PROTECTING THE PROFESSION OR THE PUBLIC? RETHINKING UNAUTHORIZED-PRACTICE ENFORCEMENT

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INTRODUCTION

For one of us, interest in the professional monopoly spans almost four decades. As a Yale law student in the mid-1970s, Rhode became enmeshed in a controversy over unauthorized practice of law (UPL). She was an intern in a New Haven legal aid office that was overwhelmed with routine divorce cases. The office's strategy was to accept new cases only one day a month, leaving the vast majority of poor people with no lawyer and no decent alternative. For a standard uncontested divorce case, attorneys in private practice charged what would now be $2,000 to $3,000 for completing three forms and attending a hearing that lasted an average of four minutes.[1] There were no do-it-yourself kits until the legal aid office prepared one. In response, local bar association officials threatened to file charges of unauthorized practice of law. Under existing precedents, they had a good chance of winning.[2] "That ended that," as far as the legal aid office was concerned. But Rhode was outraged and began work on an empirical study that challenged the bar's justifications for banning do-it-yourself assistance. She has returned to the subject a number of times since, including a 1981 article that surveyed unauthorized-practice enforcement procedures across the fifty states.[3]

This Article continues that body of work. It provides the first comprehensive overview of enforcement practices since the 1981 article. The following analysis explores a contested doctrine through interviews with chairs of unauthorized-practice committees or other prosecutors and a

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1. Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 123–29 (1976).

2. *Id.* at 109–11, 167–68.

3. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) [hereinafter Rhode, *Policing*]; *see also* DEBORAH L. RHODE, ACCESS TO JUSTICE 87–91 (2004); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) [hereinafter Rhode, *Professionalism in Prospective*]; Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

survey of over 100 reported unauthorized-practice decisions in the last decade. In essence, this Article's central claim is that unauthorized-practice law needs to increase its focus on the public rather than the profession's interest and that judicial decisions and enforcement practices need to adjust accordingly.

I. AN OVERVIEW OF UNAUTHORIZED-PRACTICE DOCTRINE

Since the turn of the twentieth century, state courts have asserted inherent, and often exclusive, power to regulate the practice of law.[4] That authority, rooted in constitutional requirements of separation of powers between the judicial, executive, and legislative branches, has enabled courts to punish unauthorized practice of law as contempt of court.[5] Most jurisdictions also have misdemeanor penalties and multiple authorities that enforce prohibitions, including state bar committees or counsel, state supreme court committees or commissions, state attorneys general, and local and county attorneys.[6] The bar derives its enforcement authority from statutes or from state supreme court rules and decisions.[7] Nine jurisdictions report that enforcement is inactive or nonexistent.[8]

Attempts to provide a principled definition of unauthorized practice have been notably unsuccessful.[9] The American Bar Association's (ABA) Model Rules of Professional Conduct avoid the problem by avoiding discussion. Comment 2 to Rule 5.5 notes, "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."[10] How well, and at what cost, are questions discretely overlooked?

Those issues are also ignored in most state law. A common feature of statutory and common law prohibitions is their broad and ambiguous scope. A number of jurisdictions simply prohibit the practice of law by nonlawyers without defining it.[11] Others take a circular approach: the practice of law is

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4. Laurel Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 111. *See generally* Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation, The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1 (1989).

5. *See* Wolfram, *supra* note 4, at 12.

6. Rhode, *Policing*, *supra* note 3, at 11–12; *see also* AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES 1 (2012).

7. Rhode, *Policing*, *supra* note 3, at 12.

8. AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 6.

9. For discussion of the difficulty, see Catherine J. Lanctot, *Does Legal Zoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 262 (2011). *See also* discussion *infra* note 107.

10. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2013).

11. For examples, see Rhode, *Policing*, supra note 3, at 45 n.135. For state courts' reluctance to offer a definition, see cases cited in Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 722 n.35 (2007).

what lawyers do.[12] Some list conduct that is illustrative, such as legal advice, legal representation, and preparation of legal instruments, and then conclude with some amorphous catch-all provision, such as "any action taken for others in any matter connected with the law."[13] On their face, these prohibitions encompass a wide range of common commercial activity. Many individuals, including accountants, financial advisors, real estate brokers, and insurance agents, could not give intelligent advice without reference to legal concerns. Moreover, the ban on personalized assistance stands as a powerful barrier to competent, low-cost providers of legal assistance. So, for example, form-processing services may provide clerical help, but may not answer simple questions about where and when papers must be filed or correct obvious errors.[14] A few state bars and courts have even concluded that online document assistance constitutes the unauthorized practice of law because the services go beyond clerical support.[15] Only a few states have licensing systems that enable nonlawyers to provide limited assistance in specified fields. However, some of these systems explicitly exclude legal advice.[16] The breadth and ambiguity of this body of law permits considerable discretion in enforcement, and until the survey described below, there had been no recent comprehensive effort to understand how unauthorized-practice doctrine works in practice.

II. SURVEY METHODOLOGY

During the summer of 2013, we surveyed the chairs or staff counsel of state unauthorized-practice committees and other heads of entities responsible for UPL enforcement to gain a better sense of enforcement policies. Initially, we emailed a survey to all of those identified by the

12. *See* Rhode, *Policing*, *supra* note 3, at 45 n.136.

13. *Id.* at 46 nn.140–42; *see also* Cincinnati Bar Ass'n v. Bailey, 852 N.E.2d 1180, 1185–86 (Ohio 2006) ("The practice of law [includes] the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.").

14. *See* Fla. Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978); Fifteenth Judicial Dist. Unified Bar Ass'n v. Glasgow, No. M1996-00020-COA-R3-CV., 1999 WL 1128847 (Tenn. Ct. App. Dec. 10, 1999).

15. *See, e.g.*, *In re* Reynoso, 477 F.3d 1117 (9th Cir. 2007); Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999) (per curiam); Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053 (W.D. Mo. 2011); *see also* Pa. Bar Ass'n Unauthorized Practice of Law Comm., Formal Op. 2010-01 (2010); Conn. Bar Ass'n Unauthorized Practice of Law Comm., Informal Op. 2008-01 (2008). As noted by the Fifth Circuit in *Parsons Technology, Inc.*, the Northern District of Texas ruling that online assistance was unauthorized practice was overturned by a legislative exemption. *See Parsons Tech., Inc.*, 179 F.3d at 956. The Missouri case was subsequently settled without banning the services altogether. For other discussion, see Lanctot, *supra* note 9; Tom McNichol, *Is LegalZoom's Gain Your Loss?*, CAL. LAW., Sep. 2010, at 20.

16. For a description of the California, Arizona, and Washington systems that prevent advice, see Rigertas, *supra* note 4, at 114–15, 117–18. For a proposed expansion of the Washington system that would allow limited license legal technicians and for proposals in California and New York, see Don J. DeBenedictis, *Licensing of Nonlawyers Gets Traction*, S.F. DAILY J. (Mar. 23, 2013), http://www.law.uci.edu/news/in-the-news/2013/djournal_nonlawyers_052313.pdf.

American Bar Association's Center for Professional Responsibility as responsible for the state's enforcement efforts and supplemented that list as necessary. We followed up with at least two telephone contacts. We were successful in reaching representatives from forty-two states and the District of Columbia, twenty-nine more jurisdictions than responded to the ABA's 2012 survey on unauthorized practice.[17] In a few cases, where enforcement was lodged in local district attorneys or the state attorney general's office, we attempted to contact someone in those offices, as well as a representative of the state bar. In total, we have responses from forty-seven entities. Respondents provided estimates where possible in jurisdictions that did not collect the statistical information we requested.[18] Although the majority of enforcement of unauthorized practice of law takes place beyond the formal judicial process, it is necessary to explore the doctrinal approaches taken by the courts to ascertain a complete picture of the current situation. We reviewed 103 federal and state cases from the past ten years in which unauthorized practice was either the primary or a significant issue before the court.[19]

III. AN EMPIRICAL ANALYSIS OF ENFORCEMENT ACTIVITY

We first asked for the total number of complaints of unauthorized practice of law the UPL enforcement committees received per year. Table 1 reflects those responses.

