The regulatory process does little to help lawyers practice better over time. State courts' requirement that lawyers undertake CLE each year is more symbolic than meaningful. Although some malpractice insurers require insured lawyers to adopt sound management practices, most lawyers are not required to carry malpractice insurance. The formal post-licensing regulatory process is largely reactive: Lawyers who perform incompetently run a risk (probably small) of professional discipline, civil liability, or reputational harm.

State courts can do better for new providers by collaborating and building certification and regulation processes from the ground up—

recognizing that training, experience, and assessment should cover the work that providers are expected to perform competently; that pre-certification training should be affordable and flexible; that provider education should continue post-certification; that providers should ultimately be allowed to practice independently in association with other legal professionals, including lawyers; and that regulation should be proactive as well as reactive. State courts should collaborate on the preferable processes for certifying and regulating new categories of providers, as well as agreeing on the best names for them. Rather than designing programs destined to fail, and thereby to preserve lawyers' monopoly, state courts in the twenty-first century should collectively undertake the challenge of designing successful programs to certify new legal providers who can help ordinary people with legal problems at an affordable rate.

We offer this simply by way of example, not as a singular prescription. State courts have unlimited choices about how to ensure that providers work competently while also creating a viable path to legal practice for providers. Courts can decide whether a rigid and demanding educational or experiential requirement is needed, or whether a well-designed assessment process permits greater flexibility; whether to assess applicants through a test of knowledge or by watching them in action; whether to require that providers have lawyer supervision in perpetuity or to allow independent practitioners, including some who may charge a fee for their services; whether formal post-certification regulation should be almost entirely reactive or also proactive; and so on. But state courts' long experience with lawyers' licensing and regulatory processes should not obscure the breadth of the choices. The old house should be razed. A new structure is required.

APPENDIX A

	Permitted Areas of Practice	Permitted Scope of Practice
Full Scope, Independent Representation		
Arizona Legal Paraprofessionals[1]	Certain matters in family, civil, criminal, administrative, and juvenile law.[2]	Everything, including advocacy.[3]
Texas Licensed Legal Paraprofessional (proposed program)[4]	Certain matters in family, estate-planning and probate, and consumer-debt law.[5]	Everything, including advocacy.[6]
Full Scope, Supervised Representation		
Delaware Qualified Tenant Advocates[7]	Landlord-tenant.[8]	Everything, including advocacy.[9]
Minnesota Legal Paraprofessionals[10]	Family law and landlord-tenant.[11]	Family law—Everything, including advocacy. Landlord-tenant—Everything, including advocacy.[12]
Limited Scope, Independent Representation		
Colorado Licensed Legal Paraprofessionals[13]	Family law.[14]	Various limitations, including a prohibition on court advocacy.[15]
Oregon Licensed Paralegals[16]	Certain family law matters and landlord-tenant.[17]	May appear in court but may not represent a client during evidentiary hearings or other similar court appearances.[18]
Utah Licensed Paralegal Practitioners[19]	Certain family law matters; forcible entry and detainer; certain debt collection matters.[20]	Everything short of advocacy.[21]
Washington Limited License Legal Technicians[22]	Certain family law matters[23]	Everything short of advocacy.[24]

	Permitted Areas of Practice	Permitted Scope of Practice
Limited Scope, Supervised Representation		
Alaska Community Justice Workers[25]	SNAP & unemployment benefits; will drafting; Indian Child Welfare Act; debt collection; domestic violence protection orders.[26]	Limited to legal services on which the provider has been trained by the legal assistance organization sponsor.[27]
California Legal Document Preparers[28]	Family, property, bankruptcy, business, estate, immigration, and more.[29]	Prepare and file documents.[30]
New Hampshire Legal Paraprofessionals[31]	Family law and landlord-tenant.[32]	Case preparation tasks, until January 1, 2025, when the second phase of the pilot will permit representation in court in three NH cities.[33]
South Carolina Housing Advocates[34]	Landlord-tenant.[35]	Advise the tenant on how to request hearing provide additional narrow advice, including re: common defenses.[36]
Texas Limited Court-Access Assistants[37]	Civil justice court matters.[38]	Limited to legal services on which the provider has been trained by the legal assistance organization sponsor.[39]

1. ARIZ. CODE JUD. ADMIN. § 7-210 (2024).
2. *Id*. § 7-210(F)(1)(b)(1)–(5). Permitted family law practice areas include domestic relations matters (adoption, certain asset divisions, and appeals excepted). *Id.* § 7-210(F)(1)(b)(1). Permitted civil law practice areas include any matter in municipal or justice court where lawyers permitted to appear. *Id.* § 7-210(F)(1)(b)(2). Permitted criminal law practice areas include pretrial detention advocacy and misdemeanor matters, not subject to incarceration, in a municipal or justice court. *Id.* § 7-210(F)(1)(b)(3). Permitted administrative law are those where representation is not prohibited by state agency (appeals and representing other legal professionals excepted). *Id.* § 7-210(F)(1)(b)(4). Permitted juvenile law practice areas include dependency proceedings and adoption (contested matters and matters under Indian Child Welfare Act excepted). *Id.* § 7-210(F)(1)(b)(5).
3. *Id*. § 7-210(F)(1)(b)(1)–(5).

4. Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633 (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U].

5. *Id*. at Art. XV § 3(B). Permitted family law practice areas include uncontested divorce. *Id.* Cases involving children or complex property issues excepted. Additionally, lawyer review or supervision required for certain matters. *Id.* Permitted estate-planning and probate law practice areas include completion of certain documents and representation in uncontested matters; and communication with the court on certain matters. *Id.* Permitted consumer-debt law practice areas have a similar scope to family law. Other permitted general civil law practice areas include certain justice court matters. *Id.*

6. *Id*. at Art. XV § 7(C)–(G).

7. DEL. SUP. CT. R. 57.1.

8. *Id*. at 57.1(a).

9. *Id*. at 57.1(a)(1).

10. SUPERVISED PRAC. R. 12 (MINN. BD. L. EXAM'RS 2024).

11. *Id*. at 12.01(1)–(6). Permitted family law practice areas include court appearance in default hearings, pretrial hearings, and informal family court proceedings, and hearings related to establishing child support, child-support modifications, parenting-time disputes, and paternity; advising on establishing child support, child-support modifications, parenting-time disputes, paternity matters, and stipulated dissolution and custody/parenting time agreements, including the drafting of stipulated dissolution and custody/parenting time agreements matters; and appearing in a mediation where issues are limited to less complex matters, such as simple property divisions, parenting-time matters, and spousal-support determinations. *Id*. Permitted landlord-tenant practice areas include housing disputes as defined by the relevant MN statutes. *Id.*

12. *Id*. (stating in landlord tenant matters, representation in the Fourth Judicial District Housing Court is not permitted).

13. COLO. R. CIV. P. 207.

14. *Id*. at 207(2)(a)–(e). Permitted family law practice areas include legal separation; declaration of invalidity of marriage; dissolution of a marriage of civil union; initial allocation or modification of parental responsibility; establishment or modification of child support and/or maintenance; protection orders; name changes; adult gender designation changes; and filing and responding to motions for remedial contempt citations. *Id.*

15. *Id*. at 207.1(2)(f).

16. RULES FOR LICENSING PARALEGALS (OR. STATE BAR 2023).

17. *Id* at 11.1, 11.2.

18. *Id* at 11.1.

19. UTAH CODE OF JUD. ADMIN. r. 14-802.

20. *Id*. at 14-802(c). Permitted family law practice areas include temporary separation; divorce; parentage; cohabitant abuse; civil stalking; custody and support; name or gender change; and petitions to recognize a relationship as a marriage. *Id.* Permitted debt collection practice areas include matters in which the dollar amount in issue does not exceed the statutory limit for small claims cases. *Id.*

21. *Id*. at 14-802(c)(1).

22. WASH. ADMIN. & PRAC. R. APR 28.

23. *Id*. at app. Reg. 2(B)(1). Permitted practice areas include divorce and dissolution; parenting and support; parentage or paternity; child support modification; parenting plan modification; domestic violence protection orders; committed intimate relationships only as they pertain to parenting and support issues; legal separation; agreed or default minor guardianships; other protection or restraining orders arising from a domestic relations case; and relocation. *Id.*

24. *Id*.

25. ALASKA BAR R. 43.5.

26. Current training areas listed in the *Advocate Training Brochure*, ALASKA LEGAL SERVS. CORP., https://www.alsc-law.org/wp-content/uploads/2022/10/Advocate-Training-Brochure-v922.pdf [https://perma.cc/UEH6-PE82]. Because the rule refers on only to "certain civil matters," the practice areas are limited to those in which the Alaska Legal Services Corporation (ALSC) provides training. *Id.* ALSC then submits applicants for approval in the subject areas for which they have received training. *Id.*

27. ALASKA BAR R. 43.5.

28. *See What Is a Legal Document Assistant?*, CALIF. ASS'N OF LEGAL DOCUMENT ASSISTANTS, https://calda.org/What-is-a-Legal-Document-Assistant-(LDA) [https://perma.cc/2KXR-LDN9].

29. *Id.*

30. *Id.*

31. N.H. REV. STAT. ANN § 311:2-a (2024).

32. *Id.*

33. Tom Jarvis, *Newly Enacted Paraprofessional Pilot Program Helps Promote Access to Justice*, N.H. BAR ASS'N, https://www.nhbar.org/newly-enacted-paraprofessional-pilot-program-helps-promote-access-to-justice [https://perma.cc/BX7L-SABE].

34. *In re* S.C. NAACP Hous. Advoc. Program, 897 S.E.2d 691, 697 (S.C. 2024).

35. *Id.*

36. *Id.*

37. Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, No. 24-9050, 2024 Tex. Lexis 633, at Art. XVI (Tex. Aug. 6, 2024), https://www.txcourts.gov/media/1458990/249050.pdf [https://perma.cc/24GK-ZU6U].

38. *Id*. at Art. XVI § 3.

39. *Id*. at Art. XVI § (4)(A).