

Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis

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ABSTRACT. America has an access-to-justice crisis. At a time when law is more prominent in every facet of American life and commerce than ever before, most of our people and small businesses have no access to legal service. The consequences are dire.

America has ample resources to provide everyone the legal service they need. We have the lawyers, the technology, the know-how, and the capital. Our failure to enable those resources to meet the needs of our people is a disgrace.

This Essay addresses one of most obvious causes of the access-to-justice crisis: rules created and enforced by lawyer-led state bars that arbitrarily restrict who can help Americans with their legal issues and handcuff legal-service firms' ability to draw on modern technology and business techniques to get Americans the service they need.

The Essay details how the rules have caused the crisis and lays out a common-sense approach state bars can pursue to assess and remedy it. State bars made the rules that caused the crisis. It is their duty to fix them. Failure to do so is a dereliction of duty.

INTRODUCTION

State bars have the authority and responsibility to govern their justice systems in a way that makes legal service available to everyone who needs it.¹ Yet no state in America achieves that outcome today. In a country based on the rule of law and blessed with talent and technology able to help everyone, most people and most small businesses cannot access legal service at all.

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1. I will use the term "state bar" in this Essay to refer to the entities in each state that have been delegated the authority to regulate legal service, whoever they are and however they are denominated. In most states, that is a "state bar" or "state bar association" supervised by the state supreme court. In many states, it is principally the state supreme court. In operation, it is normally some combination of a lawyer-based entity and the state supreme court. Whatever the model, I am addressing the organizations and people who have been delegated the authority and, I believe, the duty to make legal service work in their states.

The system our state bars created in the nineteenth century does not work in the twenty-first. It unduly restricts the supply of legal-service resources and compels a law-firm business model that impedes the resources that do exist. As stewards of the American legal system, state bars have a duty to fix it.² And yet, only a few state bars have taken meaningful action to remedy the crisis.³ The inaction of others is a dereliction of duty.

In this Essay, I contend that state bars have a duty to reform their rules to alleviate the failure of our justice system. In Part I, I detail the access-to-justice crisis in America. In Part II, I set out the comprehensive authority state bars have over our legal system and their consequent duty to remedy the crisis that has arisen on their watch. In Part III, I suggest a process for states to follow to address the crisis. In Part IV, I offer my view of the changes they should make.⁴

I. AMERICA HAS AN ACCESS-TO-JUSTICE CRISIS

For most Americans, “justice for all” is a slogan, not a reality. At a time when law intersects with their lives more than ever before, most people and small businesses cannot find anyone to help them understand their rights and obligations, make their legal decisions, or represent them in court.

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2. This Essay will address three state-bar rules, the revision of which have the greatest potential for increasing access to justice. Many other regulatory issues warrant examination, including the sufficiency of legal education, the ability of the traditional bar exam to evaluate qualification, and the adequacy of continuing legal education (CLE) requirements to assure that licensed lawyers keep their knowledge and skills where they need to be.
 3. Some have begun the process but have been unable to achieve significant change. At least one state has approved a limited liability legal technician role. Others have made minor adjustments to their unauthorized practice of law (UPL) statutes to address specific situations. Only Utah, Arizona, and the District of Columbia have adopted reforms that have a truly significant prospect of materially increasing access to justice.
 4. A personal note: I wrote this Essay at the request of the *Yale Law Journal*, and because I believe we can and should enable our legal system to work better for everyone. I know how law works, having been a lawyer nearly half a century – with half of that time spent presiding over a large law firm. I also know something about how state bars and the American Bar Association (ABA) work. I have great respect and affection for American lawyers and believe in the goodwill of our state bars. My objective here is not to criticize. Rather, I write to observe some fundamental realities and encourage those who govern our legal system to revise their rules to enable their most overarching objective: *justice for all*. I am pleased to compare outlooks with Stephen P. Younger and grateful to the *Yale Law Journal* for creating a forum for this exchange. We need more public attention to the issues addressed by our Essays.