TABLE 1: NUMBER OF COMPLAINTS RECEIVED PER YEAR

RESPONSE ITEM	FREQUENCY	PERCENT
0 to 10	8	22%
11 to 20	4	11%
21 to 50	14	38%
51 to 100	5	14%
Greater than 100	6	16%
Total	37	

17. Twenty-nine jurisdictions responded to the survey conducted in 2012 by the Standing Committee on Client Protection of the ABA. AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 6.

18. Due to rounding, some statistical totals do not add up to 100 percent.

19. *See infra* note 71. Because we felt the initial search to be somewhat incomplete and to ensure that we captured the important cases from the jurisdictions most affected by unauthorized practice, we ran additional searches in New York, Texas, California, and Florida and incorporated the leading cases from the past ten years into the review.

Responses ranged from "a handful" to 520 a year.[20] Just over one-fifth of jurisdictions (22 percent) reported minimal enforcement activity: ten or fewer complaints annually. A majority of jurisdictions reported between eleven and twenty (11 percent) or twenty-one to fifty (38 percent), and another 14 percent reported between fifty-one and 100. Sixteen percent reported over 100 complaints per year. As Table 2 indicates, the vast majority of these complaints concerned nonlawyers rather than disbarred or out-of-state attorneys. This may, in part, reflect our focus on entities that had jurisdiction over nonlawyers; we did not target disciplinary systems that in many states would have jurisdiction over lawyers. Almost two-thirds of states (61 percent) reported that at least three-quarters of their complaints involved nonlawyers, and another quarter (25 percent) of jurisdictions reported that one-half to three-quarters of their complaints involved nonlawyers.

TABLE 2: PERCENTAGE OF COMPLAINTS ABOUT NONLAWYERS

COMPLAINTS ABOUT NONLAWYERS	FREQUENCY	PERCENT
0% to 25%	2	6%
26% to 50%	3	8%
51% to 75%	9	25%
76% to 100%	22	61%
Total	36	

The next question asked the origin of the complaints. As Table 3 indicates, about three-quarters (74 percent) reported that less than half of their complaints came from consumers or clients. Most of the remainder came from attorneys, as Table 4 indicates, and a small number came from other sources, such as judges, consumer protection agencies, immigration officials, the attorney general's office, the bar, or independent investigations. Forty-two percent of jurisdictions reported that at least half of complainants were attorneys.

20. Telephone Interview with Kathleen Tuttle, Deputy Head of Antitrust Div., Consumer Prot. Div. L.A. Cnty. Dist. Attorney's Office (July 22, 2013) (ten a week); Telephone Interview with Stephen J. Van Goor, Special Servs. Counsel, State of Alaska (June 27, 2013) (a handful).

TABLE 3: PERCENTAGE OF COMPLAINTS COMING FROM CLIENTS/CONSUMERS

COMPLAINTS FROM CLIENTS/CONSUMERS	FREQUENCY	PERCENT
0% to 25%	9	29%
26% to 50%	14	45%
51% to 75%	3	10%
76% to 100%	5	16%
Total	31	

TABLE 4: PERCENTAGE OF COMPLAINTS COMING FROM LAWYERS

COMPLAINTS FROM LAWYERS	FREQUENCY	PERCENT
0% to 25%	6	19%
26% to 50%	12	39%
51% to 75%	7	23%
76% to 100%	6	19%
Total	31	

Slightly over one-third of jurisdictions will undertake investigations without complaints (38 percent). One-third of those jurisdictions reported investigations in over ten cases per year. When asked what other agencies enforce UPL prohibitions, slightly over half (52 percent) identified the attorney general's office, and slightly over one-third (35 percent) identified local prosecutors.

We then asked respondents how often they filed a case or complaint based on unauthorized practice of law and how those cases were resolved. About one-third (36 percent) filed five or fewer cases per year and another 7 percent filed six to twenty. About one-third (36 percent) filed twenty-one to fifty and one-fifth (21 percent) filed over fifty. Close to half (45 percent) of respondents reported that most, or almost all, of their cases were informally settled, typically through a warning or cease-and-desist letter, and another large percentage reported a high settlement rate without giving specific percentages.

Table 5 reflects the percentage of cases that result in court proceedings. The vast majority of respondents (88 percent) reported five or fewer court proceedings per year. Only 3 percent reported more than twenty.

TABLE 5: NUMBER OF CASES THAT RESULTED IN FORMAL COURT PROCEEDINGS

CASES RESULTING IN COURT PROCEEDINGS	FREQUENCY	PERCENT
0 to 10	28	88%
11 to 20	2	6%
21 to 50	1	3%
51 to 100	1	3%
Greater than 100	0	0%
Total	32	

Three-quarters of respondents felt that their enforcement efforts were successful in halting unauthorized practice in at least three-quarters of cases. Only 15 percent felt that fewer than one-quarter of cases were halted.

We then asked, "How serious do you think the problem of unauthorized practice is in your jurisdiction?" Respondents split almost evenly between those who said it was a serious problem and those who said it was not. In total, 22 percent said it was isolated and rare and 33 percent said it was common but not serious, while 30 percent said it was serious and prevalent and 14 percent said it was very serious and very prevalent. In explaining their answers, some officials credited efforts by their office in reducing the threat.[21] Others attributed a substantial problem to large numbers of immigrants who "get taken advantage of on a continuing basis."[22] Debt adjustment and mortgage foreclosure services also seemed to present significant problems.[23]

We also asked if unauthorized practice posed a threat to lawyers or to the public. Unsurprisingly, the vast majority of respondents viewed unauthorized practice as a threat to both. Over four-fifths (84 percent) saw it as a threat to the public and over three-quarters (78 percent) saw it as a threat to lawyers. In gauging seriousness, some respondents took the position that any unlicensed practice posed a threat. As the deputy counsel to the North Carolina State Bar put it,

21. Telephone Interview with Jim Coyle, Colo. Regulation Counsel (June 24, 2013); Telephone Interview with Chuck Plattsmeir, Chief Disciplinary Counsel, La. State Bar (Aug. 1, 2013).

22. Telephone Interview with Jeff McGrath, Deputy District Attorney, L.A. Cnty. District Attorney's Office (July 2, 2013); *accord* Telephone Interview with Jack Carey, Past Chair of Ill. State Bar Ass'n Unauthorized Practice of Law Taskforce (July 8, 2013); Telephone Interview with David R. Johnson, Deputy Counsel, N.C. State Bar (June 11, 2013).

23. Telephone Interview with David R. Johnson, *supra* note 22; Telephone Interview with Angie Ordway, Staff Attorney, Ind. Supreme Court Disciplinary Comm'n (July 30, 2013).

> Asking if there are any "legitimate" providers who are not licensed begs the question. By definition they are not legitimate as long as what they provide is illegal. In North Carolina, the legislature has declared the providing of legal advice and services by one who is not licensed to be a criminal offense, not the State Bar.[24]

When asked if there should be a role for licensed nonlawyers, he responded, "It is not really within our role of an agency to talk about. We are not really in the policymaking business."[25] By contrast, the director of Minnesota's Office of Professional Responsibility offered his personal opinion that

> paralegal services that offer assistance to the public with simple legal tasks/forms *and* who perform those services well do not harm the public and are likely appreciated by the public; [the] same [is true] for online services that offer DIY type services to the public. Some are of reasonably high quality while others may not be . . . . The problem therefore seems to me not to be with "unauthorized practice" by nonlawyers per se . . . but that it is not regulated as to the practitioners' competence or ethics. Licensing and regulating such activities would be a major undertaking. To date, prohibiting the activity, even for those who do provide quality work, has been the simpler alternative. This has led to rather uneven enforcement.[26]

So too, the chief disciplinary counsel to the Missouri Bar acknowledged difficulty assessing the seriousness of the problem because "I don't know how often it goes wrong. . . . [I] don't know how often it goes right. I've seen some pleadings by nonlawyers that are just as good as lawyers. Those could get prosecuted too."[27] Similarly, the general counsel to the State Bar of New Mexico pointed out that "we only hear about [unauthorized practice] when it goes really bad. I know there is a movement to open certain practice areas to paralegals and I can see a role for that."[28] New Hampshire's chief of the consumer protection and antitrust bureau did not know of "any cases where there has been harm [from unauthorized practice]. I do know of cases where it has been helpful. If you don't have a track record of significant harm being done, it's difficult to make the argument that it is a threat to the public. And the public can pay a lot less—[unauthorized practice] could be beneficial."[29] Special counsel to the New York State Bar also distinguished between cases posing threats in areas

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24. Telephone Interview with David R. Johnson, *supra* note 22.

