

# BROADENING ACCESS TO JUSTICE IN NEVADA BY DEFINING THE PRACTICE OF LAW

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## I. INTRODUCTION

*“Rights protected by the First Amendment include advocacy and petition for redress of grievances, and the Fourteenth Amendment ensures equal justice for the poor in both criminal and civil actions. But to millions of Americans who are indigent and ignorant . . . these rights are meaningless. They are helpless to assert their rights under the law without assistance.”*

—Justice William Douglas<sup>1</sup>

People *need* help. Each year, the legal profession fails to provide more than 20 million hours of needed legal assistance.<sup>2</sup> In fact, close to 75 percent of low-income and 60 percent of middle-income individuals nationwide suffer from unmet legal needs each year.<sup>3</sup> Describing this alarming disparity, President Jimmy Carter stated, “Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented.”<sup>4</sup> Many Americans cannot afford competent legal services and, as a result, individuals with legal needs often seek assistance from less capable, but affordable providers or ignore their need for legal services altogether.<sup>5</sup> Nevada is no exception to the

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<sup>1</sup> *Hackin v. Arizona*, 389 U.S. 143, 144-45 (1967) (Douglas, J., dissenting) (citations omitted).

<sup>2</sup> DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 241 (1988).

<sup>3</sup> Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 712 (1996) [hereinafter Rhode, *Professionalism*]. Researchers have conducted numerous studies measuring unmet legal needs in conjunction with efforts to improve access to justice. See ABA COMM’N ON NONLAWYER PRACTICE, *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS* 45 (1995) [hereinafter ABA, *NONLAWYER ACTIVITY*]; see also Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 913 (1996).

<sup>4</sup> Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004) [hereinafter Rhode, *Connecting Principles*]. Similarly, in 1983, Harvard Dean Derek Bok stated that “[t]he legal system . . . is grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot.” Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 533-34 (1994) (quoting Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983)).

<sup>5</sup> Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 56 (1998). Low-income individuals that cannot afford high-cost

problem of unmet legal needs.<sup>6</sup> In 1994, 60 percent of low- and middle-income Nevadans faced legal problems without access to legal services, and a 2008 survey revealed that Nevadans continued to suffer from limited access to legal services.<sup>7</sup>

Defining the practice of law and restructuring prohibitions on the unauthorized practice of law (“UPL”) through court rules and legislation would dramatically improve access to justice for Nevadans.<sup>8</sup> Historically, the legal profession has used the public’s need for protection as justification for limiting the practice of law to lawyers,<sup>9</sup> but excluding all other providers from the legal market creates a legal monopoly.<sup>10</sup> Currently, Nevada uses a case-by-case approach that preserves most of the legal services market for lawyers.<sup>11</sup> As a result, Nevada’s current approach fails to acknowledge that nonlawyers can provide services at a price that low- and middle-income persons can afford, thus broadening access to justice.<sup>12</sup> Nevertheless, Nevada must balance the public’s need for access to justice against the public’s need for protection from incompetent service providers.<sup>13</sup> Thus, Nevada’s definition of the practice of law must identify a middle ground that preserves the monopoly only to the extent it is justified, and permits nonlawyers to serve individuals whose legal needs have gone unmet for far too long.<sup>14</sup>

This Note proposes a new definition of the practice of law that properly balances the public’s need for access to justice against its need for protection from incompetent legal service providers. Part II explores the historical development of UPL laws and definitions of the practice of law in the United States. Part III details the arguments made by both proponents and critics of UPL laws. Part IV scrutinizes approaches to defining the practice of law. Part V proposes a broad definition of the practice of law with exceptions for legal services that

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legal services often ignore their legal problems or eventually resort to low-cost alternatives. Professor Bertelli analogized the legal services market to the market for used cars, arguing that low-income consumers will either purchase a “lemon” or do without a car. *Id.*

<sup>6</sup> Nitta, *supra* note 3, at 912.

<sup>7</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 71-72; NEV. SUPREME COURT ACCESS TO JUSTICE COMM’N, ASSESSMENT OF CIVIL LEGAL NEEDS AND ACCESS TO JUSTICE IN NEVADA 2 (July 2008), <http://www.nvbar.org/Committees/LNA%20Assessment%20Final.doc> [hereinafter ACCESS TO JUSTICE COMM’N REP.].

<sup>8</sup> See Rhode, *Connecting Principles*, *supra* note 4, at 407. The Nevada Supreme Court holds the power to define the practice of law, but rather than adopt a formal definition, the court has used a case-by-case approach. *In re Lerner*, 197 P.3d 1067, 1069, 1071 (Nev. 2008).

<sup>9</sup> Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2593 (1999) (noting that courts prohibit nonlawyers from providing legal services for ethical reasons, primarily the public’s need for protection from incompetence).

<sup>10</sup> Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 153 (2000) (referring to the legal monopoly as a “Legal Cartel”).

<sup>11</sup> See *In re Lerner*, 197 P.3d at 1069.

<sup>12</sup> Rhode, *Connecting Principles*, *supra* note 4, at 408-09.

<sup>13</sup> *Id.*

<sup>14</sup> The ABA has recommended an analytical approach that weighs the consumers’ interest in access to justice against their need for protection. See ABA, NONLAWYER ACTIVITY, *supra* note 3, at 12.

nonlawyers can competently provide. The definition also includes a regulatory scheme that protects the public from incompetent legal services. Part VI summarizes Nevada's next steps toward broadening access to justice.

## II. HISTORICAL DEVELOPMENT OF UPL LAWS AND PRACTICE OF LAW DEFINITIONS

Throughout American history, both lawyers and nonlawyers have participated in the legal services market.<sup>15</sup> However, the nonlawyer's role in this market has changed in response to the degree of regulation and enforcement of UPL laws.<sup>16</sup> During the Colonial period, for example, most courts barred nonlawyers from representing clients in court,<sup>17</sup> but nonlawyers provided a variety of services that many states today would consider UPL, including drafting legal documents and offering legal advice.<sup>18</sup> Nonlawyers experienced increased freedom during the first century of American history, when state legislatures further liberalized UPL rules to allow nonlawyers to appear in court.<sup>19</sup> This freedom continued through the Civil War and the organization of the American Bar Association ("ABA") in 1878.<sup>20</sup>

During the 1920s and 1930s, many states began limiting nonlawyers' participation in the legal market.<sup>21</sup> The Great Depression created new economic pressure for the legal profession to protect its own interests, which led to increased regulations of the practice of law.<sup>22</sup> States began requiring bar admission to practice law and imposed criminal sanctions for UPL.<sup>23</sup> Also, the ABA organized its first Committee on the Unauthorized Practice of Law in 1930, and charged the committee with investigating and enforcing UPL laws.<sup>24</sup> Accordingly, the 1930s set in motion a period of increased enforcement of UPL laws.<sup>25</sup>

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<sup>15</sup> *Id.* at 1. In addition to nonlawyer service providers, consumers themselves participate in the legal market through self-representation. Cramton, *supra* note 4, at 566. Thus, the legal monopoly, even at its peak, had at least one exception: self-representation. *Id.*

<sup>16</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 1.

<sup>17</sup> Denckla, *supra* note 9, at 2583; *see also* Cramton, *supra* note 4, at 567. Courts regulated the practice of law by limiting "who could enter an appearance in litigation." *Id.*

<sup>18</sup> Denckla, *supra* note 9, at 2583.

<sup>19</sup> *Id.* Nonlawyer practice flourished during the first 100 years of the new American republic. ABA, NONLAWYER ACTIVITY, *supra* note 3, at 15.

<sup>20</sup> Denckla, *supra* note 9, at 2582.

<sup>21</sup> Susan D. Hoppock, Note, *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, 721 (2007). "Bar associations, formerly concerned with the two issues of educational or experience requirements for admission to the bar and prohibiting the appearance of non-bar members in court, now began to analyze a broader range of nonlawyer activities." ABA, NONLAWYER ACTIVITY, *supra* note 3, at 16.

<sup>22</sup> Cramton, *supra* note 4, at 567.

<sup>23</sup> Hoppock, *supra* note 21, at 721-22.

<sup>24</sup> Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 8 (1981) [hereinafter Rhode, *Policing*].

<sup>25</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 1. From the mid-twentieth century through the 1970s, the ABA and state bar associations actively enforced UPL laws. Quintin

Beginning in the 1940s, the ABA entered into “Statements of Principles” with other professions.<sup>26</sup> These negotiated agreements sought to limit nonlawyers’ ability to compete with lawyers by prohibiting certain activities as UPL.<sup>27</sup> However, with the rise of antitrust law in the 1970s, consumers began challenging “Statements of Principles” because the agreements violated antitrust laws.<sup>28</sup> In response, the ABA, along with other bar associations, rescinded all “Statements of Principles,” and the ABA and many state bar associations disbanded their UPL committees.<sup>29</sup>

Although most states retained their UPL laws after the antitrust lawsuits, the 1970s through the 1990s marked an era of confusion and inconsistency.<sup>30</sup> Not only did states’ judicial approaches to UPL lack uniformity, enforcement efforts also significantly declined, thus increasing the occurrence of UPL.<sup>31</sup> The ABA responded in 2003 by publishing a Model Definition of the Practice of Law, recommending that states define the practice of law using the following basic premise as a framework: “[T]he practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.”<sup>32</sup> The ABA also encouraged states to specify *who* can provide *what* services.<sup>33</sup>

Currently, many states define the practice of law, but the definitions differ from state to state.<sup>34</sup> Regardless, most states agree that the practice of law includes representing clients in court, preparing legal documents, and giving legal advice.<sup>35</sup> Most definitions contain an exception for self-representation and some definitions allow nonlawyers to represent clients before state administrative agencies.<sup>36</sup> Other states have declined to adopt a definition and

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Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 815 (2003).

<sup>26</sup> Rhode, *Policing*, *supra* note 24, at 9. The ABA and other bar associations entered into these agreements with “accountants, architects, bankers, claims adjusters, collection agents, engineers, social workers, law book publishers, realtors, and insurance brokers.” *Id.* The parties involved entered into these agreements to avoid litigation, to improve relations between the professions, and to better serve the public interest. *Id.*

<sup>27</sup> Denckla, *supra* note 9, at 2584.

<sup>28</sup> Cramton, *supra* note 4, at 567; Denckla, *supra* note 9, at 2584 (“[T]hese ‘statements of principles’ were seriously undermined by the Supreme Court’s decision in *Goldfarb v. Virginia State Bar* . . .”). In *Goldfarb*, the Supreme Court applied antitrust laws to bar associations and reasoned that a state bar association’s position as a state agency does not create an “antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.” *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791, 793 (1975); *see also* James Podgers, *Statements of Principles: Are They on the Way Out?*, 66 A.B.A. J. 129, 129 (1980).

<sup>29</sup> Denckla, *supra* note 9, at 2584-85.

<sup>30</sup> *See* Hoppock, *supra* note 21, at 722-23.

<sup>31</sup> Johnstone, *supra* note 25, at 814.

<sup>32</sup> ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT TO THE HOUSE OF DELEGATES 13 (2003), *available at* <http://www.abanet.org/cpr/model-def/recomm.pdf> [hereinafter ABA TASK FORCE REPORT].

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *See* TEX. GOV’T CODE ANN. § 81.101 (West 2005); UTAH SUP. CT. R. 14-802 (2007); WASH. GEN. R. 24 (2002); *see also* Hoppock, *supra* note 21, at 722.

<sup>35</sup> *See, e.g.*, WASH. GEN. R. 24 (2002); Denckla, *supra* note 9, at 2588.