More than one hundred million Americans experience civil justice issues every year.⁵ The vast majority, however, do not receive legal assistance. For example, a 2014 survey by the American Bar Foundation found that 66% of American adults experienced at least one civil legal issue during an eighteen-month period.⁶ While some Americans reported more than one legal issue, the researchers randomly selected one per respondent for further investigation and found that just 16% were addressed with assistance from a lawyer.⁷ Similarly, in 76% of all state-court civil cases, at least one party appears in court without a lawyer.⁸ In some categories of cases,⁹ that number rises to well over 90%.¹⁰ The problem is particularly acute for lower-income Americans and small businesses. In its latest Justice Gap Report, the Legal Services Corporation found that low-income Americans receive little or no civil legal service for 93% of problems that substantially impact them.¹¹ Moreover, 60% of small business owners with significant legal issues do not have a lawyer to help them deal with them.¹² All in all, the United States ranks 126th out of 139 countries in access to justice and legal-service affordability.¹³ As former Colorado Supreme Court Justice Rebecca Love

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5. Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE 223 (Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., 2012).
 6. Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, AM. BAR FOUND. 7 (Aug. 8, 2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa__aug__2014.pdf [<https://perma.cc/FR3M-DFWD>] (surveying Americans' "experience with situations involving money, debt, rented and owned housing, insurance, employment, government benefits, children's education, clinical negligence, personal injury, and relationship breakdown and its aftermath").
 7. *Id.* at 5, 14.
 8. Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR STATE CTS. at iv (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/93HT-2T2Z>].
 9. Examples include debt collection, family law, and landlord-tenant cases.
 10. *Report to the Chief Judge of the State of New York*, TASK FORCE TO EXPAND ACCESS TO CIV. LEGAL SERVS. IN N.Y. 1 (Nov. 2010), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf> [<https://perma.cc/L9RW-6H4Q>].
 11. *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 48 (Apr. 2022), <https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhwtjlgioemp3myz1> [<https://perma.cc/M7CU-GDQC>].
 12. *The Legal Needs of Small Business: A Research Study Conducted by Decision Analyst*, LEGALSHIELD 4 (2013), <https://coruralhealth-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/Small-Business-White-Paper.pdf> [<https://perma.cc/9JY3-DRD3>].
 13. *WJP Rule of Law Index, Country Insights: United States*, WORLD JUST. PROJECT (2021), <https://worldjusticeproject.org/rule-of-law-index/country/2021/United%20States/Civil%20Justice> [<https://perma.cc/KWG5-Q57S>].

Kourlis and U.S. Supreme Court Justice Neil M. Gorsuch observed in a 2020 op-ed: “The rule of law in the United States is the envy of the world. But our system of justice is too often inaccessible for the ordinary American.”¹⁴

Many facets of our legal system work well, of course. We have more than 1.3 million well-educated, dedicated, and ethical lawyers.¹⁵ We have a well-developed system of laws and courts to administer them. Legal service is readily available for large corporations and wealthy individuals. Large law firms and corporate legal departments offer financially rewarding careers to the graduates of America’s law schools.

Articulating the elements that do work creates a revealing context for the elements that do not. Our system has become one that works well for the minority – those with the most money and the best education. For everyone else, access to justice is largely an illusion.

