

# RETHINKING REGULATION OF LEGAL SERVICES: How the Status Quo Contributes to the Access to Justice Crisis

## AT A GLANCE:

- The **demand** for legal services in the United States far exceeds the supply of lawyers.
- As a result, a large percentage of civil litigants—particularly indigent individuals—are **left without representation or legal advice**, causing many to refrain from pursuing their legal claims altogether.
- The justice gap is partly attributable to **regulations that prohibit non-lawyers from giving legal advice and ban fee-sharing** between lawyers and non-lawyers.

## The Landscape of Legal Services

Every day, millions of Americans experience civil legal problems.<sup>1</sup> Between 2017 and 2020, 66 percent of Americans faced one or more legal problems.<sup>2</sup> Among low-income Americans, the numbers are even more staggering. In 2021, 74 percent of low-income households grappled with at least one legal problem.<sup>3</sup> Most commonly, these are housing, domestic violence, debt, and healthcare issues, where safety and shelter are at stake.<sup>4</sup>

Because the supply of lawyers to meet this need for legal services is limited, the justice gap is wide.<sup>5</sup> Lawyers are costly and often inaccessible, with the majority of their services going to corporations and businesses, rather than ordinary citizens.<sup>6</sup> Meanwhile, legal aid organizations lack the resources to serve all who seek their assistance. Every year, organizations funded by the Legal Services Corporation receive 1.9 million requests for legal assistance and must deny almost half.<sup>7</sup> As a result, low-income Americans receive insufficient legal help, or none at all, for 92 percent of their problems.<sup>8</sup>

<sup>1</sup> LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 13 (2022).

<sup>2</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & THE HAGUE INST. FOR INNOVATION OF LAW, JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 29 (2021).

<sup>3</sup> LEGAL SERVS. CORP., *supra* note 1, at 8.

<sup>4</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & THE HAGUE INST. FOR INNOVATION OF LAW, *supra* note 2, at 35; LEGAL SERVS. CORP., *supra* note 1, at 8.

<sup>5</sup> The Legal Services Corporation defines the justice gap as “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.” LEGAL SERVS. CORP., *supra* note 1, at 14.

<sup>6</sup> Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in BEYOND ELITE LAW 21, 22 (Gillian K. Hadfield & Jamie Heine eds., 2016).

<sup>7</sup> LEGAL SERVS. CORP., *supra* note 1, at 9.

<sup>8</sup> *Id.* at 19.

Faced with this bleak legal services landscape, many choose to do nothing about their legal issues—a course of inaction that some scholars have called “lumping it.”<sup>9</sup> Alternatively, many litigants in the civil system proceed unrepresented. A 2012 study of state courts found that 76 percent of cases had at least one self-represented party, typically the defendant.<sup>10</sup> In some states, as many as 80 or 90 percent of litigants do not have a lawyer.<sup>11</sup> Meanwhile, plaintiffs in some of the most common types of cases—debt collection and eviction—are often corporations and repeat players, giving them a significant advantage in the proceedings.<sup>12</sup>

The consequences of self-representation are significant. Legal advice about basic procedural requirements could mean that a judge reaches the merits of a case, rather than dismissing it outright.<sup>13</sup> And in housing and debt collection lawsuits, legal advice about potential defenses could be the difference between someone keeping or losing their salary or home.<sup>14</sup>

The justice gap runs deeper than the scarcity of lawyers supplying affordable services or insufficient legal

aid funding. One study reported that, even if every lawyer in the United States did 100 more hours of pro bono work every year, there would be only 30 minutes of legal help per dispute-related civil legal problem per household.<sup>15</sup> Further, even if \$40 billion more were allocated to legal aid, that would still only mean an hour of attorney legal assistance for every household experiencing a legal problem.<sup>16</sup> Recognizing that this crisis cannot be solved by increasing access to lawyers alone, access-to-justice advocates have begun to take a closer look at regulations of the legal profession.