<sup>36</sup> Denckla, *supra* note 9, at 2588; *see also* 31 C.F.R. § 10.3 (2007) (permitting a certified public accountant to appear before the Internal Revenue Service).

instead have resorted to earlier approaches to UPL, such as case-by-case analysis<sup>37</sup> or looking to specific conduct that requires the skills and training of a lawyer.<sup>38</sup>

### III. PROPONENTS AND CRITICS OF UPL LAWS

Professor Deborah Rhode, a leading scholar in the access-to-justice campaign, commented, “Almost from conception, the unauthorized practice movement has been dominated by the wrong people asking the wrong questions.”<sup>39</sup> Players in this debate have characterized the unauthorized practice of law differently.<sup>40</sup> Which side people take, whether for or against UPL laws, depends largely on what questions they ask. For example, someone who asks how can we protect the public from incompetent services probably supports UPL laws and believes that only lawyers should provide legal services.<sup>41</sup> On the other hand, someone who asks how can we broaden the public’s access to legal services is most likely a critic of UPL laws and favors nonlawyer participation in the legal services market.<sup>42</sup> Professor Rhode argues that the underlying question should be “whether [incompetency] issues arise with sufficient frequency, and whether lawyers make so unique a contribution to their resolution, as to justify a professional monopoly.”<sup>43</sup>

Importantly, the burden of proof is on the legal profession to justify its legal monopoly.<sup>44</sup> In support of UPL laws, the legal profession presents several justifications for its monopoly, centered around protecting the public.<sup>45</sup> Critics of UPL laws respond that the legal profession cloaks its true motive of suppressing competition in claims of public protection.<sup>46</sup> This section explores

<sup>37</sup> *In re Lerner*, 197 P.3d 1067, 1069 (Nev. 2008). The Nevada Supreme Court applied a case-by-case analysis and failed to adopt a definition for the practice of law as recommended by the ABA.

<sup>38</sup> *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 412-13 (Nev. 1958) (holding Pioneer Title liable for UPL because some of the services they provided required the skills and training of an attorney); Hoppock, *supra* note 21, at 723.

<sup>39</sup> Rhode, *Policing*, *supra* note 24, at 97.

<sup>40</sup> See e.g., Peter S. Margulies, *Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 ROGER WILLIAMS U. L. REV. 285, 285-86 (2002); Rhode, *Policing*, *supra* note 24, at 97.

<sup>41</sup> See Hoppock, *supra* note 21, at 728.

<sup>42</sup> See generally Rhode, *Connecting Principles*, *supra* note 4, at 371-75.

<sup>43</sup> Rhode, *Policing*, *supra* note 24, at 88.

<sup>44</sup> Cramton, *supra* note 4, at 572 (citing Rhode, *Policing*, *supra* note 24, at 97).

<sup>45</sup> See generally Hoppock, *supra* note 21, at 727-29.

<sup>46</sup> See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 448 (2001); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 697 (Aspen 2009). In 1967, ABA President Orison S. Marden declared that regulation of the practice of law “must not be motivated by selfishness, by competition-for-competition’s sake, or by avaricious materialism,” indicating that the ABA recognized the protectionist nature of UPL laws. Orison S. Marden, *The American Bar and Unauthorized Practice*, 33 UNAUTHORIZED PRAC. NEWS 1, 2 (1967). See also LUBAN, *supra* note 2, at 247 (“The clear conclusion is that unauthorized practice regulations—state actions—prop up legal fees without serving any other significant public interest.”).

the major arguments advanced by proponents of UPL along with the counter-arguments made by critics of UPL.

### A. *Protecting the Public from Incompetent Services*

#### 1. *Proponents of UPL Laws*

Courts, lawyers, and bar associations have defended UPL laws for decades on the basis that limiting the practice of law to lawyers protects the public from incompetence.<sup>47</sup> “[T]he cost society pays by restricting competition through licensing is worth the assurance of quality that licensing brings.”<sup>48</sup> More specifically, proponents of UPL argue that consumers suffer from “information asymmetry.”<sup>49</sup> Consumers do not have enough information and experience to evaluate their needs or the quality of the services provided.<sup>50</sup>

Furthermore, proponents of UPL laws argue that information asymmetry makes individuals more vulnerable to incompetence:<sup>51</sup> “The services rendered by the professional . . . are necessary to individuals at various points in their lives and are frequently of the utmost personal concern . . . . Because of the specialized knowledge involved, the quality of the services rendered . . . is untestable from the perspective of the layman.”<sup>52</sup> Moreover, proponents argue that consumers in need of legal services are more vulnerable than are other consumers<sup>53</sup> because, in many situations, a lawyer’s authority is self-executing.<sup>54</sup> For example, a doctor’s authority depends on the patient acting on the doctor’s recommendation, whether by taking a pill, exercising once a day, or getting more rest.<sup>55</sup> Alternatively, a lawyer has broader, binding power; a lawyer’s performance can greatly affect the outcome of the legal dispute.<sup>56</sup> There-

<sup>47</sup> *In re Schwartz*, 862 P.2d 215, 218 (Ariz. 1993) (“The purpose of lawyer discipline is not to punish the offender, but to protect the public, the profession, and the administration of justice.”); MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (2010) (“[L]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”); Jonathan Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 190 (1979) (identifying public protection as the most common justification for occupational regulation).

<sup>48</sup> Soha F. Turfler, Note, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1923 (2004).

<sup>49</sup> Cramton, *supra* note 4, at 551; Barton, *supra* note 46, at 437; Rose, *supra* note 47, at 191 (discussing lack of sufficient information to evaluate service providers as a justification for occupational licensing).

<sup>50</sup> Barton, *supra* note 46, at 437-38.

<sup>51</sup> Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615 (1986); see also Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 48 (1999).

<sup>52</sup> Pepper, *supra* note 51, at 615.

<sup>53</sup> Rose, *supra* note 47, at 191 (the risk of harm from incorrect decisions is greater in the legal services market than in other markets); see also Stempel, *supra* note 51, at 48.

<sup>54</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2010). Although Rule 1.2(a) requires lawyers to consult with the client regarding the means of carrying out the client’s objections, the rule also permits lawyers to act on behalf of the client as “impliedly authorized to carry out the representation.” *Id.*

<sup>55</sup> Stempel, *supra* note 51, at 49.

<sup>56</sup> *Id.* at 49-50.

fore, proponents argue that UPL laws provide “an organizing construct that will maximize the chances that such services will be rendered proficiently.”<sup>57</sup>

To illustrate this concept of information asymmetry, suppose Bob Jones and his wife have three children who enjoy jumping on a trampoline in Bob’s backyard.<sup>58</sup> One day, while jumping on the trampoline, a neighborhood child slips through a gap in the trampoline’s frame where Bob had forgotten to replace a few missing springs. Sadly, the child breaks her leg, and the child’s parents blame Bob. A few months later, Bob is served with a summons and complaint. Bob, like many low-income Americans, faces an average of one legal problem per year<sup>59</sup> and manages them without a lawyer’s assistance by ignoring his legal problems<sup>60</sup> or resorting to self-help.<sup>61</sup> Now, Bob is staring at a frightening legal document that tells him he must answer the complaint within twenty days.<sup>62</sup> Because of his lack of experience with the law, Bob cannot adequately evaluate his need for an attorney.<sup>63</sup> Even if he retains legal counsel, Bob might not be able to accurately evaluate the quality of services he receives because he suffers from information asymmetry.<sup>64</sup> Bob’s inability to make this evaluation leaves him vulnerable to incompetent service providers.<sup>65</sup> Thus, according to proponents of UPL laws, the legal profession should step in and prevent Bob from seeking help from anyone but a lawyer.<sup>66</sup>

## 2. Critics of UPL Laws

Critics of UPL laws characterize this rationale as completely unjustified for two main reasons:<sup>67</sup> (1) information asymmetry concerns are minor and remediable,<sup>68</sup> and (2) lawyers are not necessarily more competent than nonlawyers.<sup>69</sup> Regarding the first reason, critics argue that information asymmetry poses a minimal threat to consumers and that individuals can easily remedy information asymmetry.<sup>70</sup> Arguably, any consumer in any market possesses less information about the product or service than does the provider.<sup>71</sup> For instance, whenever an interested buyer seeks to purchase shoes from a manufacturer, presumably the buyer knows less about the quality of the

<sup>57</sup> *Id.* at 50.

<sup>58</sup> Bob Jones’s story is hypothetical.

<sup>59</sup> LUBAN, *supra* note 2, at 241.

<sup>60</sup> Bertelli, *supra* note 5, at 56; *see also* Turfler, *supra* note 48, at 1905.

<sup>61</sup> Turfler, *supra* note 48, at 1905.

<sup>62</sup> NEV. R. CIV. P. 12(a)(1).

<sup>63</sup> Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 889 (1990).

<sup>64</sup> *Id.*

<sup>65</sup> Pepper, *supra* note 51, at 615.

<sup>66</sup> *See* Barton, *supra* note 46, at 436.

<sup>67</sup> Barton, *supra* note 46, at 436 (“This rationale alone cannot justify regulation of lawyers.”).

<sup>68</sup> *Id.* at 439.

<sup>69</sup> Denckla, *supra* note 9, at 2594.

<sup>70</sup> Barton, *supra* note 46, at 439.

<sup>71</sup> *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 480 (Aspen 4th ed. 2008); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1267-68 (1995).

shoes than the manufacturer, such as the type of leather used and the method of production.<sup>72</sup> Yet, information asymmetry in the shoe industry does not justify giving manufacturers a monopoly on the sale of shoes, simply to protect buyers from low-quality shoes. Nonetheless, lawyers enjoy a monopoly in the name of protecting consumers from low-quality legal services.<sup>73</sup>

Critics of UPL laws also contend that any effects of information asymmetry are remediable without prohibiting nonlawyers from providing services.<sup>74</sup> Basically, critics argue that the public simply needs more information, not more regulation.<sup>75</sup> A consumer can obtain more information about a legal service provider by getting a recommendation from family or friends or by researching the provider.<sup>76</sup> States can reduce information asymmetry by reforming rules that inhibit the free flow of information and by making all client complaints and discipline related to competency available to the public.<sup>77</sup> Thus, critics of UPL argue that the “‘incompetent lawyer justification’ . . . cannot justify regulation of the legal market as a whole, because the entire market is not affected by information asymmetry.”<sup>78</sup>

For critics of the justification that UPL laws are necessary for the protection of the public from incompetence, the second main argument is that lawyers are not necessarily more competent than nonlawyers.<sup>79</sup> Critics point out that the legal profession attempts to ensure competence by mandating that every lawyer obtain a legal education, pass a bar exam, comply with professional and ethical standards, and participate in continuing education courses.<sup>80</sup> Unfortunately, these efforts often fail to ensure competence.<sup>81</sup> Many law schools fail to train their law students adequately, bar exams mostly just screen out students

<sup>72</sup> Soha F. Turfler drew a similar analogy to orange buyers and fruit suppliers. Turfler, *supra* note 48, at 1919.

<sup>73</sup> *See id.* Arguably, the consumer is more vulnerable to serious harm when seeking legal services than when buying a new pair of shoes. *See* Stempel, *supra* note 51, at 49. However, this Note proposes that nonlawyers be permitted to provide routine legal services only, not services with a high risk of harm to the consumer. Therefore, the shoe industry is analogous to the routine legal services industry. *See infra* Part V.A-C. Even so, critics of UPL maintain that information asymmetry in the legal market can be easily remedied. *See* Barton, *supra* note 46, at 439.

<sup>74</sup> *See* Barton, *supra* note 46, at 439.

<sup>75</sup> *Id.* at 446.