This crisis imposes great harm on our people and our society. Assessing that harm begins with this reality: moderate-to-low-income individuals and small-business proprietors are far more vulnerable to legal risk than high-income individuals and large businesses. They have less experience with the law, less understanding of their rights and obligations, and less preparation to navigate the legal system. While leading their lives or trying to make a go of their businesses, they inevitably encounter legal issues. They may not even realize when a problem is legal in nature and are highly unlikely to know what to do about it. Without help, their chances of a negative outcome are high.¹⁶

The direct harm to the unrepresented is real and commonly severe. Start with individuals. Without representation, people lose custody of their children. They are evicted from their homes. Their assets or wages are seized. They are deported. Their lives are disrupted with significant financial and emotional impact. “The human costs are often staggering, with domestic violence, illness and serious economic hardships among them.”¹⁷

14. Rebecca Love Kourlis & Neil M. Gorsuch, Opinion, *Legal Advice Is Often Unaffordable. Here's How More People Can Get Help: Kourlis and Gorsuch*, USA TODAY (Sept. 17, 2020, 3:15 AM ET), <https://www.usatoday.com/story/opinion/2020/09/17/lawyers-expensive-competition-innovation-increase-access-gorsuch-column/5817467002> [<https://perma.cc/52L6-EKZM>].

15. *New ABA Data Reveals Rise in Number of US Lawyers, 15 Percent Increase Since 2008*, AM. BAR ASS'N (May 11, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals [<https://perma.cc/4PNM-SV42>].

16. See LEGAL SERVS. CORP., *supra* note 11, at 48.

17. Jason Solomon, Deborah Rhode & Annie Wanless, *How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice*, STAN. CTR. ON THE LEGAL PRO. 1 (Apr. 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf [<https://perma.cc/E2PJ-GG3B>].

For small businesses, the absence of legal service makes an already challenging situation harder, if not impossible. With the enormous increase in regulation, mushrooming amount of data,¹⁸ and complexity of engaging our courts and bureaucracies, businesses without representation are at a great disadvantage. They lose necessary licenses. They cannot get necessary approvals. They cannot enforce their contracts. They are fined. They cannot defend themselves against claims, even baseless ones. They are outmaneuvered by larger businesses that know how to work the system. All of these obstacles significantly decrease their ability to succeed.

The access-to-justice crisis compounds itself by producing the flood of unrepresented litigants noted above. Pro se litigants cause substantial delays and otherwise undermine the effectiveness of our already overburdened and under-resourced judicial system.¹⁹

More broadly, the crisis undermines society's trust and confidence in our justice system.²⁰ With confidence in our government at historic lows,²¹ the day-to-day perception among people and small businesses that the judicial system only works for banks, insurance companies, and landlords reduces even further their belief that "justice for all" is a reality in America.²²

II. IT IS UP TO STATE BARS TO REMEDY THIS CRISIS

Great authority comes with great responsibility.²³

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18. In the information age, disputes that once would have been relatively simple no longer are because of the massive data sets that now are implicated in asserting or defending claims. Inexperienced litigants will find this burden much more challenging.
 19. See Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009).
 20. For example, only 28% of low-income Americans believe they are treated fairly by the legal system. LEGAL SERVS. CORP., *supra* note 11, at 51.
 21. See *Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022> [<https://perma.cc/ZV26-KPPY>]; Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx> [<https://perma.cc/GQQ5-6YMQ>].
 22. Jim Harbaugh & Ken Frazier, Opinion, *Intimidating, Unfair Legal System Makes It Hard for People to Get the Help They Need*, PHILA. INQUIRER (May 23, 2022), <https://www.inquirer.com/opinion/commentary/community-legal-services-funding-20220523.html> [<https://perma.cc/3GFT-TR6P>].
 23. "[P]ower must be linked with responsibility, and obliged to defend and justify itself within the framework of the general good." Franklin D. Roosevelt, President of the United States, State of the Union Address (Jan. 6, 1945), <https://www.presidency.ucsb.edu/documents/state-the-union-address> [<https://perma.cc/KN7R-2K2A>].

A. State Bars Determine How Much and What Kind of Legal Service Is Available in America

No organization is more responsible for how our justice system works than our state bars.²⁴ Beginning in the late nineteenth century,²⁵ America adopted a system in which each state bar was delegated virtually total authority to govern the way legal service is delivered.