### **The Role of Regulation**

Notable contributors to the justice gap include underfunded state civil justice systems, the lack of affordable lawyers, the complexity of legal proceedings, and decreased public investment in legal aid.<sup>17</sup> Each of these issues is exacerbated by the regulations that govern the legal profession, which decrease competition in the legal services arena, drive up prices, and block access to basic legal assistance for unrepresented litigants. Two such rules ban the unauthorized practice of law and fee sharing with nonlawyers. The contours and consequences of both are discussed below.

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<sup>9</sup> Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limit of Legal Change*, 9 L. & SOC’Y REV. 95, 124 (1974); see also Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 114-17 (Pascoe Pleasence et al. eds., 2007).

<sup>10</sup> NAT’L CENTER FOR STATE CTS., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015).

<sup>11</sup> Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 749-50 (2015).

<sup>12</sup> NAT’L CENTER FOR STATE CTS., *supra* note 10, at 35.

<sup>13</sup> Steinberg, *supra* note 11, at 744.

<sup>14</sup> NAT’L CENTER FOR STATE CTS., *supra* note 10, at v, vi.

<sup>15</sup> Hadfield & Heine, *supra* note 6, at 50.

<sup>16</sup> 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, 1193 (2016).

<sup>17</sup> See generally Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227 (2014) (describing causes of the justice gap).

## Unauthorized Practice of Law Statutes

Unauthorized practice of law (UPL) statutes prohibit non-lawyers from practicing law. Though the language of these prohibitions vary by state, they have widely been interpreted to prevent non-lawyers from performing tasks such as giving legal advice, advocating on behalf of clients in court, or assisting with the preparation of legal documents.<sup>18</sup>

Supporters of UPL statutes primarily argue that such regulations are necessary for consumer protection, citing concerns about the provision of incorrect legal advice.<sup>19</sup> Opponents counter that a review of UPL cases reveals this critique is not grounded in reality.<sup>20</sup> Far from protecting consumers, they view UPL statutes as protectionist measures based on an unfounded assumption that lawyers alone can provide competent legal services.<sup>21</sup> They point to other countries with no comparable regulations, where non-lawyers achieve case outcomes and client satisfaction at the same level as, if not better than, lawyers.<sup>22</sup> And they also note

that, in the limited areas where, currently, non-lawyers in the United States are permitted to offer legal representation, the quality of these services appears comparable to that provided by lawyers.<sup>23</sup>

### Model Rule 5.4

State laws based on Model Rule of Professional Conduct 5.4 ban fee sharing between lawyers and non-lawyers. This in effect means that law firms cannot partner with, nor receive funding from, individuals who are not licensed to practice law.<sup>24</sup> Supporters of this ban argue that fee-sharing arrangements would inhibit “the lawyer’s professional independence of judgment” by making lawyers beholden to individuals other than their clients.<sup>25</sup> They fear that lawyers would sacrifice the interests of their clients for those of their non-lawyer partners or funders. Opponents counter that these concerns are overblown and can be mitigated by putting proper safeguards in place for de-regulation.<sup>26</sup> They argue that non-traditional partnerships between lawyers and non-lawyers could

<sup>18</sup> Lauren Sudeall, *The Overreach of Limits on “Legal Advice,”* 131 YALE L.J.F. 637, 640 (2022); see also KY. SUP. CT. R. 3.020 (1978) (“The practice of law is any service rendered involving legal knowledge or legal advice.”); TEX. GOV’T. CODE § 81.101 (1999) (defining the practice of law as “the giving of advice or the rendering of any service requiring the use of legal skill or knowledge”); MONT. CODE ANN. § 37-61-201 (2009) (defining the practice of law as engaging “in the business and duties and performs acts, matters, and things that are usually done or performed by an attorney at law in the practice of that profession”).

<sup>19</sup> See, e.g., F.M. Apicella, John A. Hallbauer & Robert H. Gillespy II, *Keeping Standards High Protects the Public*, 77 A.B.A.J. 37, 37 (arguing that the provision of legal services by non-lawyers “would result in the most unwary, guileless members of the public being incompetently represented and advised, if not victimized and defrauded”).