<sup>76</sup> *Id.* at 439. *See also* Cramton, *supra* note 4, at 571 (proposing that consumer groups and ratings can remedy information asymmetry). Just as car and electronics consumers use publications such as *Consumer Reports* as a source of information, Gilson, *supra* note 63, at 891, legal consumers use rating systems, such as Martindale-Hubbell, to find and evaluate lawyers. *Peer Review Ratings*, MARTINDALE-HUBBELL, [http://www.martindale.com/Products\\_and\\_Services/Peer\\_Review\\_Ratings.aspx](http://www.martindale.com/Products_and_Services/Peer_Review_Ratings.aspx) (last visited Dec. 15, 2010). Consumer groups could develop similar rating systems to evaluate nonlawyer legal service providers.

<sup>77</sup> Barton, *supra* note 46, at 485.

<sup>78</sup> *Id.* at 441 (internal quotation marks omitted). Barton uses criminal law as an example of a portion of the legal market more susceptible to information asymmetry. *Id.* Barton argues that “[t]he need for regulation based upon consumer protection should thus be understood as a sliding scale. The more serious and irreversible the potential harm, the greater the justification for regulation to counteract informational asymmetry.” *Id.*

<sup>79</sup> Denckla, *supra* note 9, at 2594.

<sup>80</sup> ABA TASK FORCE REPORT, *supra* note 32, at 7; Turfler, *supra* note 48, at 1922.

<sup>81</sup> Turfler, *supra* note 48, at 1925 (“Consumers are no longer ensured intellectually competent services through the use of an attorney.”).



who do not function well under time pressure, professional and ethical violations often go unpunished, and continuing education classes are not reflective of the actual legal environment.<sup>82</sup> As a result, critics suggest that many non-lawyer specialists are more competent than generalist and inexperienced lawyers.<sup>83</sup> For example, after having a default judgment entered against him from the personal injury case, Bob Jones now needs to file bankruptcy. Bob might be better off going to a nonlawyer specialist who has thirty years of experience with bankruptcies than a first-year associate who recently passed the bar on his fifth try.<sup>84</sup> Critics of UPL laws essentially argue that providers can gain competence by means other than a formal legal education.<sup>85</sup>

Additionally, critics of UPL laws emphasize that little evidence exists to support the legal profession's claim that the unauthorized practice of law actually harms the public.<sup>86</sup> Many instances of UPL involve no harm to the consumer.<sup>87</sup> In fact, only 2 percent of all inquiries, investigations, and complaints filed with bar associations allege consumer injury.<sup>88</sup> Critics highlight these statistics as evidence that not only do nonlawyers rarely injure consumers, but the public does not perceive UPL as a danger.<sup>89</sup> Some unethical and unqualified nonlawyers do seek to exploit vulnerable consumers, but "the appropriate response to these problems is regulation, not prohibition."<sup>90</sup>

Even assuming that some nonlawyers are less competent than some lawyers, varying degrees in quality do not justify a legal monopoly, according to critics of UPL laws.<sup>91</sup> Virtually every market contains a spectrum of quality in services and products.<sup>92</sup> For instance, anyone who eats out on a regular basis recognizes that servers vary in quality.<sup>93</sup> Yet, states do not regulate servers in an attempt to weed out the ones who do not have the menu memorized or who

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<sup>82</sup> *Id.* at 1925-26; *see also* Barton, *supra* note 46, at 449 (noting that bar associations rarely enforce rules of professional conduct in cases of incompetence, and that CLEs are designed not to eliminate incompetence, but rather to expand the skills and knowledge of already-competent lawyers).

<sup>83</sup> Rhode, *Connecting Principles*, *supra* note 4, at 408. Although licensing requirements for lawyers do not ensure competence, these requirements "equip[ ] lawyers with a global perspective not shared by lay practitioners." Rhode, *Policing*, *supra* note 24, at 88. Lawyers with professional training are needed to handle complex legal issues, but nonlawyers can competently provide routine services. *See id.* Each has a place in the legal services market.  
<sup>84</sup> Rhode, *Connecting Principles*, *supra* note 4, at 408.

<sup>85</sup> ABA TASK FORCE REPORT, *supra* note 32, at 7 ("[C]ompetence of nonlawyers providing services that are included within the definition of the practice of law could be assured, for instance, through experience, education or training standards, certification or licensing, or supervision by a lawyer.").

<sup>86</sup> Hoppock, *supra* note 21, at 725.

<sup>87</sup> Rhode, *Policing*, *supra* note 24, at 43; *see, e.g., In re Lerner*, 197 P.3d 1067, 1070 (Nev. 2008). In this case, the client did not allege any harm. Rather, opposing counsel, Progressive Insurance Company, filed the complaint for UPL with the State Bar of Nevada. *Id.*

<sup>88</sup> Rhode, *Policing*, *supra* note 24, at 43.

<sup>89</sup> *Id.*

<sup>90</sup> DEBORAH L. RHODE, ACCESS TO JUSTICE 89-90 (2004) [hereinafter RHODE, ACCESS TO JUSTICE]. *See infra* Part IV.B.

<sup>91</sup> Barton, *supra* note 46, at 436.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (drawing a similar analogy to grocery clerks).

regularly spill drinks on customers.<sup>94</sup> Likewise, critics argue that states should not limit the practice of law to lawyers simply because nonlawyers might provide lower quality services.<sup>95</sup> Although low-quality legal service providers arguably can cause more harm than a clumsy server, market forces protect consumers by weeding out incompetent providers.<sup>96</sup> Consumers would not return to nonlawyers who performed poorly, thus driving incompetent providers out of the legal services market.<sup>97</sup>

### B. *Protecting the Administration of Justice*

Proponents of UPL laws also argue that proper administration of justice requires that only lawyers provide legal services.<sup>98</sup> Stated differently, “[t]he effectiveness of the legal order in every state is heavily dependent on the state’s unauthorized practice laws.”<sup>99</sup> UPL laws ensure that participants in the judicial system comply with court rules and standards of professional conduct,<sup>100</sup> thereby facilitating efficient and fair operation of the judicial system.<sup>101</sup>

Critics of UPL laws identify three flaws in the proponents’ argument that administration of the justice system justifies the legal monopoly.<sup>102</sup> First, proponents assume that consumers would hire incompetent nonlawyers, ignorant of court rules of procedure and conduct.<sup>103</sup> In reality, many nonlawyer specialists are more competent than generalist lawyers.<sup>104</sup> Nonlawyers can familiarize themselves with courts rules of procedure and conduct, and states can subject nonlawyers to the same malpractice liability as lawyers to prevent incompetent providers from obstructing administration of justice.<sup>105</sup> Second, courts possess inherent power to impose sanctions on nonlawyers for failure to comply with rules of conduct.<sup>106</sup> Third, nonlawyers can adequately provide many routine services outside of court.<sup>107</sup> “[F]or many routine conveyances, retaining coun-

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<sup>94</sup> *See id.* Barton qualifies his statement that varying degrees of competence do not justify laws by pointing out “a free-market system relies upon a combination of consumer expertise to choose the best and safest products, and ex post damages actions to control for substandard or dangerous products. When these options fail, *ex ante* regulation may be justified.” *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> Turfler, *supra* note 48, at 1919.

<sup>97</sup> *Id.* Driving incompetent service providers out of the market would protect all consumers, including those that infrequently seek legal assistance. Although these one-time users lack enough experience to evaluate the quality of services they receive, having fewer incompetent providers in the market (a result of free market forces) reduces the risk to one-time users.

<sup>98</sup> Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2259 (1999); *see also* *Robinson v. Jones (In re Robinson)*, 162 B.R. 319, 325 (Bankr. D. Kan. 1993) (commenting that UPL can hinder the administration of justice).

<sup>99</sup> Johnstone, *supra* note 25, at 795.

<sup>100</sup> Hoppock, *supra* note 21, at 727.

<sup>101</sup> Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 *OR. L. REV.* 889, 893 (1996).

<sup>102</sup> Denckla, *supra* note 9, at 2597; Rhode, *Policing*, *supra* note 24, at 88.

<sup>103</sup> Denckla, *supra* note 9, at 2597.

<sup>104</sup> Rhode, *Connecting Principles*, *supra* note 4, at 408.

<sup>105</sup> Denckla, *supra* note 9, at 2597.

<sup>106</sup> *Id.*

<sup>107</sup> Rhode, *Policing*, *supra* note 24, at 88.

sel may be tantamount to ‘hir[ing] a surgeon to pierce an ear.’”<sup>108</sup> Moreover, if a client does hire a law firm to perform a routine service, a nonlawyer employee will most likely do the work with little lawyer supervision.<sup>109</sup> Therefore, critics of UPL laws maintain that administration of justice concerns cannot justify the legal monopoly.<sup>110</sup>

### C. Preventing Competitive Practice

Another argument for proponents of strict UPL laws is that without such laws, the legal profession, traditionally a public service profession,<sup>111</sup> would become a competitive business.<sup>112</sup> One scholar suggests that if forced to compete, lawyers would “cut ethical corners in search of a buck.”<sup>113</sup> Thus, permitting lawyers to compete with one another for clients, similar to other businesses, would corrupt the profession and harm the clients.<sup>114</sup>

In response, UPL critics argue that the legal profession is already a business rather than a public service.<sup>115</sup> Historically, lawyers were distinguishable from businesspersons because lawyers were more committed to public interest than their own financial self-interest.<sup>116</sup> Today, however, lawyers behave much like businesspersons—marketing their services, catering their business to individuals who can afford it, and striving to increase profits.<sup>117</sup> Accordingly, the legal profession “should be regulated like a business and subject to free market forces,”<sup>118</sup> rather than sheltered from competition by a professional monopoly.<sup>119</sup> Increasing competition within the legal services market would likely improve quality and lower costs.<sup>120</sup>

### D. Protecting Confidential Information

Lastly, proponents of UPL laws are concerned that allowing nonlawyers to practice law would fail to protect confidential client information.<sup>121</sup> Clients’ private information could be in jeopardy if nonlawyers could practice law, because nonlawyers and clients do not share a relationship of confidence, such as the attorney-client privilege.<sup>122</sup>

<sup>108</sup> *Id.* (alteration in original) (citing Lancaster, *Rating Lawyers: If Your Legal Problems Are Complex, a Clinic May Not Be the Answer*, WALL. ST. J., July 31, 1980, at 1, 8).

<sup>109</sup> GILLERS, *supra* note 46, at 697. The client could have saved on legal fees by retaining a nonlawyer to perform the routine service. *Id.*

<sup>110</sup> Denckla, *supra* note 9, at 2597-98.

<sup>111</sup> Turfler, *supra* note 48, at 1925.

<sup>112</sup> Denckla, *supra* note 9, at 2598.

<sup>113</sup> Pearce, *supra* note 71, at 1243.

<sup>114</sup> Denckla, *supra* note 9, at 2598.

<sup>115</sup> Pearce, *supra* note 71, at 1232.

<sup>116</sup> *Id.* at 1229.

<sup>117</sup> *Id.* at 1231; Turfler, *supra* note 48, at 1926.

<sup>118</sup> Turfler, *supra* note 48, at 1927.

<sup>119</sup> *Id.* at 1916.

<sup>120</sup> Pearce, *supra* note 71, at 1232-33.

<sup>121</sup> Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 779-80 (2002).

<sup>122</sup> Rhode, *Policing*, *supra* note 24, at 90-91.

Critics argue that this rationale cannot possibly justify the legal monopoly because the public's need for the attorney-client privilege is outweighed by its need for access to justice.<sup>123</sup> In fact, one scholar suggests that few, if any, consumers have ever filed a complaint for UPL on the grounds of injury from release of private information.<sup>124</sup> In addition, other professions, such as social workers, accountants, and bankers have access to private information; yet they still function without the equivalent of an attorney-client privilege.<sup>125</sup> Thus, "the public's need for such safeguards cannot simply be presumed,"<sup>126</sup> nor can it justify the legal monopoly.