Each state operates independently, making and administering its own rules, guided by a framework of “model rules” established by the American Bar Association (ABA).²⁶ The law is perhaps the pinnacle of self-regulated professions. The state bars are governed by lawyers elected from within their ranks. They are overseen by state supreme courts, which are also governed by lawyers.

The regulatory model that has emerged also does more than regulate lawyers. It determines how much and what kind of legal service is available to those who need it. The regulatory model begins with the broadest possible prohibition on anyone other than licensed lawyers engaging in the expansively construed “practice of law.”²⁷ Anyone who violates the prohibition commits a crime.²⁸ This prohibition severely limits the number of people available to deliver legal service.

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24. As noted, *see supra* note 1, I use the term “state bar” to refer to the entities of each state, however configured, that have the authority I discuss in this Essay. The models vary, but each state has delegated this authority to some combination of an association of lawyers and its state supreme court. For reasons not known to me, Younger takes issue with my use of this shorthand. *See* Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 *YALE L.J.F.* 259, 260 n.6 (2022). Whatever the arrangement, in each state a combination of self-regulated, lawyer-led entities has virtually total control over the rules governing legal service.
 25. Our current regulatory model began with the formation of the ABA in 1878. *ABA Timeline*, AM. BAR ASS’N, https://www.americanbar.org/about_the_aba/timeline [<https://perma.cc/E55M-DNAR>].
 26. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR. ASS’N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [<https://perma.cc/HGY7-UXYJ>] (listing states that have adopted the ABA’s Model Rules).
 27. Every state prohibits the “unauthorized practice of law” by statute, bar rule, or both. The scope of the ban is expressed in broad and general terms, which are commonly circular in nature. *See, e.g.*, Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 *S.C. L. REV.* 429, 431-32 (2016); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 45 (1981) [hereinafter Rhode, *Policing the Professional Monopoly*].
 28. *See, e.g.*, CAL. BUS. & PROF. CODE § 6125 (West 2019) (punishable by fine and imprisonment for up to one year).

The model then prescribes how lawyers may deliver legal service. Much of the model's prescription is familiar, such as the lawyer's duty not to disclose confidential client information.²⁹ But some of it is counterintuitive, such as prescribing that only lawyers can share in the financial success of law firms.³⁰

Together, these prohibitions and prescriptions limit the number of people *who* can deliver legal service and *how* they can deliver it. More than a century under these rules has led to the crisis of justice we face today.

B. State Bars' Broad Authority Implies a Duty to Ensure that Legal Service Is Available to All

All state bars recognize that protecting the public is their fundamental mission. This is axiomatic for state supreme courts, and it is explicit in the mission statement of every state bar association. For example, the California bar, of which I have been a member since 1974, begins its mission statement: "The State Bar of California's mission is to protect the public . . ."³¹ The mission statement of West Virginia, my home state, begins: "The objects of the West Virginia State Bar shall be to protect the interests of the public . . ."³²

Protecting the public is more than a good idea. It is a solemn duty that includes ensuring access to needed legal service for every person and organization. When an American child begins her day pledging allegiance to our flag, she concludes with the phrase: "justice for all." Those in charge of our legal system have a duty to keep faith with the pledge we teach our children to recite.

This duty requires state bars to reexamine their rules. The rules have created and perpetuated systems that fail to serve most of their people and small businesses. Three central elements of the rules stand out as contributing significantly to the shortfall of legal service in America: restricting who can deliver legal service, prohibiting employee sharing in profits and equity appreciation, and limiting access to capital.

First, the cornerstone of state-bar rules is a blanket prohibition against anyone delivering legal service unless they have gone to law school and been licensed as a lawyer, commonly called the "UPL" ban.³³ It would be hard to imagine a greater barrier to entry or a more effective constriction of resources available to

29. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020).

30. *Id.* r. 5.4.

31. *Our Mission: What We Do*, STATE BAR CAL., <https://calbar.ca.gov/About-Us/Our-Mission> [<https://perma.cc/PM7T-R6G5>].