25. *Id.*

26. Email from Marty Cole, Dir., Office of Lawyers' Prof'l Responsibility, Minn., to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (July 2, 2013, 6:53 AM) (on file with *Fordham Law Review*).

27. Telephone Interview with Nancy Ripperger, Office of Chief Disciplinary Counsel, Mo. Supreme Court (July 22, 2013).

28. Telephone Interview with Richard Spinello, Gen. Counsel, State Bar of N.M. (July 1, 2013).

29. Telephone Interview with Jim Boffetti, Chief Counsel, N.H. Consumer Prot. & Antitrust Bureau (June 28, 2013).

such as immigration and cases that did not, such as real estate closings.[30] The ethics counsel to Virginia's state bar also acknowledged that, "when it comes to routine document preparation, the bar has not been able to prove that nonlawyers are causing any harm."[31] Nonetheless, the Virginia State Bar has taken the position that nonlawyer companies like LegalZoom are engaged in the unauthorized practice of law, because they provide "substantial assistance to a pro se applicant in selecting and completing documents."[32]

As to whether unauthorized practice threatens the legal profession, a minority of respondents felt that the threat was "nominal," either because the clients of nonlawyers would not hire lawyers or because lawyers were necessary to fix the problems created by unlicensed providers.[33] Other respondents believed that lawyers perceived a harm and were motivated to report nonlawyers whom they saw advertising, because they viewed such individuals as "taking work away from them."[34] However, the general counsel of the Utah State Bar also added that "regardless of the complainant's motivation, the practice is still unauthorized. We don't require a victim to investigate advertising. But it's not as high on the priority list either."[35] By contrast, other respondents emphasized that the bar's concern was "the harm that [unauthorized practice poses to the public."[36] An investigator in the Oklahoma Bar's Office of General Counsel noted that "we try our best to concentrate on cases where there was harm done to the public."[37]

Although the vast majority of respondents perceived UPL as a public threat, over two-thirds (69 percent) could not recall an instance of serious injury in the past year. Of those who reported injury, almost all singled out immigration fraud. In the typical case, an undocumented immigrant paid substantial sums and "got nothing done."[38]

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30. Telephone Interview with Richard Rifkin, Special Counsel, N.Y. State Bar Ass'n (June 28, 2013).

31. Telephone Interview with Jim McCauley, Ethics Counsel, Va. State Bar (July 16, 2013).

32. *Id.*

33. Telephone Interview with Chuck Plattsmeir, *supra* note 21; *accord* Telephone Interview with Jim Coyle, *supra* note 21; Telephone Interview with Stephen J. Van Goor, *supra* note 20; Email from Marty Cole, *supra* note 26.

34. Email from Katherine Fox, Gen. Counsel, Utah State Bar, to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (June 20, 2013, 4:00 PM) (on file with *Fordham Law Review*); *accord* Telephone Interview with Joan Eliel, Investigator, Mont. Dep't of Consumer Prot. (June 25, 2013).

35. Email from Katherine Fox, *supra* note 34.

36. Memorandum from Dane Dauphine, Assistant Chief Trial Counsel, Office of Chief Trial Counsel, State Bar of Cal., to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (July 1, 2013) (on file with *Fordham Law Review*); *see also* Telephone Interview with Leland de la Garza, Chair, Unauthorized Practice of Law Comm. of the Supreme Court of Tex. (July 18, 2013).

37. Telephone Interview with Tanner Condley, Investigator, Office of the Gen. Counsel of the Okla. Bar Ass'n (July 1, 2013).

38. Telephone Interview with Sheila Shanks, Counsel, Neb. Comm'n of Unauthorized Practice of Law (July 1, 2013); *accord* Telephone Interview with Jim Coyle, *supra* note 21;

We also asked about public attitudes toward unauthorized practice. The consensus was that consumers were unaware of the problem unless they were personally affected by it.[39] A Colorado Bar counsel noted, "Nobody wants to see someone taken in a scam, but the public doesn't want lawyers out there policing their own turf."[40] Many respondents reported skepticism of their efforts. A bar staff counsel in Indiana thought that "a lot of the public has the perception that lawyers are trying to financially benefit off their hardship and a UPL-type company helps them more than a lawyer could or would and would be less expensive."[41] The executive director of the Maryland State Bar similarly believed that the "public has a negative opinion about lawyers because of the fees. . . . The perception is that the lawyers want to protect their own turf."[42] Nebraska's counsel for the Unauthorized Practice Commission noted, "Some people are cynical towards lawyers . . . . They think the bar is concerned about competition."[43] The ethics counsel to the Virginia State Bar also believed that "unless the bar can demonstrate substantial public harm," the public, as represented by nonlawyer legislators, may feel that lawyers are "engaging in anticompetitive practices," and that it should be "up to the consumer to make the choice" about whether to engage a nonlawyer.[44]

A number of respondents mentioned the public's desire for a "lower cost alternative" to lawyers and the popular perception that UPL enforcement procedures were part of the problem by "protecting lawyers rather than the public."[45] The deputy in charge of the Antitrust Division of the Los Angeles County District Attorney's Office noted,

> People are in a quandary about how to get legal help. There is a justice gap and various parts of the public that need help [find that] . . . the legal profession is unreachable for them. They get tempted to go to some businesses like We the People that may or may not be operating legally.[46]

Counsel to the Alaska Bar similarly felt that "people are tolerant out of necessity."[47] Whether the lack of a "strong public outcry to crack down" on UPL affected enforcement strategies is unclear.[48] Some respondents

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Telephone Interview with Lori Holcomb, Dir., Client Prot., Fla. State Bar (July 3, 2013); Telephone Interview with Shannon Presby, Assistant Head Deputy of Justice Sys. Integrity, L.A. Cnty. Dist. Attorney's Office (June 28, 2013).

39. Telephone Interview with Joan Eliel, *supra* note 34; Telephone Interview with Jeff McGrath, *supra* note 22; Telephone Interview with Carol A. Wright, Investigator to the Unauthorized Practice of Law Comm., Ala. State Bar (June 27, 2013).

