Stanford LawSchool | Deborah L. Rhode Center on the Legal Profession

RETHINKING REGULATION OF LEGAL SERVICES:

First Amendment and Antitrust Challenges to the Status Quo

AT A GLANCE:

- **Unauthorized Practice of Law statutes sweep broadly,** prohibiting a range of activities by non-lawyers such as providing basic information about legal rights and court proceedings.
- Access-to-justice advocates have challenged these statutes on the grounds that they violate **First Amendment rights**—an argument that recently has had some success in federal court.
- The Department of Justice Antitrust Division and Federal Trade Commission have also argued that broad UPL statutes **violate antitrust principles** by preventing competition and consumer choice.
- Because federal courts—rather than bar associations—have been at the forefront of legal regulatory reform in the past, the **law is central** to conversations about the future of legal services.

Executive Summary

Unauthorized practice of law statutes define the practice of law broadly. Some definitions are circular, stating that the practice of law is "any service rendered involving legal knowledge or legal advice" or the "doing of any act for another person usually done by attorneys in the course of their profession."[1] Other states don't define the practice of law at all, simply declaring that it is a violation of UPL when one practices law without a license.[2] Such broad definitions have consequences, as they prohibit even knowledgeable non-lawyers from providing information about legal rights and court proceedings to those consigned to navigate courts without counsel.[3] They also dissuade knowledgeable non-lawyers, such as court clerks, from providing even basic legal information out of fear that they will violate state ethics laws that criminalize such conduct.[4]

In response, access to justice advocates have sought to challenge UPL rules on legal grounds. They argue that UPL rules violate the First Amendment by abridging non-lawyers' freedom of speech and freedom of association. They also urge state legislatures and courts to reevaluate UPL rules on the basis that they violate antitrust principles, preventing fair competition and consumer choice in the legal services arena. This paper previews these arguments and how they have fared before judges and lawmakers.

1 Ky. Sup. Ct. R. 3.020 (2021); R.I. Gen. Laws § 11-27-2 (1956).

2 *See, e.g.*, Nev. Rev. Stat. § 7.285 (2022); Cal. Bus. & Pro. Code § 6125 (2022).

3 Lauren Sudeall, *The Overreach of Limits on "Legal Advice,"* 131 Yale L.J.F. 637, 647-48 (2022).

4 John M. Greacen, Legal Information vs. Legal Advice 49 (2022).

The First Amendment Arguments

Non-lawyers and legal services organizations have mounted First Amendment challenges to the enforcement of UPL statutes against their activities for decades. Their arguments typically fall into one or both of two doctrinal buckets. First, non-lawyers argue that the First Amendment's freedom of association protects the right of common interest groups, such as unions or advocacy organizations, to organize around the provision of legal advice.[5] Second, advocates challenge UPL statutes on the basis that they infringe on the free speech of non-lawyers who seek to provide legal advice through verbal communication or written materials.[6]

Courts assessing First Amendment challenges consider whether there is a compelling government interest for a regulation of speech and if the restriction is narrowly tailored to achieve that interest. In the context of UPL statutes, the Supreme Court has recognized that the governmental interest in regulation of the legal profession is not sufficiently compelling to justify sweeping prohibitions of speech.[7] Nevertheless, First Amendment arguments against the enforcement of UPL statutes have largely been rejected by lower courts, which have tended to look at the provision of legal advice primarily as conduct rather than speech. Two such recent cases, however, were met with some success at the district court level, suggesting increased skepticism about the need for broad UPL regulations today.

In Upsolve v. James, a nonprofit legal technology company planning to launch a non-lawyer debt collection assistance program providing free legal advice filed suit.[8] Upsolve sought an injunction against the state's attorney general to prevent the enforcement of UPL rules against the organization's planned activities.[9] It based this challenge on both of the First Amendment grounds outlined above. The district court found for Upsolve, stating that the statute's sweeping prohibition of the non-lawyers' advice could not be justified based on New York's interest in regulating legal services.[10] It therefore prevented New York's Attorney General from enforcing the UPL statute against Upsolve, permitting the non-lawyers to proceed with their provision of limited legal support to low-income New Yorkers.[11]

A similar non-lawyer legal advice case followed Upsolve in South Carolina. At issue in South Carolina State Conference of the NAACP v. Wilson were the legal services of trained non-lawyers who sought to provide assistance to low-income tenants facing eviction.[12] As in Upsolve, the NAACP brought the case to enjoin the enforcement of UPL statutes against the organization's program.[13]

---

5 *See* NAACP v. Button, 371 U.S. 415 (1963).