#### IV. APPROACHES TO DEFINING THE PRACTICE OF LAW

Courts, states, and bar associations have implemented a variety of approaches to defining the practice of law.<sup>127</sup> This section discusses judicial, regulatory, and statutory approaches, as well as Nevada's approach to defining the practice of law.

##### A. *Judicial Approaches to Defining the Practice of Law*

State courts have used a number of different approaches to defining the practice of law. For example, some courts use a "legal knowledge standard," under which activities that require the "knowledge and the application of legal principles' constitute[ ] the practice of law."<sup>128</sup> Other courts define the practice of law according to a "community-custom" standard, meaning that activities "'commonly understood' to be the practice of law" are limited to lawyers only.<sup>129</sup> Courts sometimes make exceptions for "incidental services," recognizing that nonlawyers can competently provide certain legal services related to their specialty.<sup>130</sup> Furthermore, some courts implement an "activity-centered" approach by focusing on *what* legal services a nonlawyer can competently pro-

<sup>123</sup> *See id.*

<sup>124</sup> *Id.* at 91.

<sup>125</sup> *Id.*; *see also* Bertelli, *supra* note 5, at 50-51. Limiting the practice of law to lawyers to protect confidential client information assumes that nonlawyers are less trustworthy than are lawyers. *Id.* In actuality, a number of professions successfully protect confidential information, and, thus, are trustworthy. *See id.*

<sup>126</sup> Rhode, *Policing*, *supra* note 24, at 91.

<sup>127</sup> *See generally* ABA, NONLAWYER ACTIVITY, *supra* note 3, at 60-72.

<sup>128</sup> Rhode, *Policing*, *supra* note 24, at 81; *see, e.g.*, R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 416 (Okla. 1972) ("Our decisions definitely spell out the concept of the practice of law: the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent.").

<sup>129</sup> Rhode, *Policing*, *supra* note 24, at 82 (quoting State Bar Ass'n v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958); *see, e.g.*, Lowell Bar Ass'n v. Loeb (*In re Loeb*), 52 N.E.2d 27, 34 (Mass. 1943) ("The actual practices of the community have an important bearing on the scope of the practice of law.")).

<sup>130</sup> Rhode, *Policing*, *supra* note 24, at 82; *see, e.g.*, Creekmore v. IZARD, 367 S.W.2d 419, 423 (Ark. 1963) ("[T]he filling in of the simple standardized forms here involved is a necessary incident of [the appellant's real estate] business.").

vide.<sup>131</sup> This approach “focuses on the nature of the activity rather than the skills of the layman.”<sup>132</sup> Conversely, other courts use an “actor-centered” approach, defining the practice of law according to *who* can provide legal services.<sup>133</sup>

Yet another judicial approach to defining the practice involves balancing the public’s need for protection against its need for access to justice.<sup>134</sup> This balancing test creates a sliding scale where only lawyers can provide services that pose a high risk of harm to the consumer, and nonlawyers can freely provide only those services that pose a low risk of harm.<sup>135</sup> Thus, the balancing approach preserves the legal monopoly when the risk of harm is high, while allowing nonlawyers to provide low-risk services.<sup>136</sup> Compared with other judicial approaches to defining the practice of law, the balancing test best represents the needs of both the legal profession and the public.<sup>137</sup>

### B. Regulatory Schemes for Nonlawyers

States can further regulate nonlawyer activity within the legal market in three ways: registration, certification, and licensing.<sup>138</sup> Under these regimes, nonlawyers range from minimally qualified to formally educated, thus ensuring that nonlawyers’ participation in the legal services market is commensurate with their abilities.<sup>139</sup>

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<sup>131</sup> Turfler, *supra* note 48, at 1955; *see, e.g.*, Hulse v. Criger, 247 S.W.2d 855, 861 (Mo. 1952) (“[G]eneral warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training.”).

<sup>132</sup> Rhode, *Policing*, *supra* note 24, at 83 (criticizing the activity-centered approach as over-inclusive because it permits an activity without regard to the actor’s ability, but the approach might also be under-inclusive by omitting activities that certain nonlawyers can perform competently). *See also* Turfler, *supra* note 48, at 1955.

<sup>133</sup> *See* Turfler, *supra* note 48, at 1952 (referring to the actor-centered approach as the “lawyer-centered perspective”); *see, e.g.*, Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864, 867 (Minn. 1988) (“The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers’ field.”). The actor-centered approach would have the inverse affect of the activity-centered approach. Focusing on the actor might be over-inclusive because not all activities performed by an actor should be allowed. Additionally, the actor-centered approach would be under-inclusive because some omitted actors might be competent to provide legal services. Johnstone, *supra* note 25, at 797 (noting that UPL laws must define *whom* can provide *what* services). The ABA also makes the *whom/what* distinction. ABA TASK FORCE REPORT, *supra* note 32, at 5.

<sup>134</sup> Rhode, *Policing*, *supra* note 24, at 83-84; *see, e.g.*, Conway-Bogue Realty Inv. Co. v. Denver Bar Ass’n, 312 P.2d 998, 1007 (Colo. 1957) (“[R]equiring all [real estate] transactions to be conducted through lawyers, would not be in the public interest; . . . the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render the service . . .”).

<sup>135</sup> Rhode, *Professionalism*, *supra* note 3, at 714-15; *see also* ABA, NONLAWYER ACTIVITY, *supra* note 3, at 12; Barton, *supra* note 46, at 441.

<sup>136</sup> Rhode, *Professionalism*, *supra* note 3, at 714-15.

<sup>137</sup> *See* Rhode, *Policing*, *supra* note 24, at 84-85.

<sup>138</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 145-46.

<sup>139</sup> ABA TASK FORCE REPORT, *supra* note 32, at 6.

Registration is the least restrictive method of regulation.<sup>140</sup> Specifically, registration involves nonlawyers filing their names, addresses, and qualifications with a state agency, and agreeing to comply with certain standards of conduct.<sup>141</sup> The register then provides the state with a list of all legal service providers, enabling the state to watch over registrants' activities.<sup>142</sup>

Certification, like registration, requires nonlawyers to register with a state agency, but nonlawyers must demonstrate certain qualifications to receive a specific occupational title.<sup>143</sup> Titles may include "Certified Legal Assistant" or "Certified Paralegal."<sup>144</sup> Although certification is voluntary<sup>145</sup> and cannot guarantee ongoing competence,<sup>146</sup> the public benefits from the opportunity to choose between certified and uncertified providers.<sup>147</sup> Additionally, certified providers may charge a higher fee.<sup>148</sup> Yet, because uncertified providers may still compete in the market, their lower fees serve as a check on the higher prices charged by certified providers.<sup>149</sup> On the other hand, certification schemes might require states to develop exams, which makes this method more expensive than registration.<sup>150</sup>

Licensing is the most restrictive of the regulatory schemes.<sup>151</sup> Similar to registration and certification, licensing involves registering with a state agency to receive an occupational title, but licensees must prove their competency through testing.<sup>152</sup> The standards are typically much higher for licensing than certification.<sup>153</sup> The legal profession requires that law school graduates obtain licenses to become lawyers, but some states also offer limited licensing for nonlawyers.<sup>154</sup> Because licensing requires standardized testing and policing of unlicensed providers, however, it remains the most expensive method of state regulation.<sup>155</sup>

### C. *Statutory Approaches to Defining the Practice of Law*

Many states define the practice of law by statute or court rule. This section discusses the scope of these definitions and highlights three states' definitions as examples of the varied statutory approaches to defining the practice of law.

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<sup>140</sup> Julie A. Flaming, Note, *Avoiding the Unauthorized Practice of Law: Proposed Regulations for Paralegals in South Carolina*, 53 S.C. L. REV. 487, 501 (2002).

<sup>141</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 145.

<sup>142</sup> *Id.* at 146.

<sup>143</sup> *Id.* at 145.

<sup>144</sup> Flaming, *supra* note 140, at 501; ABA, NONLAWYER ACTIVITY, *supra* note 3, at 146.

<sup>145</sup> Flaming, *supra* note 140, at 501.

<sup>146</sup> Barton, *supra* note 46, at 447.

<sup>147</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 147.

<sup>148</sup> Barton, *supra* note 46, at 447.

<sup>149</sup> *Id.*

<sup>150</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 147.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 146.

<sup>153</sup> *Id.* at 147.

<sup>154</sup> WASH. GEN. R. 24(b)(1) (2002).

<sup>155</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 147.

### 1. *Scope of Definitions of the Practice of Law*

Commentators often refer to statutory definitions of the practice of law according to their scope: broad, narrow, or subject to the free market.<sup>156</sup> However, none of these definitions alone satisfy the competing interests of the legal profession and the public.

Broad definitions of the practice of law encompass most, if not all, legal services, leaving little to nothing for nonlawyers to offer.<sup>157</sup> Thus, a broad definition includes heavy regulation on the practice of law.<sup>158</sup> The ABA proposed a broad definition in 2003, which recommended that each state define the practice of law using the following basic premise: “[T]he practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.”<sup>159</sup> Many states have recognized this broad premise, including Nevada.<sup>160</sup> However, this broad definition on its own severely restricts the public’s access to justice because disallowing nonlawyer participation in the legal services market drives up prices.<sup>161</sup> Consumers who cannot afford a lawyer have little or no access to justice.<sup>162</sup>

The free-market definition of the practice of law repeals all UPL laws, allowing the free market to control the services and providers for which the public is willing to pay.<sup>163</sup> Free-market advocates argue that the legal monopoly has not only failed to perpetuate respect for lawyers and the law,<sup>164</sup> but also that the legal profession fails to adequately meet the needs of the public.<sup>165</sup> Therefore, the legal market should be subject to free market forces like most other businesses.<sup>166</sup> However, without a definition of the practice of law, consumers would be vulnerable to abuse by service providers.<sup>167</sup> Although protecting consumers from incompetence alone cannot justify the legal monopoly, the need for some protection from scammers and inept providers remains.<sup>168</sup>

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<sup>156</sup> Turfler, *supra* note 48, at 1917. Professor Pearce discusses a range of approaches similar to the broad and free market definitions, but he refers to them as the “status quo” and the “pure market approach.” Pearce, *supra* note 71, at 1232, 1269-70. Ultimately, Professor Pearce proposes a “hybrid approach” similar to this Note’s proposed definition. *Id.* at 1270.

<sup>157</sup> GILLERS, *supra* note 46, at 690; *see also* Turfler, *supra* note 48, at 1924.

<sup>158</sup> Turfler, *supra* note 48, at 1921.

<sup>159</sup> ABA TASK FORCE REPORT, *supra* note 32, at 13.

<sup>160</sup> *See, e.g., In re Lerner*, 197 P.3d 1067, 1072 (Nev. 2008); TEX. GOV’T CODE ANN. § 81.101(a) (West 2005); UTAH SUP. CT. R. 14-802(b)(1) (2010); WASH. GEN. R. 24(a) (2002).

<sup>161</sup> Turfler, *supra* note 48, at 1932.

<sup>162</sup> Rhode, *Connecting Principles*, *supra* note 4, at 373.

<sup>163</sup> Turfler, *supra* note 48, at 1924.

<sup>164</sup> DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 3-4 (2000) (“About three-fifths of Americans describe attorneys as greedy, and between half and three-quarters believe that they charge excessive fees. There is even broader agreement that lawyers handle many matters that could be resolved as well and with less expense by nonlawyers.”); Turfler, *supra* note 48, at 1925 (arguing that UPL laws have failed to promote respect for the legal profession).

<sup>165</sup> Rhode, *Professionalism*, *supra* note 3, at 712.

<sup>166</sup> Turfler, *supra* note 48, at 1927.

<sup>167</sup> *See* Stempel, *supra* note 51, at 48-50.