40. Telephone Interview with Jim Coyle, *supra* note 21.

41. Telephone Interview with Angie Ordway, *supra* note 23.

42. Telephone Interview with Paul Carlin, Exec. Dir., Md. State Bar Ass'n, Inc. (July 2, 2013).

43. Telephone Interview with Sheila Shanks, *supra* note 38.

44. Telephone Interview with Jim McCauley, *supra* note 31.

45. Telephone Interview with Al Gill, Bar Counsel Investigator, Idaho State Bar (July 31, 2013).

46. Telephone Interview with Kathleen Tuttle, *supra* note 20.

47. Telephone Interview with Stephen J. Van Goor, *supra* note 20.

48. Telephone Interview with Joseph Molina, Dir. of Gov't and Legal Affairs, Kan. State Bar (June 27, 2013).

seemed to think that the appropriate response to popular perceptions was not to shift enforcement priorities but rather to inform the public of the risks of unauthorized practice.[49]

A final question asked respondents whether any other strategies would be more effective. Unsurprisingly, the most common response was the need for more resources.[50] Counsel to the Missouri Office of Chief Disciplinary Counsel noted wistfully that Florida's unauthorized practice budget was larger than the budget for their entire office.[51] More funding would enable Kentucky to take a "more proactive approach to preventing unauthorized practice of law."[52] Another frequent response was that greater clarity was necessary in the definition of unauthorized practice.[53] In Mississippi, after study by a UPL task force, the bar intends to file a petition with the state supreme court to clarify what is and what is not unauthorized practice.[54] Although Arkansas also lacked a definition of unauthorized practice, the staff attorney to the state's unauthorized practice committee did not think that was a problem, because it gave the committee "leeway" in interpretation.[55]

Many respondents were frustrated by the inadequacy of penalties. Bar officials whose only option was civil injunctive remedies often felt that they were not enough of a "dissuader."[56] These respondents advocated more enforcement by state attorney generals who could impose civil fines and freeze assets, or by local prosecutors who could impose criminal penalties.[57] By contrast, in New York, where enforcement authority rests

49. Telephone Interview with David Clark, Bar Counsel, Nev. State Bar (July 16, 2013) (noting the bar's "failure" to get the word out about unauthorized practice of law); Telephone Interview with Leland de la Garza, *supra* note 36 ("It would be nice if we could have some public information programs").

50. *See* Telephone Interview with Jack Carey, *supra* note 22; Email from Katherine Fox, *supra* note 34; Email from Mark H. Hayes, Chair, Unlawful Practice Comm. of the W. Va. State Bar, to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (July 23, 2013) (on file with *Fordham Law Review*); Telephone Interview with Jessica Myers, Assistant Attorney Gen., Tenn. Attorney Gen. Office (Aug. 6, 2013).

51. Telephone Interview with Nancy Ripperger, *supra* note 27.

52. Email from Steven D. Pulliam, Deputy Bar Counsel, Ky. State Bar Ass'n, to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (June 13, 2013) (on file with *Fordham Law Review*).

53. *See* Telephone Interview with Leland de la Garza, *supra* note 36; Telephone Interview with Joseph Molina, *supra* note 48; Telephone Interview with Christopher Young, Deputy Attorney Gen., Haw. Dep't of the Attorney Gen. (June 27, 2013).

54. Email from Adam B. Kilgore, Gen. Counsel, Miss. Bar, to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (June 28, 2013) (on file with *Fordham Law Review*).

55. Telephone Interview with Charlene Fleetwood, Staff Attorney, Ark. Unauthorized Practice Comm. (Aug. 2, 2013).

56. Telephone Interview with Leland de la Garza, *supra* note 36.

57. Email from Patricia Bartley Schwartz, Disciplinary Counsel, Del. State Bar Ass'n, to Deborah L. Rhode, Professor of Law, Stanford Law Sch. (Aug. 14, 2013) (on file with *Fordham Law Review*) (criminal or civil fraud enforcement); Telephone Interview with Leland de la Garza, *supra* note 36 (attorney general); Telephone Interview with Al Gill, *supra* note 45 (treatment as a violation of consumer protection laws); Telephone Interview with Angie Ordway, *supra* note 23; *accord* Telephone Interview with David Feiss, Dir., Public Integrity Unit, Milwaukee Cnty. Dist. Attorney (July 31, 2013).

exclusively with district attorneys and the state attorney general, counsel to the bar felt that this was "not a very effective strategy . . . . [U]nless there has been real harm, they have to prioritize their own caseloads and this is never going to be a high priority."[58] To encourage more prosecutions, the state had recently made unauthorized practice a felony, and it was too soon to tell whether this would lead to greater enforcement. Louisiana's chief disciplinary counsel also felt that criminal prosecution was "not very helpful. As a practical matter, prosecutors have limited budget and staff and have more serious matters to pursue. . . . It would be far better to have the bar devote resources to civil injunctive relief."[59] In Hawaii, the deputy attorney general thought it was a problem to have a misdemeanor statute that only required proof beyond a reasonable doubt.[60] Bar officials from Missouri and West Virginia also mentioned the need for stiffer criminal penalties.[61] Washington's general counsel to the Practice of Law Board felt that the "split responsibility in most states for UPL enforcement leads to ineffective control."[62]

Only two respondents mentioned the possibility of other approaches that might reduce the need for unauthorized practice. Nevada recently created a licensing scheme for document preparers, who have to be registered and bonded in order to complete certain forms.[63] In New York, the state's chief judge appointed a panel to explore whether to license nonlawyers to perform certain tasks, primarily to assist pro se litigants.[64] Another respondent, however, thought that the answer to the access problem was to get more "good lawyers willing to take middle income problems."[65]

Taken together, these findings suggest a number of broader points about unauthorized-practice enforcement. First, public harm is playing an increasing role. In 1979, only 39 percent of bar chairs reported direct customer complaints, and only 21 percent indicated that the complaints involved any specific injury.[66] Overall, of some 1,188 investigations, inquiries, and complaints reported by bar chairmen, only 2 percent arose from "customer complaints and involved specific injury."[67] In the current survey, 71 percent of respondents reported that at least a quarter of cases arose from customers and another 26 percent reported that over half did.[68]

Yet consumer harm was not the only factor shaping enforcement priorities. It is striking that over two-thirds of respondents could not recall

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58. Telephone Interview with Richard Rifkin, *supra* note 30.
59. Telephone Interview with Chuck Plattsmeir, *supra* note 21.
60. Telephone Interview with Christopher Young, *supra* note 53.
61. Telephone Interview with Nancy Ripperger, *supra* note 27; *see also* Email from Mark H. Hayes, *supra* note 50.
62. Telephone Interview with Julie Shankland, Assistant Gen. Counsel, Wash. Adm'r of Practice of Law Bd. (July 25, 2013).
63. Telephone Interview with David Clark, *supra* note 49.
64. Telephone Interview with Richard Rifkin, *supra* note 30.
65. Telephone Interview with Kathleen Tuttle, *supra* note 20.
66. Rhode, *Policing*, *supra* note 3, at 33.
67. *Id.*
68. *See supra* Tables 3–4.

an instance of serious public harm in the preceding year.[69] Given that over three-quarters of respondents (78 percent) thought that unauthorized practice constituted a threat to lawyers, and that 42 percent reported that over half their complaints came from lawyers, it is likely that bar self-interest continues to influence enforcement practices.[70] Because the vast majority of cases are settled informally, there is little opportunity for judicial oversight.

So too, as a number of respondents acknowledged, the public is suspicious of the bar's motives in banning unauthorized practice. Lodging enforcement authority in more publicly accountable officials, such as state prosecutors or district attorneys, might allay such skepticism as well as ensure that enforcement is based on public harm rather than professional self-interest. In jurisdictions with a substantial amount of client complaints and a significant immigrant population, that approach would require sufficient resources to ensure adequate enforcement and public education.

To add to our understanding of unauthorized-practice enforcement, we also reviewed the last ten years of reported cases that yielded 103 decisions involving nonlawyers.[71] We began by categorizing them by subject matter. The results are set out in Table 6 below.[72]

TABLE 6: SUBJECT MATTER OF CASE

SUBJECT MATTER	FREQUENCY	PERCENTAGE
General Civil Litigation	17	17%
Trusts and Estates	15	15%
Family Law	14	14%
Housing or Mortgage	13	13%
Arbitration or Administrative Hearing/Process	10	10%
Real Estate	9	9%
Bankruptcy	9	9%
Debt Collection	9	9%
Criminal	8	8%
Immigration	3	3%
Other	9	9%
Total Number of Cases	103	

69. *See supra* note 38 and accompanying text.
70. *See* discussion *supra* Part III.
71. We ran the following Westlaw search: "adv: unauth! /10 practice /10 law /10 (non-lawyer OR nonlawyer)." It returned 253 cases. We excluded the following types of cases: cases dealing with an attorney assisting a nonlawyer in the unauthorized practice of law, cases dealing with an attorney not licensed in the state, cases dealing with suspended or disbarred attorneys, and cases dealing with legal support or paralegals employed by attorneys. On review of the remaining cases, we were concerned that the search was underinclusive, and supplemented it by conducting targeted searches in jurisdictions in which unauthorized practice is a significant problem.
72. Where the facts of the case cover multiple areas, our coding reflects both areas.