<sup>20</sup> See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2604 (2014) (finding that fewer than a quarter of UPL cases mention specific instances of harm that resulted from the incorrect advice or exploitative practices of a non-lawyer).

<sup>21</sup> See, e.g., Bruce A. Green & David Udell, *What’s Wrong With Getting a Little Free Legal Advice?*, N.Y. TIMES (March 17, 2023), <https://www.nytimes.com/2023/03/17/opinion/lawyers-debt-monopoly-advice.html>; David Freeman Engstrom & Nora Freeman Engstrom, *Why Do Blue States Keep Prioritizing Lawyers Over Low-Income Americans?*, SLATE (Nov. 17, 2022), <https://slate.com/news-and-politics/2022/10/blue-states-legal-services-lawyers-fail.html>.

<sup>22</sup> Rhode, *supra* note 17, at 1232; Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. C.R. & C.L. 283, 294-95, 304 (2020).

<sup>23</sup> Nora Freeman Engstrom, *Effective Deregulation: A Look Under the Hood of State Civil Courts*, JOTWELL (Oct. 31, 2022) (reviewing Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer’s Monopoly*, 89 FORDHAM L. REV. 1315 (2021)), <https://legalpro.jotwell.com/effective-deregulation-a-look-under-the-hood-of-state-civil-courts/>.

<sup>24</sup> MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS’N 2023).

<sup>25</sup> MODEL RULES OF PRO. CONDUCT r. 5.4 CMT. (AM. BAR ASS’N 2023).

<sup>26</sup> Hadfield & Rhode, *supra* note 16, at 1195, 1216.

increase access to legal services by promoting innovation in the legal profession (through support from a wider range of investors) and making legal services more affordable.<sup>27</sup>

## Revisiting Regulation as a Solution to the Justice Gap

In recent years, state courts and legislatures concerned by the justice gap have sought to increase access to legal services by loosening restrictions on non-lawyers qualified to provide legal advice. While some states are still in the early stages of considering and advancing such proposals, others have implemented them in various forms. The accompanying policy papers, previewed below, provide an overview of these policies, offer case studies of their implementation, and step through the challenges and benefits they present:

**1. Legal Paraprofessionals:** Since 2012, non-lawyers in some states have been able to earn their license to provide legal services. Widely known as legal paraprofessionals, these advocates assist clients with a limited number of legal issues, offering advice and performing tasks such as in-court representation and document preparation. Today, seven states—Arizona, Colorado, Utah, Minnesota, New Hampshire, Oregon, and Washington—have launched paraprofessional programs and many others are considering similar proposals.

**2. Community Justice Workers:** In several states, including Alaska and Delaware, trained non-lawyers supervised by community organizations can provide limited legal services to indigent individuals. Though they are not licensed like paraprofessionals, their work is possible due to waivers to UPL rules

approved by states' supreme courts. Known in some places as Community Justice Workers, they help clients with pleadings, court appearances, and settlement negotiations.

**3. Entity Regulation:** In Arizona and Utah, the state supreme courts have established the authorization and regulation of legal service entities owned in whole or in part by nonlawyers (Arizona and Utah) and/or offering services provided by nonlawyers and/or technology (Utah only). Known as entity regulation, this reform approach seeks to spur innovation and the scaled provision of legal services through the authorization of entities deploying new (to legal services, at least) corporate forms and financing and interdisciplinary leadership and expertise. In Utah, the additional option of deploying technology and nonlawyer providers within regulated entities seeks to allow increased innovation and diversity of service options.

**4. First Amendment, Antitrust, and the Unauthorized Practice of Law:** Legal services providers and non-lawyer advocates have challenged the enforcement of unauthorized practice of law on legal grounds. Non-lawyers have argued that UPL rules violate their First Amendment freedoms of speech and association. Other groups—most prominently, the Department of Justice—argue that UPL rules violate antitrust principles, preserving a lawyers' monopoly that prevents competition and undermines access to affordable legal services.

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<sup>27</sup> Gillian K. Hadfield, *Legal Markets*, 60 J. ECON. LITERATURE 1264, 1279-81 (2022).