<sup>168</sup> Barton, *supra* note 46, at 441. Some unlicensed providers misrepresent themselves as licensed attorneys in order to exploit consumers, particularly low-income immigrants. Rhode, *Connecting Principles*, *supra* note 4, at 408. Professor Rhode suggests the solution

Accordingly, the free market definition does not sufficiently balance the profession's interests against the public's interests.

A narrow definition of the practice of law reserves a small portion of the legal services market for lawyers and leaves the rest open to nonlawyers.<sup>169</sup> Lawyers would still enjoy exclusive power over complex legal services, but nonlawyers could perform all routine and simple services.<sup>170</sup> However, a narrow definition alone cannot meet the needs of both the profession and the public. Although narrow definitions allow for increased competition and reduced prices,<sup>171</sup> states should still regulate nonlawyer providers to maintain legal order and ensure professional and competent performance.<sup>172</sup>

## 2. *Specific States' Approaches to Defining the Practice of Law*

Although states have implemented a wide variety of approaches and definitions for the practice of law,<sup>173</sup> this section focuses on Texas, Washington, and Utah. These states represent a broad spectrum of approaches, and this Note incorporates certain features from each one into its proposed definition for Nevada.

### a. *Texas*

The Texas UPL statute, Texas Government Code § 81.101, contains a narrow definition with exceptions, and authorizes the case-by-case approach.<sup>174</sup>

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is not prohibition, but rather regulation of nonlawyers in the legal services market. *Id.* Justice Douglas agreed, stating that “[c]ertainly the States have a strong interest in preventing legally untrained shysters who pose as attorneys from milking the public for pecuniary gain. But it is arguable whether this policy should support prohibitions against charitable efforts of nonlawyers to help the poor. . . . [L]ay assistance may be the only hope for achieving equal justice at this time.” *Hackin v. Arizona*, 389 U.S. 143, 151-52 (1967) (Douglas, J., dissenting) (citations omitted).

<sup>169</sup> GILLERS, *supra* note 46, at 690; Turfler, *supra* note 48, at 1929.

<sup>170</sup> Turfler, *supra* note 48, at 1932-33.

<sup>171</sup> *Id.* at 1932.

<sup>172</sup> Hoppock, *supra* note 21, at 728.

<sup>173</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009); *see also* ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW: STATE DEFINITIONS OF THE PRACTICE OF LAW app. a, *available at* [http://www.abanet.org/cpr/model-def/model\\_def\\_statutes.pdf](http://www.abanet.org/cpr/model-def/model_def_statutes.pdf). This Appendix demonstrates the variety of state approaches and definitions for the practice of law. *See id.* However, the Appendix lists Utah's 2003 definition, rather than its current edition enacted in 2005; therefore, the list is not an accurate list of all current state definitions.

<sup>174</sup> TEX. GOV'T CODE ANN. § 81.101 (West 2005). The Texas UPL statute reads in pertinent part:

(a) In this chapter the “practice of law” means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

(c) In this chapter, the “practice of law” does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an



The statute enumerates three activities that qualify as the practice of law: preparing legal documents, representing clients in court, and giving legal advice.<sup>175</sup> The Texas statute also lists the services and products not designated as the practice of law, and, in effect, authorizes nonlawyers to provide these services and products.<sup>176</sup> Although the statute allows nonlawyers to provide written and electronic products to consumers, such as books, forms, and computer software, these products must disclose that they are not substitutes for the advice of an attorney.<sup>177</sup> Courts may add to both the list of activities that constitute the practice of law and the list of exceptions on a case-by-case basis.<sup>178</sup>

*b. Washington*

Washington's UPL rule, Washington General Rule 24, includes a broad definition of the practice of law and a series of exceptions.<sup>179</sup> The rule defines

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Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.

<sup>175</sup> *Id.* § 81.101(a). Most states agree that these three activities constitute the practice of law. Denckla, *supra* note 9, at 2588.

<sup>176</sup> TEX. GOV'T CODE ANN. § 81.101(c).

<sup>177</sup> *Id.* Prior to enactment of this statute, the Texas Unauthorized Practice of Law Committee aggressively enforced UPL laws against providers of legal self-help materials. Fischer, *supra* note 10, at 131-34. But, just as one scholar predicted, Texas reformed its UPL statute to allow self-help materials, focusing on the consumer's need, rather than protecting the legal profession. *Id.* at 134.

<sup>178</sup> TEX. GOV'T CODE ANN. § 81.101(b).

<sup>179</sup> WASH. GEN. R. 24 (2002). The Washington UPL rule reads in pertinent part:

(a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

- (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
- (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

(b) Exceptions and Exclusions: Whether or not they constitute the practice of law, the following are permitted:

- (1) Practicing law authorized by a limited license to practice pursuant to Admission to Practice Rules 8 (special admission for: a particular purpose or action; indigent representation; educational purposes; emeritus membership; house counsel), 9 (legal interns), 12 (limited practice for closing officers), or 14 (limited practice for foreign law consultants).
- (2) Serving as a court house facilitator pursuant to court rule.
- (3) Acting as a lay representative authorized by administrative agencies or tribunals.
- (4) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.
- (5) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.
- (6) Providing assistance to another to complete a form provided by a court for protection under RCW chapters 10.14 (harassment) or 26.50 (domestic violence prevention) when no fee is charged to do so.

the practice of law as the “application of legal principles and judgment . . . to the circumstances or objectives of another entity or person(s).”<sup>180</sup> Washington’s rule lists the same three activities as Texas’ statute—preparing documents, representing clients in court, and giving legal advice<sup>181</sup>—but subsection 24(a)(4) adds negotiating for a client to the list of activities that constitute the practice of law.<sup>182</sup>

The rule also contains exceptions for certain providers and services that would otherwise qualify as UPL under subsection (a).<sup>183</sup> More specifically, Washington permits the following providers and services: (1) potential limited licensees who may practice law although they are not licensed lawyers;<sup>184</sup> (2) nonlawyers that represent clients before an administrative agency;<sup>185</sup> and (3) the sale of legal forms by nonlawyers, such as fill-in-the-blank divorce papers and wills.<sup>186</sup> Like Texas, Washington also authorizes a case-by-case approach to determining UPL.<sup>187</sup>

### c. Utah

Utah’s UPL rule, Utah Supreme Court Rule 14-802, takes a form very similar to Washington’s statute. It includes a broad definition and “carve-outs” or exceptions for nonlawyers to provide certain services that would otherwise qualify as UPL.<sup>188</sup> Similar to the statute in Texas and the rule in Washington,

(7) Acting as a legislative lobbyist.

(8) Sale of legal forms in any format.

(9) Activities which are preempted by Federal law.

(10) Serving in a neutral capacity as a clerk or court employee providing information to the public pursuant to Supreme Court Order.

(11) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law or that have been permitted under a regulatory system established by the Supreme Court.

<sup>180</sup> WASH. GEN. R. 24(a). The Nevada Supreme Court articulated an almost identical definition in *Lerner*—“the application of the general body of legal knowledge to a client’s specific problem.” *In re Lerner*, 197 P.3d 1067, 1072 (Nev. 2008). The ABA also proposes this definition as a basic premise for defining the practice of law. ABA TASK FORCE REPORT, *supra* note 32, at 13.

<sup>181</sup> WASH. GEN. R. 24(a)(1)-(3); TEX. GOV’T CODE ANN. § 81.101(a).

<sup>182</sup> WASH. GEN. R. 24(a)(4).

<sup>183</sup> WASH. GEN. R. 24(b).

<sup>184</sup> WASH. GEN. R. 24(b)(1). Rule 24(b)(1) authorizes “certain lay persons to select, prepare and complete legal documents incident to the closing of real estate and personal property transactions.” WASH. ADMISSION TO PRACTICE R. 12(a) (2009).

<sup>185</sup> WASH. GEN. R. 24(b)(3). Many states permit nonlawyers to practice before an administrative agency. Denckla, *supra* note 9, at 2588.

<sup>186</sup> WASH. GEN. R. 24(b)(8). The Nevada Supreme Court noted that routine transactions should not require a lawyer’s assistance. *In re Lerner*, 197 P.3d 1067, 1072 (Nev. 2008); *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 410 (Nev. 1958).

<sup>187</sup> WASH. GEN. R. 24(b)(11); TEX. GOV’T CODE ANN. § 81.101(b) (West 2005).

<sup>188</sup> Gary G. Sackett, *An Analytic Approach to Defining the “Practice of Law”—Utah’s New Definition*, 18 UTAH B. J. 12, 16 (2005); UTAH SUP. CT. R. 14-802 (2010). Utah’s UPL statute reads in pertinent part:

(b)(1) The “practice of law” is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances. . . .

Utah's rule defines the practice of law broadly as the "application of the law . . . to [another] person's facts and circumstances."<sup>189</sup> The rule goes on to list permitted activities by nonlawyers,<sup>190</sup> notably adding clarity by listing the actors and activities together.<sup>191</sup> For instance, a real estate agent can prepare real estate sales agreements, and a certified public accountant may prepare tax returns.<sup>192</sup> This method clearly draws "[t]he line that marks the area into which the layman may not step except at his peril."<sup>193</sup>

However, Utah has an interesting history in defining the practice of law.<sup>194</sup> In 2003, the Utah Legislature adopted an extremely narrow definition, limiting the practice of law to representation in court.<sup>195</sup> As a result, everything outside of the courthouse was fair game for nonlawyers and lawyers alike.<sup>196</sup> The legislation did not take effect for one year, suggesting that the

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(c) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

- (1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.
- (2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person's facts or circumstances.
- (3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so. . . .
- (8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice. . . .
- (12) Advising or preparing documents for others in the following described circumstances and by the following described persons:
  - (A) a real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.
  - (B) an abstractor or title insurance agent licensed by the state of Utah may issue real estate title opinions and title reports and prepare deeds for customers.
  - (C) financial institutions and securities brokers and dealers licensed by Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.
  - (D) insurance companies and agents licensed by the state of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.
  - (E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.
  - (F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

<sup>189</sup> UTAH SUP. CT. R. 14-802(b)(1); TEX. GOV'T CODE ANN. § 81.101(a); WASH. GEN. R. 24(a).

<sup>190</sup> UTAH SUP. CT. R. 14-802(c)(1)-(12).

<sup>191</sup> UTAH SUP. CT. R. 14-802(c)(12)(A)-(F).

<sup>192</sup> UTAH SUP. CT. R. 14-802(c)(12)(A), (F).

<sup>193</sup> *Hackin v. Arizona*, 389 U.S. 143, 150 (1967) (Douglas, J., dissenting).

<sup>194</sup> Sackett, *supra* note 188, at 12-16.

<sup>195</sup> Sackett, *supra* note 188, at 12-13; UTAH CODE ANN. § 78-9-102 (2003) (repealed 2004). Courts used a similar definition—limiting the practice of law to representation in court only—during the Colonial period. Denckla, *supra* note 9, at 2583. Thus, Utah's definition was, for a time, radically different from the definitions in most other states.