General civil litigation accounted for 17 percent of the cases reviewed. This type of unauthorized practice often occurred when an individual filed a civil claim on behalf of someone else—either a family member or friend.[73] It also occurred when an officer of a corporation attempted to represent the corporation in litigation.[74] This category included cases against internet document services such as We the People and LegalZoom.[75] Finally, several cases involved businesses or individual nonlawyers who held themselves out as lawyers and advised clients or filed claims.[76]

Trusts and estates, which accounted for 15 percent of cases, typically involved nonlawyers who drafted trusts and estate plans for others or attempted to represent the estate in court.[77] In family law, which represented 14 percent of the cases, nonlawyers were generally advising clients and preparing forms in connection with divorce and custody matters.[78] Housing, which accounted for another 13 percent of the cases, involved both landlord-tenant disputes and mortgages. Common situations concerned banks that completed mortgage forms or nonlawyers who assisted homeowners facing foreclosure by setting up a savings plan and negotiating with the lender.[79]

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73. Chase v. City of Earle, No. 3:09CV00167, 2010 WL 1658610 (E.D. Ark. Apr. 21, 2010); Crump-Donahue v. U.S. Dep't of Agriculture, No. 4:07CV00511-WRW, 2007 WL 1702567, at *1 (E.D. Ark. June 11, 2007); Yulin Li *ex rel.* Lee v. Rizzio, 801 N.W.2d 351, 352 (Iowa Ct. App. 2011).

74. *See, e.g.*, Carey v. Indian Rock Corp., 863 A.2d 289 (Me. 2005); Rabb Int'l, Inc. v. SHL Thai Food Serv., LLC, 346 S.W.3d 208 (Tex. App. 2011).

75. *See* Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1054 (W.D. Mo. 2011); Ohio Bar Ass'n v. Martin, 886 N.E.2d 827, 829 (Ohio 2008) ("We the People"). One additional case involving "We the People" arose specifically in the bankruptcy context and was only included in that section. *See In re* Moore, 290 B.R. 287 (Bankr. E.D.N.C. 2003).

76. *See, e.g.*, Spicuzza v. Liss Fin. Servs., No. C06-1244JLR, 2006 WL 3064947 (W.D. Wash. Oct. 26, 2006); Ky. Bar Ass'n v. Brooks, 325 S.W.3d 283, 286 (Ky. 2010); Disciplinary Counsel v. Pratt, 939 N.E.2d 170, 171 (Ohio 2010); Toledo Bar Ass'n v. Joelson, 872 N.E.2d 1207, 1207–08 (Ohio 2007); Cleveland Bar Ass'n v. McKissic, 832 N.E.2d 49, 50 (Ohio 2005).

77. For nonlawyers who drafted deeds and estate plans, see Ind. State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 11 (Ind. 2010); Ind. State Bar Ass'n v. Northouse, 848 N.E.2d 668, 670 (Ind. 2006); Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp., 916 N.E.2d 784, 786 (Ohio 2009); Dayton Bar Ass'n v. Addison, 837 N.E.2d 367, 368 (Ohio 2005). For nonlawyers who attempted to represent the estate, see Morgan v. Nat'l Bank of Kan. City, No. 4:09CV00792-WRW, 2009 WL 3592543 (E.D. Ark. Oct. 27, 2009); Hansen v. Hansen, 114 Cal. App. 4th 618 (Ct. App. 2003); Brown v. Coe, 616 S.E.2d 705, 708 (S.C. 2005).

78. Ky. Bar Ass'n v. Tarpinian, 337 S.W.3d 627, 629 (Ky. 2011); *In re* Broussard, 900 So.2d 814, 814 (La. 2005); Comm'n on the Unauthorized Practice of Law v. O'Neil, 147 P.3d 200, 204 (Mont. 2006); State v. Yah, 796 N.W.2d 189, 192 (Neb. 2011); Cleveland Metro Bar Ass'n v. Boyd, 901 N.E.2d 795, 796 (Ohio 2009); Cleveland Bar Ass'n v. Boyd, 859 N.E.2d 930, 930 (Ohio 2006); Cleveland Bar Ass'n v. Washington, 836 N.E.2d 1212, 1212 (Ohio 2005).

79. For mortgage forms, see Hargis v. Access Capital Funding, LLC, 674 F.3d 783 (8th Cir. 2012); King v. First Capital Fin. Servs. Corp., 828 N.E.2d 1155 (Ill. 2005); Charter One Mortg. Corp. v. Condra, 865 N.E.2d 602 (Ind. 2007); Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003); Fuchs v. Wachovia Mortg. Corp., 838 N.Y.S.2d 148 (App. Div. 2007). For foreclosure, see Disciplinary Counsel v. Foreclosure Alts., Inc., 940 N.E.2d 971 (Ohio 2010); Cincinnati Bar Ass'n v. Foreclosure Solutions, L.L.C., 914 N.E.2d 386 (Ohio 2009).

Arbitration and administrative proceedings, representing 10 percent of the sample, involved situations such as a union business agent representing the union at a labor arbitration meeting (not UPL), a contractor's president representing the contractor in an arbitration (UPL), and a nonlawyer advising clients in connection with suspension of a driver's license (UPL).[80]

Real estate, which represented 9 percent of cases, typically involved residential closings and related actions, such as title searches. What nonlawyers can do without constituting an unauthorized real estate law practice varies by jurisdiction, and the lines drawn by some courts seem arbitrary at best. In *Real Estate Bar Ass'n v. National Real Estate Information Services*,[81] the real estate bar in Massachusetts sued a multistate real estate settlement services provider. The Massachusetts Supreme Judicial Court concluded that some of the activities in question, such as the preparation of deeds, constituted unauthorized practice of law, while others, such as preparation of settlement forms, did not.[82]

Bankruptcy cases, at 9 percent of the total, typically involved a nonlawyer attempting to represent a friend or family member in bankruptcy proceedings, a business offering document assistance, or a bankruptcy petition preparer who overstepped the boundaries established by 11 U.S.C. § 110.[83] Debt collection, also 9 percent of the sample, often arose in the context of a person or business engaged in purchasing and attempting to enforce liens or other debts.[84]

Criminal cases made up 8 percent of the sample. In *United States v. Johnson*,[85] the Seventh Circuit found that a paralegal firm offering various criminal defense services was engaging in unauthorized practice because it operated without attorney supervision. Another scenario involved a "jailhouse lawyer" who assisted inmates with legal research, gave advice, and helped prepare pleadings.[86] Only 3 percent of the cases involved immigration, a surprising result given that such matters accounted for the

80. Nisha, LLC v. Tribuilt Constr. Grp., LLC, 388 S.W.3d 444 (Ark. 2012) (contractor president representing contractor in arbitration); Cincinnati Bar Ass'n v. Bailey, 852 N.E.2d 1180 (Ohio 2006) (nonlawyer giving advice regarding suspension of driver's license); *In re* Town of Little Compton, 37 A.3d 85, 95 (R.I. 2012) (union agent representing union at labor arbitration).

81. 946 N.E.2d 665 (Mass. 2011).

82. *Id.* at 676–80.