6 *See, e.g.*, Dacey v. New York Cnty. Laws. Ass'n, 423 F.2d 188, 190 (2d Cir. 1969); People v. Shell, 148 P.3d 162, 173 (Colo. 2006).

7 *See, e.g., Button,* 371 U.S. at 444 ("[T]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."); *In re* Primus, 436 U.S. 412, 438 (1978) ("The State's special interest in regulating members of a profession it licenses . . . justifies the application of narrowly drawn rules.")

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

9 *Id.* at 109.

10 *Id.* at 119 ("Aside from its less-than-compelling interests, the State has failed to narrowly tailor the statute. In fact, the UPL rules could barely be broader: New York could implement less restrictive alternatives to blanket ban on all unauthorized legal advice.").

11 *Id.* at 120-21.

12 S.C. State Conference of NAACP v. Wilson, No. 2:23-CV-01121-DCN, 2023 WL 5207978, at *1 (D.S.C. Aug. 14, 2023).

13 *Id.* at 2.

Although the district court determined that the plaintiffs had standing to bring their case, it declined to rule on the legal issue because it found that state law was not clear as to whether the NAACP's activities would constitute the unauthorized practice of law.[14] Applying a longstanding doctrine called abstention, it reasoned that any decision would constitute an unnecessary federal intervention into state affairs.[15] But the district court encouraged the NAACP to bring its case in state supreme court, signaling that such a challenge could potentially be successful there.[16] Indeed, in a declaratory judgment issued on February 8, 2024, the South Carolina Supreme Court found that NAACP's proposed program did not constitute the unauhorized practice of law and allowed the program to proceed.[17]

These recent district court cases might encourage similar First Amendment challenges to UPL rules in other states. On January 4, 2024, the Institute for Justice and North Carolina Justice for All Project filed a federal lawsuit along the same lines as those discussed above, arguing that North Carolina's UPL rules violated the plaintiffs' First Amendment right to provide legal advice about court-created forms.[18] This case differs in that it concerns non-lawyers seeking to offer paid as well as free legal advice.

Although the outcome of even successful cases is somewhat limited—the prohibition of enforcement of UPL rules against one organization's activities—their implications are still significant. For example, the restriction of UPL rules can inspire other non-lawyer organizations to provide similar services, modeled on those that were deemed protected. It could also deter the state from enforcing UPL rules so widely and spur state legislatures to reconsider their states' capacious definitions of the practice of law.

The Antitrust Arguments

The Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) have long sounded the alarm about UPL statutes. They have expressed concern that such broad professional regulations "unduly restrict non-lawyers from competing with lawyers to the detriment of consumers."[19] The agencies have consequently conducted investigations of, and filed lawsuits against, local coalitions of lawyers and state bar associations for monopolistic practices, such as anti-competitive boycotts and the restriction of competing non-lawyer services like title insurance companies or corporate fiduciaries in the trusts and estates context.[20]

As these comments and cases highlight, federal anti-

14 *Id.* at 6.

15 *Id.* at 8.

16 *Id.* at 9.

17 In re South Carolina NAACP Housing Advocate Program, 897 S.E.2d 691, 697 (S.C. 2024).

18 *North Carolina Legal Advice*, Inst. for Just., https://ij.org/case/north-carolina-upl/ (last visited Jan 5, 2024).