<sup>196</sup> See Sackett, *supra* note 188, at 13.

legislature wanted to send a message rebuking the legal profession for being “too parochial and over-protective of its professional turf.”<sup>197</sup> The narrow definition compelled the Utah Supreme Court to formulate a definition of the practice of law,<sup>198</sup> which it did by promulgating the current rule in 2005.<sup>199</sup>

#### D. Nevada’s Approach to Defining the Practice of Law

Nevada’s approach to defining the practice of law has evolved over the last fifty years, but because Nevada has not adopted a bright-line rule, Nevada’s approach fails to address the public’s need for access to justice.<sup>200</sup> In 1958, the Nevada Supreme Court first considered defining the practice of law in *Pioneer Title Ins. & Trust v. State Bar of Nevada*.<sup>201</sup> The Court held Pioneer Title liable for the unauthorized practice of law, and in doing so, made several important statements regarding the practice of law.<sup>202</sup> First, the court stated that the purpose of Nevada’s UPL statute was “not the protection of the lawyer against lay competition but the protection of the public.”<sup>203</sup> Second, the court defined the practice of law by looking for conduct that required the skills and training of a lawyer.<sup>204</sup> Third, with the public’s interest in mind, the court carved out an exception from its broad definition for services that qualify as public necessities, such as investment, insurance, and tax accounting.<sup>205</sup>

Subsequently, the Nevada Supreme Court struggled to apply the definition and public necessity exceptions it had laid out in *Pioneer Title*.<sup>206</sup> In *Greenwell v. State Bar of Nevada*, the appellant claimed that its typing service business qualified as a public necessity under *Pioneer Title*.<sup>207</sup> The Court declined to extend the public necessity exception to the appellant’s conduct,<sup>208</sup> but it did recognize that the record lacked evidence relating to the availability of legal assistance for low- and middle-income Nevada residents.<sup>209</sup> Accordingly, the court ordered the State Bar of Nevada to conduct an investigation, and if the

<sup>197</sup> *Id.* at 12, 13.

<sup>198</sup> *Id.* at 13. A state’s highest court traditionally regulates the practice of law. ABA, NON-LAWYER ACTIVITY, *supra* note 3, at 135. In fact, the separation of powers doctrine requires that the legislature and executive refrain from interfering when the judiciary exercises its regulatory powers. *Id.* However, in many states, the legislature also enacts UPL laws and the executive branch enforces those laws. *Id.* at 136.

<sup>199</sup> Sackett, *supra* note 188, at 14.

<sup>200</sup> Compare *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 412 (Nev. 1958) (defining the practice of law by looking for specific conduct that requires the skills and training of a lawyer), with *In re Lerner*, 197 P.3d 1067, 1069 (Nev. 2008) (applying a case-by-case approach to defining the practice of law).

<sup>201</sup> *Pioneer Title*, 326 P.2d at 408; *In re Lerner*, 197 P.3d at 1071 (noting that *Pioneer Title* represents the only other time the court considered defining the practice of law).

<sup>202</sup> *Pioneer Title*, 326 P.2d at 413.

<sup>203</sup> *Id.* at 409.

<sup>204</sup> *Id.* at 412. The Court identified evaluating the legal sufficiency of a document as an activity that requires the skills and training of a lawyer. *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See *Greenwell v. State Bar of Nev.*, 836 P.2d 70, 71 (Nev. 1992).

<sup>207</sup> *Id.* At the time, typing services often helped customers fill out legal forms related to bankruptcy, divorce, and estate planning. Nitta, *supra* note 3, at 912 n.16.

<sup>208</sup> *Greenwell*, 836 P.2d at 71.

<sup>209</sup> *Id.*

investigation confirmed the “alleged unavailability of legal services for low and middle-income Nevadans,” the Court instructed the Bar to draft rules that would allow nonlawyers to provide simple legal services to the meet the needs of the community.<sup>210</sup>

In response to the court’s order in *Greenwell* and in an effort to broaden access to justice, the State Bar of Nevada appointed a commission to conduct a survey of legal needs in Nevada.<sup>211</sup> The survey concluded that 60 percent of low- and middle-income Nevadans had legal problems and no available assistance.<sup>212</sup> Although 26.4 percent of underserved Nevadans resorted to self-representation, 25.8 percent of Nevadans could not afford a lawyer or believed that a lawyer could not help them.<sup>213</sup> Rather than proposing rules that would allow nonlawyers to participate in the legal market, as the Supreme Court had instructed, the State Bar of Nevada responded to these statistics by proposing stricter UPL laws and mandatory pro bono.<sup>214</sup> The State Bar of Nevada later withdrew the petition after bar members expressed opposition to the mandatory pro bono requirement.<sup>215</sup> Even so, the Board of Governors voted that “providing legal services to the poor” should be its “number one priority.”<sup>216</sup>

In 2006, the Nevada Supreme Court took an important step toward broadening access to justice in Nevada by creating the Access to Justice Commission.<sup>217</sup> The Court charged the Commission with assessing legal needs in Nevada and developing new policies to improve access to justice.<sup>218</sup> In 2008, the Commission conducted a statewide survey of Nevada’s civil legal needs.<sup>219</sup> The Commission also meets four times a year to discuss and implement new strategies for improving the delivery of legal services in Nevada.<sup>220</sup> Yet, the Commission, the court, and the Nevada State Bar have ignored one important

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<sup>210</sup> *Id.* The court failed to define what it meant by “simple legal services.” This Note suggests they are those services that a nonlawyer can competently provide. See *infra* Part V.C.

<sup>211</sup> Jasmine K. Mehta, *Reflections on My Year as Chair*, NEV. LAW., July 2008, at 44, 44; Nitta, *supra* note 3, at 917.

<sup>212</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 71-72.

<sup>213</sup> *Id.* at 72.

<sup>214</sup> *Id.* The State Bar of Nevada proposed adding civil penalties to the state’s UPL statutes and a 20-hour-per-year pro bono requirement (or a contribution of \$500) for every member of the Nevada Bar. *Id.* Currently, pro bono work remains voluntary. NEV. RULES OF PROF’L CONDUCT R. 6.1(a) (2006) (“A lawyer should aspire to render at least 20 hours of pro bono publico legal services per year.”).

<sup>215</sup> Nitta, *supra* note 3, at 917.

<sup>216</sup> *Id.*

<sup>217</sup> Order Creating the Nevada Supreme Court Access to Justice Commission and Adopting Rule 15 of the Supreme Court Rules (2006), available at <http://www.nvbar.org/Committees/Enabling%20order.pdf>.

<sup>218</sup> NEV. SUP. CT. R. 15(1)(a)-(b).

<sup>219</sup> ACCESS TO JUSTICE COMM’N REP., *supra* note 7, at 1; Carri Geer Thevenot, *Need for Legal Aid Outstrips Supply*, LAS VEGAS REV. J., Apr. 20, 2009, at 1B (recognizing the Access to Justice Commission’s 2008 assessment of legal needs in Nevada, which spurred fundraising campaigns to provide legal assistance to low-income Nevadans).

<sup>220</sup> *Supreme Court of Nevada Access to Justice Commission*, ST. B. NEVADA, <http://www.nvbar.org/Committees/AccessToJusticeCommittee.htm> (last visited Dec. 15, 2010). The Nevada Supreme Court requires the Commission to meet at least semi-annually. NEV. SUP. CT. R. 15(3).

option for improving access to justice for Nevadans: redefining the practice of law to allow the contributions of nonlawyers.<sup>221</sup>

Nevada's UPL rule, promulgated by the Nevada Supreme Court, fails to define nonlawyers' roles in Nevada's legal market.<sup>222</sup> The rule prohibits (1) lawyers not licensed in Nevada from practicing in Nevada, and (2) lawyers from assisting others in the unauthorized practice of law.<sup>223</sup> Although the rule makes certain exceptions for lawyers licensed in a jurisdiction other than Nevada, it makes no exceptions for nonlawyers to perform simple legal services.<sup>224</sup> Additionally, the rule does not include a clear definition for the practice of law.

In 2008, with no working definition of the practice of law, the Nevada Supreme Court resorted to applying a case-by-case approach.<sup>225</sup> In the case of *In re Lerner*, the court held attorney Glen Lerner liable for assisting in the unauthorized practice of law.<sup>226</sup> Although not licensed in Nevada, an associate at Lerner's Las Vegas office represented clients in Nevada, thereby violating Nevada's UPL law.<sup>227</sup> Lerner was liable for assisting in UPL because the associate's misconduct was consistent with firm policy.<sup>228</sup>

The Nevada Supreme Court possesses the "inherent power to define the practice of law."<sup>229</sup> Yet in both *Pioneer* and *Lerner*, the court outlined an approach to defining the practice of law without actually articulating a definition.<sup>230</sup> In *Lerner*, the court engaged in a thoughtful discussion of the policies behind defining the practice of law.<sup>231</sup> Like proponents of UPL laws,<sup>232</sup> the court identified "the overarching reason for requiring that only lawyers engage in the practice of law: to ensure that the public is served by those who have demonstrated training and competence and who are subject to regulation and discipline."<sup>233</sup> However, the court recognized the need for an exception for routine services, as it had previously suggested in *Pioneer*.<sup>234</sup> It articulated the

<sup>221</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 72. The Bar's petition did not propose changing UPL laws to allow nonlawyers to provide simple legal services, as the Nevada Supreme Court advised. *Greenwell v. State Bar of Nev.*, 836 P.2d 70, 71 (Nev. 1992).

<sup>222</sup> See NEV. RULES OF PROF'L CONDUCT R. 5.5 (2006).

<sup>223</sup> NEV. RULES OF PROF'L CONDUCT R. 5.5(a)(1)-(2).

<sup>224</sup> NEV. RULES OF PROF'L CONDUCT R. 5.5(b).

<sup>225</sup> *In re Lerner*, 197 P.3d 1067, 1069 (Nev. 2008).

<sup>226</sup> *Id.* at 1071.

<sup>227</sup> *Id.* at 1070; NEV. RULES OF PROF'L CONDUCT R. 5.5(a)(1).

<sup>228</sup> *In re Lerner*, 197 P.3d at 1071; NEV. RULES OF PROF'L CONDUCT R. 5.5(a)(2).

<sup>229</sup> *In re Lerner*, 197 P.3d at 1071. Because the Nevada Supreme Court holds this power, the court is ultimately responsible for defining the practice of law for Nevada. David Luban concluded, "The state has not been an innocent bystander observing the regrettable spectacle of economic inequality and poverty: it shares primary responsibility with the legal profession (and its well-off clients) for the fact that the poor have no meaningful access to justice and are made worse off by that fact." LUBAN, *supra* note 2, at 247-48.

<sup>230</sup> See *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 412 (Nev. 1958) (defining the practice of law by looking for specific conduct that requires the skills and training of a lawyer); see also *In re Lerner*, 197 P.3d at 1069 (applying a case-by-case approach to defining the practice of law).

<sup>231</sup> *In re Lerner*, 197 P.3d at 1072-74.

<sup>232</sup> Barton, *supra* note 46, at 436.

<sup>233</sup> *In re Lerner*, 197 P.3d at 1072.

<sup>234</sup> *Id.*

following basic premise: the practice of law is the “application of the general body of legal knowledge to a client’s specific problem.”<sup>235</sup> Unfortunately, the court went on to reject a bright-line rule for the practice of law, opting instead for a case-by-case analysis.<sup>236</sup> Lastly, the court articulated the same lofty goal as the State Bar of Nevada: making public interest the state’s number one priority.<sup>237</sup>

As illustrated, Nevada’s current approach fails to properly balance both the public’s and the legal profession’s interests in defining the practice of law. Therefore, if Nevada truly wants to meet the needs of its residents, Nevada needs a new approach and definition that combine the best elements from all the above approaches and definitions.

## V. A PROPOSED APPROACH AND DEFINITION OF THE PRACTICE OF LAW

Nevada’s number one priority in defining the practice of law should be underserved Nevadans. This idea is nothing new. In 1995, the State Bar of Nevada set this same priority at a Board of Governors meeting,<sup>238</sup> the Nevada Supreme Court discussed this same goal in 2008.<sup>239</sup> However, despite this widely accepted priority, access to justice for low-income Nevadans remains severely restricted.<sup>240</sup> Now is Nevada’s chance to reach its goal by making the public a priority, increasing access to justice, and restraining the legal monopoly. The Nevada Supreme Court, with its inherent authority to define the practice of law,<sup>241</sup> should work together with the Access to Justice Committee, the legal community, other professions, and the public to implement a new definition of the practice of law.