83. *See, e.g.*, *In re* O'Connor, No. 08-16434, 2009 WL 1616105 (Bankr. N.D. Ohio Feb. 27, 2009) (stating that debtor's daughter could not represent her mother in a bankruptcy proceeding); Ky. Bar Ass'n v. Brooks, 325 S.W.3d 283, 287 (Ky. 2010) (business offering document assistance). Bankruptcy is likely a larger unauthorized practice issue than indicated by this review because of the effect of the federal statute authorizing and setting the parameters for bankruptcy petition preparers (BPPs). *See* 11 U.S.C. § 110 (2012). Cases may discuss the activities of the BPP in the context of a violation of § 110 as opposed to that of unauthorized practice of law. *See In re* Bernales, 345 B.R. 206, 217–18 (Bankr. C.D. Cal. 2006).

84. *See, e.g.*, Roberts v. LaConey, 650 S.E.2d 474 (S.C. 2007); *see also* Ohio State Bar Ass'n v. Lienguard, Inc., 934 N.E.2d 337 (Ohio 2010).

85. 327 F.3d 554, 561–62 (7th Cir. 2003).

86. Disciplinary Counsel v. Cotton, 873 N.E.2d 1240, 1241 (Ohio 2007).

vast majority of consumer harm reported by our interview respondents.[87] It could be that prosecution of these cases, when it occurs, happens under fraud and theft statutes rather than UPL statutes.[88] It could also be that even in this high-problem area, prosecution is rare and the bulk of cases are resolved informally.

We next looked at the form the unauthorized practice took. These results are set out in Table 7 below:

TABLE 7: FORMS OF UNAUTHORIZED PRACTICE

FORM OF UNAUTHORIZED PRACTICE	FREQUENCY	PERCENTAGE
Filing papers in court/administrative body	40	39%
Legal document assistance/completion	31	30%
Giving advice	19	18%
Holding self out as lawyer	10	10%
In court appearance	10	10%
Agency/arbitration appearance	10	10%
Real estate work (closings, title searches)	7	7%
Other	4	4%
Total cases	103	

The greatest percentage (39 percent) of cases involved filing papers (complaints, pleadings, motions, settlements, etc.) in a court or an administrative body. Another 30 percent of cases involved assistance with legal documents. In some instances, individuals believed that they were allowed to file and litigate a claim themselves.[89] In other cases, lay document preparers stepped over the line by completing or filing forms,

87. *See supra* note 38 and accompanying text.

88. We ran searches for "notario public" and fraud but few cases were returned.

89. *See Ex parte* Williams, 89 So. 3d 135 (Ala. Civ. App. 2011) (finding that an executive director of the housing authority could not file unlawful detainer action on behalf of the authority); Forman v. State Dep't of Children and Families, 956 So. 2d 476 (Fla. Dist. Ct. App. 2007) (holding that a daughter's power of attorney did not permit her to file claim appealing denial of her mother's Medicaid benefits). *Contra In re* O'Connor, 2009 WL 1616105, at *4 (Bankr. N.D. Ohio Feb. 27, 2009) (finding that a daughter's power of attorney permitted her to file for bankruptcy on behalf of her mother).

such as those connected with bankruptcies or wills and trusts.[90] Several cases involved banks that charged a separate fee for the completion of mortgage documents.[91]

The next most common form of unauthorized practice involved nonlawyers who gave legal advice (18 percent). In reality, such advice probably occurred in many of the cases involving other prohibited activities. For the purposes of this review, however, we included in this category only cases where the court specifically noted that the unauthorized practice involved the giving of advice.[92]

Other forms of unauthorized practice included holding oneself out as a lawyer (10 percent), appearing in court (10 percent), appearing before an agency or at an arbitration (10 percent), or assisting with a real estate closing (7 percent).[93] The 3 percent of cases categorized as "other" most often involved nonlawyers who negotiated matters such as debts or insurance claims.[94]

We also tracked how the case came before the court. In the majority of cases (55 percent) the issue of unauthorized practice arose within the context of a civil or criminal matter and not because the bar or another enforcement body brought an enforcement action.[95] In 43 percent of the cases, the complainant was a state or local bar, an unauthorized practice commission, or the civil division of the attorney general's office.[96] Only 2 percent were criminal cases. These involved a repeat offender and an individual who held herself out as an immigration attorney.[97]

Our most important inquiry involved whether the court justified its holding in light of the injury involved. In just over half of the cases (56 percent) did the court even mention protection of the public welfare. Typically the court makes sweeping assertions about the potential for injury, often unaccompanied by actual evidence. For example, the Kentucky Supreme Court noted that the admission rules existed to "protect litigants from those persons not legally competent to counsel, advise, and

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90. *See* Cleveland Metro. Bar Ass'n v. Boyd, 901 N.E.2d 795, 796–97 (Ohio 2009); Stark Cnty. Bar Ass'n. v. Bennafield, 836 N.E.2d 562, 563 (Ohio 2005) (confronting a nonattorney who prepared and filed a complaint and supporting memorandum).

91. *See supra* note 79.

92. *See, e.g.*, Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433, 440 (Ind. 2005); Collins v. Godchaux, 86 So. 3d 831, 835 (La. Ct. App. 2012).

93. *See supra* notes 81–84 and accompanying text.

94. *See In re* UPL Advisory Op., 623 S.E.2d 464 (Ga. 2005) (addressing whether an individual or entity who negotiates with a creditor on behalf of a debtor engages in unauthorized practice); La. State Bar Ass'n v. Carr & Assocs., Inc., 15 So. 3d 158 (La. Ct. App. 2009) (encountering a public insurance adjuster negotiating with insurance companies on behalf of clients).

95. *See, e.g.*, Tighe v. Mora (*In re* Nieves), 290 B.R. 370 (Bankr. C.D. Cal. 2003) (bankruptcy action); Matrix Fin. Servs. Corp. v. Frazer, 714 S.E.2d 532 (S.C. 2011) (foreclosure action).

96. *See, e.g.*, Molano v. State, 262 S.W.3d 554 (Tex. Ct. App. 2008) (involving a state that sued the defendant for unauthorized practice and violations of the state deceptive trade practices statute).

97. Rodriguez v. State, 336 S.W.3d 294 (Tex. Ct. App. 2010); State v. Janda, 298 P.3d 751 (Wash. Ct. App. 2012).

advocate on matters of law."[98] In *Louisiana State Bar Ass'n v. Carr & Associates*,[99] the Louisiana Court of Appeal noted that both the unauthorized practice statutes and the state bar's purpose in bringing the instant lawsuit were grounded in the need to protect the public. Neither case involved any evidence of injury. In the survey as a whole, in only a quarter of cases (25 percent) did the court analyze whether actual harm occurred or could occur from the unauthorized practice in question. When a court did consider whether the unauthorized practice at issue actually caused harm to the public, it was often in the context of assessing a penalty. Thus, in *Toledo Bar Ass'n v. Joelson*,[100] the bar did not seek, and the court did not impose, any fines because the defendant had cooperated with the investigation, and there was no evidence he had caused any harm.

In even fewer cases—11 percent—did the court consider whether the unauthorized practice at issue met a public need. For example, in *Cleveland Bar Ass'n v. Compmanagement, Inc.*,[101] in which the bar association sued based on Compmanagement's representation of workers' compensation claims, the Ohio Supreme Court noted that

> there are multiple interests to consider in determining whether a particular legal activity is acceptably performed by nonlawyers. In this way, we can freely assume that all representative conduct at the administrative level falls within the broad definition of the practice of law, yet still authorize lay representatives to perform certain functions in the administrative setting when the public interest so demands.[102]

Recognizing that lay representation in this context did not require "special skill," the court observed that it also expedited the claims process and made it less expensive.[103] In *Dressel v. Ameribank*,[104] the court rejected the notion that a law license was necessary to draft "ordinary" leases, mortgages, and deeds.[105] The court stated, "To insist that only a lawyer can draft such documents would impede numerous commercial transactions without protecting the public, [and] would not further the purpose of restricting the practice of law to trained and licensed attorneys."[106] This is the kind of analysis that all courts should be undertaking.

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98. Ky. Bar Ass'n v. Tarpinian, 337 S.W.3d 627, 630 (Ky. 2011) (adopting the Special Commissioner's report).