19 Letter from Jon Leibowitz et. al., Chairman, FTC, to Sup. Ct. of Hawaii (Apr. 20, 2009), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-supreme-court-hawaii-concerning-proposed-definition-practice-law/v080004hiunauthorizedpracticeoflaw.pdf; Letter from Thomas O. Barnett et. al., Assistant Attorney General, Dep't of Just., to Judiciary Pub. Aff. Office (Jan. 25, 2008), https://www.justice.gov/sites/default/files/atr/legacy/2008/02/07/229962.pdf; Letter from Hewitt Pate et. al., Acting Assistant Attorney General, to Task Force on the Model Definition of the Prac. of Law (Dec. 20, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf; Letter from Margaret Goodlander,et al., Deputy Assistant Attorney General, U.S. Dep't of Just., Antitrust Div., to Hon. Phillip Chen, Assembly Member, 59th District (June 13, 2023), https://www.justice.gov/atr/page/file/1587441/download.

20 *See, e.g.*, United States v. N.Y. Cnty. Laws.' Ass'n, 1981 WL 2150 (S.D.N.Y. 1981); United States v. Allen Cnty. Ind. Bar Ass'n, Inc., 1980 WL 1937 (N.D. Ind. 1980); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990).

trust law arguably applies to the legal profession and is a tool for increasing access to legal services.[21] This is further evidenced by a 2015 case in North Carolina, where legal technology company LegalZoom, which provides services such as legal document assistance, filed a federal antitrust lawsuit against the state bar for its refusal to register the company's legal services.[22] The resulting consent agreement allowed LegalZoom to continue operating so long as a licensed attorney reviewed the blank templates offered to consumers and the company communicated that the forms are not a substitute for legal advice from an attorney.[23] Soon after, the DOJ and FTC filed a joint letter supporting legislation, which ultimately passed, that exempts technology companies that generate legal documents from UPL statutes.[24]

Most recently, the DOJ authored a letter to the North Carolina General Assembly in support of an amendment that would narrow the reach of the state's UPL statute.[25] The DOJ noted that current UPL statutes are justified by consumer protection but do not actually protect consumers, instead actually working to their detriment by erecting barriers to basic legal services that many otherwise cannot afford.[26] The DOJ argued that UPL reform would "benefit consumers and workers alike, including by securing lower costs, enabling more choice in the delivery of legal-related services, and lifting barriers to employment."[27]

First, it would decrease the cost of legal services for litigants who utilize non-lawyers and for those who receive assistance from lawyers. In Washington State, where the first U.S. paraprofessional program was implemented, the services of non-lawyers were on average over $100 less than those of lawyers.[28] And in Kentucky, the state's supreme court found that the cost of retaining a lawyer for a real estate closing decreased with the rise of non-lawyer competition.[29] Second, narrowing UPL restrictions would create jobs by expanding the pool of people who can enter the legal profession. In Ontario, for example, the paraprofessional program has already created over 10,000 jobs for Canadian workers.[30] Third, these reforms would protect self-represented litigants who otherwise are left to go it alone, ensuring that they have the resources necessary to make informed decisions and participate in their legal proceedings.[31]

---

21 *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").

22 LegalZoom.com, Inc. v. N.C. State Bar, 2015 WL 6441853, at 1 (N.C. Super. Ct. 2015).

23 *Id.*

24 Letter from Marina Lao et. al., Director, Off. of Pol'y Plan., FTC, to Hon. Bill Cook, Senator, 1st District (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentncbill.pdf; *see also House Bill 436/SL 2016-60*, N.C. Gen. Assembly, https://www.ncleg.gov/BillLookUp/2015/H436 (last visited Dec. 20, 2023).

25 Letter from Maggie Goodlander, Deputy Assistant Attorney General, U.S. Dep't of Just., Antitrust Div., to N.C. Gen. Assembly (Feb. 14, 2023), https://www.ncjfap.org/_files/ugd/8a3baf_dd75e7277d134fd4b5b632fdbe41f089.pdf.

26 *Id.* at 2, 5.

27 *Id.* at 2.

28 Jason Solomon & Noelle Smith, The Surprising Success of Washington State's Limited License Legal Technician Program 20 (2021).

29 Countrywide Home Loans, Inc. v. Ky. Bar Ass'n, 113 S.W.3d 105, 120 (Ky. 2003).

30 Law Soc'y of Ontario, 2021 Annual Report 1 (2021).

31 Letter from Maggie Goodlander, *supra* note 25, at 6; *see also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 97-98 (1981).