### A. *The Need for a Definition of the Practice of Law in Nevada*

Nevada’s current case-by-case approach fails to live up to Nevada’s goal to make the public the number one priority in defining the practice of law. One scholar characterized the case-by-case approach as, “I know it when I see it.”<sup>242</sup> Supporters of the case-by-case approach argue that it is the only worka-

<sup>235</sup> *Id.*; see also ABA TASK FORCE REPORT, *supra* note 32, at 13.

<sup>236</sup> *In re Lerner*, 197 P.3d at 1073.

<sup>237</sup> *Id.* In 1995, the State Bar of Nevada set “providing legal services to the poor” as its “number one priority.” Nitta, *supra* note 3, at 917.

<sup>238</sup> Nitta, *supra* note 3, at 917.

<sup>239</sup> *In re Lerner*, 197 P.3d at 1073.

<sup>240</sup> In the mid 1990s, at least 60 percent of low- and middle-income Nevadans had unmet legal needs. ABA, NONLAWYER ACTIVITY, *supra* note 3, at 71-72. In 2008, the Access to Justice Commission’s survey revealed that Nevadans continue to suffer from inadequate delivery of legal services. ACCESS TO JUSTICE COMM’N REP., *supra* note 7, at 2.

<sup>241</sup> *In re Lerner*, 197 P.3d at 1071. If the Nevada Supreme Court permits the State Bar of Nevada to define the practice of law, reform in the public’s best interests is unlikely because the Bar has a financial interest in limiting the practice of law to lawyers. CRYSTAL, *supra* note 71, at 482.

<sup>242</sup> Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business After Enron*, 44 ARIZ. L. REV. 717, 762 (2002). The “I know it when I see it” approach became well known and widely criticized after Justice Stewart used the phrase to describe obscene materials unprotected by the First Amendment. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ble option in a constantly changing market.<sup>243</sup> However, the opposite is actually true. The changing legal market makes future methods of service delivery unpredictable;<sup>244</sup> thus, a clear, yet amendable, definition of the practice of law would add necessary stability and means for enforcement.

Added stability would improve compliance and enforcement of UPL laws. Indeed, noncompliance with UPL laws is rampant,<sup>245</sup> and enforcement of UPL laws is lacking.<sup>246</sup> Both unfortunate conditions result from ambiguous UPL laws.<sup>247</sup> U.S. Supreme Court Justice Douglas stated in 1967, “The line that marks the area into which the layman may not step except at his peril is not clear.”<sup>248</sup> The same is true today.<sup>249</sup> Without a clear definition of the practice of law, nonlawyers do not know what they can and cannot do, state bars do not know what, or whom, to prosecute, and courts do not know what conduct to punish.<sup>250</sup> Nevada *needs* to define the practice of law.<sup>251</sup>

### B. A Proposed Approach to Defining the Practice of Law

The best approach, proposed by numerous scholars and the ABA, balances the public’s need for protection against its need for access to justice.<sup>252</sup> Although the public needs protection from incompetence, states can resolve these concerns by subjecting nonlawyers to standards of conduct, malpractice liability, and regulatory schemes.<sup>253</sup> In such a system, the public’s need for access to justice outweighs, but does not eliminate, its need for protection. For each legal service, the balancing test weighs the risk of harm against the need for access.<sup>254</sup> Notably, the Nevada Supreme Court articulated the need for such balancing: “In determining what constitutes the practice of law, the public interest should be of primary concern—both protection of the public from incompetent legal services and also ensuring that regulation of the practice of law is not so strict that the public good suffers.”<sup>255</sup>

### C. A Proposed Definition of the Practice of Law

The Nevada Supreme Court recently articulated a broad definition of the practice of law: “the application of the general body of legal knowledge to a client’s specific problem.”<sup>256</sup> Nevada can avoid radical reform of its UPL laws

<sup>243</sup> Keatinge, *supra* note 242, at 762.

<sup>244</sup> *See id.* at 717.

<sup>245</sup> Johnstone, *supra* note 25, at 815.

<sup>246</sup> Hoppock, *supra* note 21, at 720.

<sup>247</sup> Johnstone, *supra* note 25, at 814-15.

<sup>248</sup> *Hackin v. Arizona*, 389 U.S. 143, 150 (1967) (Douglas, J., dissenting).

<sup>249</sup> *See* Johnstone, *supra* note 25, at 808-09.

<sup>250</sup> *See id.*

<sup>251</sup> Soha Turfler made a similar declaration more generally to all states: “The time has come to formulate a model definition of the practice of law: If the time is not now, then when?” Turfler, *supra* note 48, at 1959.

<sup>252</sup> *Id.*; Rhode, *Professionalism*, *supra* note 3, at 714-15; ABA, NONLAWYER ACTIVITY, *supra* note 3, at 12; ABA TASK FORCE REPORT, *supra* note 32, at 5.

<sup>253</sup> Rhode, *Connecting Principles*, *supra* note 4, at 409.

<sup>254</sup> Rhode, *Professionalism*, *supra* note 3, at 714-15.

<sup>255</sup> *In re Lerner*, 197 P.3d 1067, 1073 (Nev. 2008).

<sup>256</sup> *Id.* at 1072.



by using this broad definition<sup>257</sup> as the foundation for its new definition. A broad definition is preferable to a narrow definition because a narrow definition indirectly defines the practice of law. Essentially, a narrow definition attempts to define services that courts must consider the unauthorized practice of law, because only a lawyer can adequately provide the service.<sup>258</sup> But defining the practice of law inversely—by defining what constitutes the unauthorized practice of law—skirts the real issue.<sup>259</sup> Nevada should define the practice of law directly to include most legal services, erring on the side of protecting the public.<sup>260</sup>

To broaden access to justice, Nevada must also provide exceptions to the broad definition for simple legal services that nonlawyers can competently provide.<sup>261</sup> Most states with broad definitions provide exceptions for nonlawyers.<sup>262</sup> Nevada could enumerate these exceptions in the definition itself or add exceptions later through case law, statutes, court rules, or agency regulations.<sup>263</sup> Because of this flexibility, a broad definition with exceptions allows the definition to persist through changing market conditions.<sup>264</sup> Meanwhile, Nevada can modify these exceptions if previously complex legal services become routine.<sup>265</sup>

In determining which exceptions to make for nonlawyers, the court should consider exceptions made by other states, as well as transactions commonly accepted as routine. In order to avoid a definition that is both over-inclusive and under-inclusive, Nevada should refrain from both activity-centered and actor-centered approaches.<sup>266</sup> Instead, Nevada's definition of the practice of law should list exempted actors and their corresponding exempted activities.<sup>267</sup> The definition should list activities only when the activity, regardless of the actor, is routine. Likewise, the definition should list actors that, regardless of the activity, are completely competent.<sup>268</sup>

The following is a list of proposed exemptions:

1. Real estate brokers and agents may draft real estate agreements.<sup>269</sup>

<sup>257</sup> *Id.*

<sup>258</sup> Turfler, *supra* note 48, at 1958.

<sup>259</sup> Denckla, *supra* note 9, at 2592.

<sup>260</sup> *In re Lerner*, 197 P.3d at 1073.

<sup>261</sup> *See id.* at 1072.

<sup>262</sup> Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303, 334 (2004).

<sup>263</sup> *Id.* at 334-35.

<sup>264</sup> *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 410 (Nev. 1958) (“[T]he public becomes accustomed to certain areas of transaction and . . . as transactions in those areas become standardized, legal counselling [sic] is no longer generally regarded as a practical necessity . . .”).

<sup>265</sup> *Id.*

<sup>266</sup> *See supra* notes 131-33 and accompanying text.

<sup>267</sup> *See, e.g.*, UTAH SUP. CT. R. 14-802(c)(12)(A)-(F) (2007).

<sup>268</sup> *See, e.g.*, UTAH SUP. CT. R. 14-802(c)(1)-(11).

<sup>269</sup> UTAH SUP. CT. R. 14-802(c)(12)(A). Many professionals routinely deliver services that would technically violate a broad definition for the practice of law, including real estate brokers, insurance agents, and financial advisors. RHODE, ACCESS TO JUSTICE, *supra* note 90, at 87. Additionally, under many states' broad definitions, these professionals could not function without engaging in prohibited activities. *Id.* Nevada's definition for the practice

2. Title insurance agents may prepare title opinions, title reports, and deeds.<sup>270</sup>
3. Financial institutions may advise customers on investments.<sup>271</sup>
4. Insurance agents may advise customers on beneficiaries and claims.<sup>272</sup>
5. Accountants may prepare tax returns and give tax advice.<sup>273</sup>

Exemptions that should qualify as routine services, regardless of the actor, include:

1. Selling legal forms.<sup>274</sup>
2. Providing general legal information.<sup>275</sup>
3. Assisting with filling out legal forms.<sup>276</sup>

A new definition that allows certain nonlawyers to provide certain legal services also calls for a regulatory scheme.<sup>277</sup> Registration, as the least restrictive option, requires minimal administrative cost.<sup>278</sup> Existing state agencies can register nonlawyers and then combine each roster to create a list of providers.<sup>279</sup> The State Bar of Nevada could then use the list to enhance its current efforts to monitor nonlawyer activity in the legal market.

of law should formally recognize nonlawyers that the public already informally recognizes as competent providers of legal services.

<sup>270</sup> UTAH SUP. CT. R. 14-802(c)(12)(B). The majority of commentators agree that requiring a lawyer to perform title searches would be a waste of the lawyer's skills and resources. Rhode, *Policing*, *supra* note 24, at 88.

<sup>271</sup> UTAH SUP. CT. R. 14-802(c)(12)(C).

<sup>272</sup> UTAH SUP. CT. R. 14-802(c)(12)(D).

<sup>273</sup> UTAH SUP. CT. R. 14-802(c)(12)(F). Tax accountants are trained to interpret the Internal Revenue Code, a complex statute. GILLERS, *supra* note 46, at 690. Thus, accountants should be permitted to prepare tax returns and give tax advice.

<sup>274</sup> WASH. GEN. R. 24(b)(8) (2002); UTAH SUP. CT. R. 14-802(c)(1); Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1193-94 (Fla. 1978) (holding that nonlawyers may sell sample legal forms because such forms can be standardized and can assist individuals who choose to represent themselves).

<sup>275</sup> UTAH SUP. CT. R. 14-802(c)(2); TEX. GOV'T CODE ANN. § 81.101(c) (West 2005). Nonlawyers can assist pro se litigants by providing general legal information. RHODE, ACCESS TO JUSTICE, *supra* note 90, at 81-82. On January 14, 2010, Clark County, with the help of the Legal Aid Center of Southern Nevada, opened the Civil Law Self-Help Center inside the Regional Justice Center in downtown Las Vegas. *Civil Law Self-Help Center Grand Opening and Ribbon Cutting*, CLARK COUNTY CTS, <http://www.clarkcountycourts.us/media/features/Civil-Law-Ribbon-Cutting.html> (last visited Dec. 15, 2010). A similar self-help center, also in Las Vegas, is located at the Family Courthouse. *Self-Help Centers*, CLARK COUNTY CTS, <http://www.clarkcountycourts.us/self-help.html> (last visited Dec. 15, 2010). Because Nevada already recognizes the role legal information plays in providing pro se litigants with access to justice, nonlawyers should be permitted to aid these efforts.

<sup>276</sup> WASH. GEN. R. 24(b)(6); Fla. Bar v. Brumbaugh, 355 So. 2d at 1194 (holding that nonlawyers may help clients fill out legal forms, but nonlawyers may not give advice on how best to fill out the forms).

<sup>277</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 145-46.