99. La. State Bar Ass'n v. Carr & Assocs., Inc., 15 So. 3d 158, 167 (La. Ct. App. 2009).

100. Toledo Bar Ass'n v. Joelson, 872 N.E.2d 1207 (Ohio 2007). The Ohio Supreme Court has stated that evidence of actual harm is not necessary to consider in unauthorized practice cases because the purpose of the restriction is to prevent harm. *See also* Cincinatti Bar Ass'n v. Bailey, 852 N.E.2d. 1180 (Ohio 2006).

101. 818 N.E.2d 1181 (Ohio 2004).

102. *Id.* at 1194.

103. *Id.* at 1193–94 (quoting Goodman v. Beall, 200 N.E. 470, 471 (Ohio 1936)).

104. 664 N.W.2d 151, 156 (Mich. 2003).

105. *Id.*

106. *Id.* (citation omitted).

IV. PROBLEMS IN ENFORCEMENT STRUCTURES

The findings of this study, together with other research in the field, suggest fundamental problems in enforcement structures. The first involves the lack of a coherent definition of unauthorized practice of law. As the American Law Institute put it, "Definitions and tests employed by courts to delineate unauthorized practice of law by nonlawyers have been vague or conclusory."[107]

A second problem is the diffusion of enforcement authority and the corresponding lack of accountability for results. In most jurisdictions, responsibility for enforcing UPL prohibitions rests in multiple entities, including bar committees and counsel, state supreme court committees and commissions, state attorneys general, and local and county attorneys.[108] This split of authority, together with resource constraints, has made it easier for some entities to abdicate oversight. Because the bar's remedial powers are often limited to civil injunctions, the reluctance of prosecutorial officials to make UPL a priority has led to significant gaps in enforcement. Moreover, many states' reliance on enforcement by the organized bar, rather than by prosecutors or attorneys general, places decisionmaking in the hands of officials who lack public accountability and may be influenced by anticompetitive interests.

A third problem is the lack of focus on the public interest. Although bar leaders and case doctrine insist that broad prohibitions on unauthorized practice serve the public, support for that claim is notable for its absence.[109] Outside a few contexts such as immigration, foreclosures, and trusts and estates, it is rare for customers to assert injury, or for suits to be filed by consumer-protection agencies.[110] As noted earlier, three-quarters of jurisdictions reported that fewer than half of their complaints came from consumers or clients, and two-thirds of respondents could not recall a specific case of injury in the last year.[111] Of those who did identify a case, almost all involved immigration.[112] So too, the vast majority of UPL lawsuits filed against cyber-lawyer products are brought by lawyers or unauthorized-practice committees and generally settle without examples of harm.[113] According to a registration statement filed in anticipation of going public, LegalZoom has served more than 2 million customers since its founding in 2002, and nine of ten of its surveyed customers reported that

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

108. AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 6; Hoppock, *supra* note 11, at 720–21; discussion *supra* notes 5–9.

109. For representative bar claims, see Nicholas J. Wallwork, *UPL Harms Public, Lawyers and Consumer Confidence*, ARIZ. ATT'Y, Feb. 2002, at 6; *see also* discussion *supra* notes 98–100 and accompanying text.

110. Rigertas, *supra* note 4, at 124. Evidence of harm from internet legal provision of assistance is sparse. Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 725 (2012).

111. *See supra* Tables 3–4; *see also supra* note 38 and accompanying text.

112. *See supra* note 38 and accompanying text.

113. Rotenberg, *supra* note 110, at 722.

they would recommend LegalZoom to their friends and family.[114] Our review of reported cases also finds little evidence of actual inquiry; fewer than a quarter of surveyed cases mentioned evidence of such public harm.[115]

Other research also casts doubt on the frequency of client injury outside the context of immigration. In other nations that permit nonlawyers to provide legal advice and to assist with routine documents, the research available does not suggest that their performance has been inadequate.[116] In a study comparing outcomes for low-income clients in the United Kingdom on a variety of matters such as welfare benefits, housing, and employment, nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction.[117] After reviewing their own and other empirical studies, the authors concluded that "it is specialization, not professional status, which appears to be the best predictor of quality."[118] In Ontario, which allows licensed paralegals to represent individuals in minor court cases and administrative tribunal proceedings, a five-year review reported "solid levels of [public] satisfaction with the services received."[119] In the United States, studies of lay specialists who provide legal representation in bankruptcy and administrative agency hearings find that they generally perform as well or better than attorneys.[120] Extensive formal training is less critical than daily experience for effective advocacy.[121]

114. LegalZoom.com, Inc., Registration Statement (Form S-1) (May 10, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm. In the Missouri case finding LegalZoom engaged in unauthorized practice, the Western District of Missouri did not discuss whether or what specific harm occurred in the case, although it did refer to the risk of harm ostensibly associated with LegalZoom's portal services. Janson v. LegalZoom, Inc., 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011).

115. *See supra* text accompanying notes 103–05.

116. *See* RHODE, *supra* note 3, at 89; Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2619–21 (2014); Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629, 1636 (2010) (discussing Swedish legal advice providers).

117. Richard Moorhead, Avrom Sherr & Alan Paterson, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 785–87 (2003); *see also* Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers To Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 888–90 (2004).

118. Moorhead et al., *supra* note 117, at 795.

119. DAVID B. MORRIS, REPORT TO THE ATTORNEY GENERAL OF ONTARIO 12 (2012). British Columbia is also considering a pilot program for nonlawyer advocates in family court. Laurel Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 SASK. L. REV. 145, 166–67 (2013).

120. HERBERT KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 76, 108, 148, 190, 201 (1998); Herbert Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100, 101 (1997).

121. KRITZER, *supra* note 120; Kritzer, *supra* note 120, at 101.

V. DIRECTIONS FOR REFORM

In a letter to the *New York Times*, then ABA President William Robinson summarized the bar's opposition to nonlawyer providers:

> The American Bar Association strongly agrees that our nation must expand access to justice for low-income Americans. However, a rush to open the practice of law to unschooled unregulated nonlawyers is not the solution. This would cause grave harm to clients. Even matters that appear simple, such as uncontested divorces, involve myriad legal rights and responsibilities. If the case is not handled by a professional with appropriate legal training, a person can suffer serious long-term consequences affecting loved ones or financial security . . . .[122]

Yet opening the practice to "unschooled unregulated nonlawyers" is not the only alternative to lawyers' monopoly over routine assistance. We advocate access to qualified licensed providers. And that would surely be preferable to the current system, where, in contexts such as domestic relations or family law, the majority of cases involve at least one party who lacks representation by a trained professional.[123] Almost all of the scholarly experts and commissions that have studied the issue have recommended increased access to licensed nonlawyer legal service providers.[124] Until recently, almost all judges and bar associations have ignored those recommendations.[125] There are, however, some signs of change. The ready access to online documents has fed desires for self-representation and low-cost assistance in routine matters. Indeed, the present legal market is ripe for the efforts of disruptive innovators stimulating total market transformation.[126] From a regulatory perspective,

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122. William T. Robinson, Letter to the Editor, *Legal Help for the Poor: The View from the A.B.A.*, N.Y. TIMES, Aug. 30, 2011, at A26.

123. For studies indicating that over half of domestic relations or family law cases involve at least one unrepresented party, see Linda F. Smith & Barry Stratford, *DIY in Family Law: A Case Study of a Brief Advice Clinic for Pro Se Litigants*, 14 J.L. & FAM. STUD. 167, 168–69 (2012); OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED CHARACTERISTICS, NEEDS, SERVICES: THE RESULTS OF TWO SURVEYS 1 (2005) (stating that 75 percent of litigants in New York City Family Court appeared without counsel). For a general discussion of the rise of pro se litigants, see JOHN M. GREACEN, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 3–6 (2002).