<sup>278</sup> Flaming, *supra* note 140, at 501.

<sup>279</sup> See ABA, NONLAWYER ACTIVITY, *supra* note 3, at 146. The Nevada Department of Business and Industry regulates Nevada businesses. *Welcome to the State of Nevada Business & Industry*, NEV. DEPARTMENT BUS. & INDUSTRY, <http://business.nv.gov/default.htm> (last visited Dec. 15, 2010). Additionally, the Bureau of Consumer Protection, under the direction of the Attorney General and Consumer Advocate, enforces consumer-protection statutes. *Consumer Protection*, NEV. ATT'Y GEN., <http://ag.state.nv.us/org/bcp/bcp.htm> (last visited Dec. 15, 2010).

Certification would allow well-qualified nonlawyers to distinguish themselves from uncertified providers.<sup>280</sup> Also, certification provides the consumer with more information about the provider, thus reducing information asymmetry.<sup>281</sup> Nevada can implement a certification process by setting minimum experience and training standards and could choose to create certification exams.<sup>282</sup> The process should not be too cumbersome, as effective certification procedures currently in use can serve as templates for developing additional programs.<sup>283</sup>

Lastly, Nevada may choose to develop a specialty-licensing scheme for nonlawyers.<sup>284</sup> The ABA encourages states to offer specialty certification to lawyers;<sup>285</sup> likewise, Nevada could offer specialty licenses to nonlawyers who can demonstrate the requisite knowledge and experience.<sup>286</sup> More specifically, the ABA's Model Plan for specialty certification for lawyers requires that an applicant demonstrate four qualifications: (1) knowledge and competence through an exam; (2) substantial involvement in the specialty area; (3) continuing education coursework; and (4) peer reviews from other professionals familiar with the applicant's work in that area of specialty.<sup>287</sup>

These same four qualifications for lawyer specialists could apply to non-lawyer specialists. Similar to certification programs, licensees could distinguish themselves from other nonlawyers, and more importantly, from certified nonlawyers.<sup>288</sup> As a result, a specialty-licensing program would add another level of competence to the continuum, ranging from a formally educated lawyer to a minimally qualified nonlawyer provider.<sup>289</sup> This additional level of competence would create more competition in the market and, thus, more competitive prices.<sup>290</sup> The increased competition would also provide the consumer with more information about the service provider, further reducing information asymmetry.<sup>291</sup> Nonlawyers already licensed in Nevada should continue to provide legal services within their specialty areas.<sup>292</sup>

Nevada can further protect the public from incompetence, without sacrificing access to services, by setting competency and professional standards for

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<sup>280</sup> ABA, *NONLAWYER ACTIVITY*, *supra* note 3, at 145-46.

<sup>281</sup> See Barton, *supra* note 46, at 485 (suggesting that states can reduce information asymmetry by providing more information to the consumer).

<sup>282</sup> See ABA, *NONLAWYER ACTIVITY*, *supra* note 3, at 147.

<sup>283</sup> To minimize administrative costs of implementing a new definition for the practice of law, Nevada should utilize the programs it already has in place. See Rhode, *Connecting Principles*, *supra* note 4, at 409 (states should incorporate existing licensing programs for nonlawyer specialists into their UPL regulatory schemes).

<sup>284</sup> See WASH. GEN. R. 24(b)(1) (2002) (authorizing a limited licensing scheme for nonlawyers). See *supra* note 184 and accompanying text.

<sup>285</sup> Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?*, 51 U. MIAMI L. REV. 273, 305 (1997). Similarly, the medical profession offers specialty certification. *Id.*

<sup>286</sup> See *id.*

<sup>287</sup> *Id.* at 296-302.

<sup>288</sup> See ABA, *NONLAWYER ACTIVITY*, *supra* note 3, at 146-47.

<sup>289</sup> ABA TASK FORCE REPORT, *supra* note 32, at 6.

<sup>290</sup> Turfler, *supra* note 48, at 1932 (noting that increased competition reduces prices).

<sup>291</sup> See Barton, *supra* note 46, at 485 (suggesting that states can reduce information asymmetry by providing more information to the consumer).

<sup>292</sup> Rhode, *Connecting Principles*, *supra* note 4, at 409.

nonlawyers.<sup>293</sup> The State could impose these standards through the regulatory schemes.<sup>294</sup> For instance, when nonlawyers register to become legal services providers, they must agree to comply with certain standards of conduct.<sup>295</sup> Nevada could choose to increase the standards of conduct for certified providers and expect even more from licensed specialists. Furthermore, Nevada could subject all legal service providers to malpractice liability.<sup>296</sup> It might even require that all providers comply with rules of professional responsibility, such as maintaining confidentiality and avoiding conflicts of interest.<sup>297</sup>

#### D. *Benefits of the Proposed Approach and Definition*

This proposed approach and definition successfully resolves concerns for both the public's protection and the public's access to justice.<sup>298</sup> The leading benefit of this proposal is that defining the practice of law in Nevada will broaden access to justice by confining the legal monopoly to a smaller and justified portion of the market.<sup>299</sup> Despite the flaws of the legal monopoly, public interest requires that high-risk services be limited to lawyers.<sup>300</sup> This proposed definition preserves business for lawyers, and, thus, the legal monopoly, to the extent that formal knowledge and training is necessary to perform the legal service. In the past, the State Bar of Nevada unsuccessfully proposed mandatory pro bono work to increase availability of legal services to the poor.<sup>301</sup> Fortunately, Nevada can still meet this goal by enabling nonlawyers to fill in the gaps and satisfy unmet legal needs of Nevada's residents.<sup>302</sup>

New regulatory schemes will provide additional levels of competence and consumer choice to the legal services market, forcing lawyers to compete on quality and price.<sup>303</sup> The table below illustrates how competition between lawyers and nonlawyers possessing similar levels of competence leads to more competitive pricing for consumers. The table also demonstrates how each service provider fits into the legal services market.

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<sup>293</sup> Turfler, *supra* note 48, at 1927.

<sup>294</sup> Rhode, *Connecting Principles*, *supra* note 4, at 409.

<sup>295</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 145.

<sup>296</sup> Rhode, *Connecting Principles*, *supra* note 4, at 409; Turfler, *supra* note 48, at 1927.

<sup>297</sup> Rhode, *Connecting Principles*, *supra* note 4, at 409. This resolves the concern posed by proponents of UPL laws that permitting nonlawyers to provide legal services would fail to protect clients' confidential information. Hoppock, *supra* note 21, at 729.

<sup>298</sup> See Turfler, *supra* note 48, at 1959.

<sup>299</sup> *Id.* at 1933, 1947.

<sup>300</sup> Turfler, *supra* note 48, at 1958.

<sup>301</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 72.

<sup>302</sup> *Id.* at 71.

<sup>303</sup> Fischer, *supra* note 10, at 144.

Classification	Competence	Cost
Lawyer	High	High
Nonlawyer Specialist	High	Moderate
Lawyer	Moderate	Moderate-High
Certified Nonlawyer	Moderate	Moderate-Low
Lawyer	Low	Low-Moderate
Registered Nonlawyer	Low	Low
Unauthorized Nonlawyer	Low	Low

This proposal will also increase efficiency for non-profit organizations in the delivery of legal services to low- and middle-income Nevadans. For instance, legal aid programs struggle to serve the public because their lawyers are overworked.<sup>304</sup> Authorizing nonlawyers to perform a broader range of services “would allow a publicly funded legal aid program to be run much more cheaply and efficiently.”<sup>305</sup> Paralegals could fill positions formerly held by lawyers, and “lawyers would be utilized more efficiently and intelligently if routine matters were diverted away from them.”<sup>306</sup>

In addition, this proposal would allow the free market to promote increased competency.<sup>307</sup> “[G]overnment intervention to protect consumers is only necessary when the market fails to perform that function.”<sup>308</sup> Here, market forces protect consumers by weeding out incompetent providers.<sup>309</sup> More specifically, consumers will not return to nonlawyers or lawyers who perform poorly, thus driving incompetent providers out of the legal services market.<sup>310</sup> This proposed definition regulates the practice of law only to the extent necessary to protect consumers, while allowing the market to encourage competency from nonlawyers and lawyers.

In the end, competition created by nonlawyers would benefit both the public and the legal profession. The public would benefit from more consumer choice,<sup>311</sup> lower costs,<sup>312</sup> and increased efficiency.<sup>313</sup> The legal profession would benefit from deregulation of nonlawyers in two primary ways. First, limiting the legal monopoly and permitting nonlawyers to perform routine services would assure the public that the legal profession is regulating the practice

<sup>304</sup> See LUBAN, *supra* note 2, at 270. Lynn Etkins, development director for the Legal Aid Center of Southern Nevada, recently stated, “We just turn away so many people because we don’t have the capacity or resources to help them.” Thevenot, *supra* note 219, at 1B.

<sup>305</sup> LUBAN, *supra* note 2, at 270; see also Trippe S. Fried, *Licensing Lawyers in the Modern Economy*, 31 CAMPBELL L. REV. 51, 55 (2008) (discussing how increased regulation leads to decreased transactional efficiency).

<sup>306</sup> LUBAN, *supra* note 2, at 270.

<sup>307</sup> See Turfler, *supra* note 48, at 1919.

<sup>308</sup> Rose, *supra* note 47, at 190.

<sup>309</sup> Turfler, *supra* note 48, at 1919. The free market can retrospectively weed out incompetent nonlawyers, but Nevada needs a regulatory scheme to weed out incompetent nonlawyers before they harm consumers. See *supra* notes 277-97 and accompanying text.

<sup>310</sup> See *supra* note 97 and accompanying text.

<sup>311</sup> See Rhode, *Professionalism*, *supra* note 3, at 713.

<sup>312</sup> LUBAN, *supra* note 2, at 270.

<sup>313</sup> Turfler, *supra* note 48, at 1908.

of law with the public's interest in mind, thereby restoring trust in the legal profession.<sup>314</sup> Second, in the name of efficiency, lawyers performing routine work can choose to refer clients to nonlawyer providers, leaving more time for professionally challenging work that commands a higher fee.<sup>315</sup> Therefore, this proposed definition broadens access to justice for Nevadans while also addressing the concerns of the legal profession, nonlawyer providers, and the public.

## VI. CONCLUSION

U.S. Supreme Court Justice William Douglas declared that for millions of Americans, the right to equal justice is "meaningless" without legal assistance.<sup>316</sup> Sadly, the legal profession restrains access to justice for the majority of low- and middle-income Nevadans.<sup>317</sup> But Nevada *can* change this reality. By defining the practice of law, lawyers and nonlawyers together can assist underserved Nevadans. More specifically, Nevada must adopt a broad definition of the practice of law that includes exceptions for certain nonlawyers to perform certain routine services. This portion of the definition broadens access to justice. While doing so, however, Nevada must balance the public's need for access against its need for protection. The definition must include regulatory schemes, such as registration, certification, and specialty licensing, as well as standards of competence and professionalism. These features, taken together, will create a definition of the practice of law that can persist through a changing market and benefit the public, nonlawyers, and the legal profession alike.

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<sup>314</sup> Rhode, *Policing*, *supra* note 24, at 98-99. "Non-lawyer participation [in the disciplinary process] provides assurance to the public that the disciplinary system is serving its interests, rather than those of individual lawyers." Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 939 (1994). Similarly, nonlawyer participation in the legal services market would assure the public that the legal profession is regulating the practice of law with the public's interest in mind.

<sup>315</sup> See LUBAN, *supra* note 2, at 270-71.

<sup>316</sup> Hackin v. Arizona, 389 U.S. 143, 144-46 (1967) (Douglas, J., dissenting).

<sup>317</sup> ABA, NONLAWYER ACTIVITY, *supra* note 3, at 71-72.