124. *See, e.g.*, Rhode, *Professionalism in Prospective*, *supra* note 3, at 705. For recent articles advocating increased access to nonlawyer services, see Levin, *supra* note 116; Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing To Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014); Jack P. Sahl, *Cracks in the Profession's Monopoly Armor*, 82 FORDHAM L. REV. 2635 (2014).

125. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOYOLA L.A. L. REV. 869, 885–86 (2009); *see also* Kritzer, *supra* note 120, at 103.

126. For an in-depth discussion of disruptive innovation in the legal market, see Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J. L. & BUS. 1 (2012). *See also* Laurel Terry, *Creative Destruction and the Legal Services and Legal Education Markets*, LEGAL PROF. JOTWELL (June 5, 2013), http://legalpro.jotwell.com/creative-destruction-and-the-legal-services-legal-education-markets/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Jotwell+%28Jotwell%29. For the seminal work on disruptive innovation, see CLAYTON M.

the key focus should not be blocking these innovations from the market, but rather using regulation to ensure that the public's interests are met. Some jurisdictions are moving in this direction. For example, New York and California are considering licensing structures, and Washington has implemented one for certain specialties.[127]

But the profession's responsibility to the public requires more than ad hoc reaction to change. Rather, the bar should be explicit about its regulatory objectives.[128] Those objectives should include not only protecting consumers against unethical and unqualified providers, but also facilitating consumer choice and enhancing access to justice. From that perspective, regulation, not prohibition, of lay specialists makes sense. In creating a licensing structure for nonlawyers, decisionmakers should consider the procedural and substantive complexity of the services provided, the urgency of unmet needs, and the likelihood of confusion over the lawyer's role.[129]

The need for such a regulatory system is particularly apparent in the area of immigration, a field characterized by both pervasive fraud and unmet needs.[130] Individuals holding themselves out as notaries and immigration consultants have preyed on the ignorance of undocumented consumers who cannot afford attorneys. Many of these consultants capitalize on the status of *notario publicos* in some Latin American countries, where these legal professionals enjoy formal legal training and authority to provide legal assistance.[131] Undocumented residents who are victims of "*notario* fraud" are often unwilling to approach authorities to complain. The situation would benefit from a licensing structure similar to that in Australia, Canada, and the United Kingdom, which allows for licensed nonlawyer experts to

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CHRISTENSEN, THE INNOVATOR'S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS 3 (First HarperBusiness Essentials ed. 2003).

127. *See* DeBenedictis, *supra* note 16; Joel Stashenko, *Non-lawyers May Be Given Role in Closing "Justice Gap*,*"* N.Y. L.J., May 29, 2013, at 1; Joyce E. Cutler, *California State Bar Group Approves Report To Spur Support for Nonlawyer Practitioners*, 29 Laws. Man. on Prof'l Conduct (ABA/BNA) 416 (July 3, 2013); Christine Simmons, *City Bar Eyes Nonlawyer "Aides," "Technicians" To Help the Poor*, N.Y. L.J., June 26, 2013, at 1. For the Washington rule, see *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-1-1005 (June 15, 2012).

128. For a thoughtful discussion of regulatory objectives and their role in facilitating legal reform in the United Kingdom and internationally, see Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012).

129. Levin, *supra* note 116.

130. For fraud, see Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425 (2011); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 589 (2009); Jessica Wesberg & Bridget O'Shea, *Fake Lawyers and Notaries Prey on Immigrants*, N.Y. TIMES, Oct. 23, 2011, at A25B. For unmet need, see Erin B. Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal To Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 654–55 (2012).

131. Ann E. Langford, *What's in a Name? Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 119–20 (2004).

provide immigration-related assistance.[132] Although the United States allows accredited nonlawyers to represent individuals in immigration appeals, it permits only representatives who work for nonprofit organizations and who accept only nominal fees for their efforts.[133] An expanded accreditation and oversight system to allow qualified lay experts to charge reasonable fees would go a long way towards expanding access to justice for a population in great need of assistance.[134] Given the possibility for confusion over the lawyer's role, and the complexity of some of the issues involved, such a system would require adequate training requirements and expanded enforcement resources. Similar regulatory systems should be developed in other contexts to allow nonlawyer provision of routine services.[135] Various consumer protections should be required concerning qualifications, training, disclaimers, malpractice liability and insurance, discipline, and so forth.[136] Many administrative agencies already have power to regulate nonlawyers appearing before them, and no evidence suggests that these frameworks have been inadequate or that agencies have more disciplinary problems with nonlawyers than lawyers.[137] Under their inherent powers, courts could oversee the development of such systems or could approve them as consistent with the public interest. As we noted earlier, a number of courts have already taken such approaches in evaluating unauthorized-practice claims.[138] So, for example, after considering factors such as cost, availability of services, and consumer convenience, the Washington Supreme Court held that it was in the public interest for licensed real estate brokers to fill in standard form agreements.[139] New York is assessing limited licensing in substantive areas where there is a great gap in access to justice, such as housing and

132. For the role of registered migration agents in Australia, see *What A Registered Migration Agent Can Do For You*, AUSTRALIAN GOV'T, OFF. MIGRATION AGENTS REGISTRATION AUTHORITY, https://www.mara.gov.au/using-an-agent/using-a-registered-migration-agent/what-a-registered-migration-agent-can-do-for-you/ (last visited Apr. 26, 2014). For the role of authorized immigration consultants in Canada, see *Use an Authorized Immigration Representative*, GOV'T CAN., http://www.cic.gc.ca/english/information/representative/rep-who.asp (last visited Apr. 26, 2014). For the role of regulated immigration advisors in the United Kingdom, see *The Code of Standards: The Commissioner's Rules*, OFF. IMMIGR. SERVICES COMMISSIONER, http://oisc.homeoffice.gov.uk/servefile.aspx?docid=6 (last visited Apr. 26, 2014).

133. *See* 8 C.F.R. § 1292.1 (2014); *see also* Shannon, *supra* note 130, at 602–03.

134. *See* Unger, *supra* note 130, at 443–49; *see also* Careen Shannon, *To License or Not To License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437 (2001).

135. Levin, *supra* note 116 (arguing that the determination of what areas should be open to licensing should depend on the procedural and substantive complexity of the matter and the likelihood of consumer confusion).

136. *See generally* Steven Gillers, *How To Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 417 (2013).

137. *See* Kritzer, *supra* note 120, at 101; Unger, *supra* note 130, at 448; *see also* Zachery C. Zurek, Comment, *The Limited Power of the Bar To Protect Its Monopoly*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 242, 265 (2013) (discussing requirements for nonlawyer patent specialists).

138. *See supra* notes 105–08 and accompanying text.

139. *See generally* Cultum v. Heritage House Realtors, 694 P.2d 630 (Wash. 1985).

consumer credit.[140] Such consumer-oriented approaches would make for a more socially defensible regulatory structure than the conventional ban on nonlawyer practice, irrespective of its quality and cost-effectiveness.

A more consumer-oriented approach would also vest enforcement authority in a more disinterested body than the organized bar. Where to locate enforcement responsibility will vary by jurisdiction. What is important is to centralize authority and to ensure that the entity in charge has sufficient resources, remedial power, and accountability to respond effectively to cases of consumer injury.

Over a quarter century ago, an ABA Commission on Professionalism report concluded, "It can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law."[141] It is time for the bar to act on that assertion and reform unauthorized-practice law and enforcement accordingly.

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140. TASK FORCE TO EXPAND ACCESS TO CIV. LEGAL SERVS., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 39 (2012) ("[T]he Task Force recommends the implementation of a pilot program to permit appropriately trained non-lawyer advocates and entities to provide out-of-court assistance in a discrete substantive area. . . . [T]he Task Force recommends that the pilot program be in an area such as housing assistance, consumer credit or, possibly, foreclosure.").

141. James Podgers, *Legal Profession Faces Rising Tide of Nonlawyer Practice*, 79 A.B.A. J. 50, 51 (1993) (quoting AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 52 (1986)).