32. *About Us*, W. VA. STATE BAR, <https://wvbar.org/about-us> [<https://perma.cc/C355-EBDT>].

33. These prohibitions are most commonly expressed as a ban on "the unauthorized practice of law." UPL has become the shorthand.

deliver legal service. Second, every state has adopted a form of ABA Model Rule of Professional Conduct 5.4, which prohibits lawyers or their firms from sharing the fees they earn or a stake in their ownership equity with “non-lawyers.”³⁴ This restriction prevents firms from attracting and incentivizing people with diverse skills to help them create service models that can reach and serve individuals and small businesses. Third, Model Rule 5.4 also prohibits firms from raising equity capital from anyone who is not a lawyer.³⁵ This prohibition hinders firms’ ability to innovate and grow, especially those that are trying to develop service and financial models that enable them to serve individuals and small businesses.

State bars exercised their power to set the rules. The rules have resulted in an access-to-justice crisis. It is their duty to fix them.

III. WHAT STATE BARS SHOULD DO

State bars should reexamine the impact of their rules on access to justice *sincerely, thoroughly, courageously, and effectively*.³⁶ It is not enough to be *open* to rule change or to create a commission that writes a report only to conclude with inaction.³⁷ State bars need to get something done. I propose that each state bar

34. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS’N 2020); *see, e.g.*, ILL. S. CT. RULES, r. 5.4 (2022); N.Y. RULES OF PRO. CONDUCT, r. 5.4 (2022).

35. *See supra* note 30 and accompanying text.

36. Achieving consensus-based reform has proven to be very difficult. To succeed, states must *sincerely* and *thoroughly* examine how and why so many do not have access to justice. A passing nod to an ill-defined policy issue will not do. The facts need to be determined and the impact of the rules identified. It will take *courage*: it likely will require facing up to inconvenient truths and questioning longstanding assumptions and norms; it will cause intense and organized opposition from within the state-bar membership. And the states must pursue this work *effectively*: gathering the data, doing the analysis, assembling the committees, and building consensus all must be done with great skill and care. The sequence I propose will help with all of this. If the process begins with a separate examination of the problem, it will create a natural, principled foundation for the succeeding steps. If it then proceeds with a separate refresh of the bar’s regulatory objectives, it will create a second sound pillar for the final step. It appears to me that states often start the process with a proposed rule change, leading to outcome-oriented advocacy and obscuring the vital details of the access-to-justice crisis and the vital consideration of the objectives of the rules.

37. Younger provides a vivid portrayal of how state efforts such as those in Florida and California have fared. If state bars sincerely want to reform their rules to enable greater access to justice, they must get something done. Among other challenges, as Younger warns, that means they must “overcome strong lawyer opposition,” which his essay forecasts is unlikely “to subside.” *See* Younger, *supra* note 24, at 265-67, 273-74. On August 9, 2022, Younger praised the most recent example of lawyers resisting efforts to reform Model Rule 5.4 to enable greater access to justice. Sam Skolnik, *ABA Sides Against Opening Law Firms up to New Competition*, BLOOMBERG L. (Aug. 9, 2022, 5:36 PM), <https://news.bloomberglaw.com/business-and->

pursue a three-step process: (1) assess the problem; (2) articulate the overarching mission of the rules; and (3) examine possible rule revisions.

As I will discuss, the process of deciding on specific rule changes is certain to be contentious.³⁸ The first two steps are essential preparation to oversee the battle.

A. Assess the Problem

State bars should start by taking a hard look at how well their state's legal system is working. In particular, state bars must ask: How well does our system meet the needs of all people and businesses? Who is not being served? In what circumstances? What kinds of life and business issues are going unmet? What kinds of legal issues? How well does the system enable people to achieve the objectives that cause them to need legal service? What are the practical reasons for access challenges? How well does the system enable the infrastructure necessary to deliver legal service to everyone?

The answers to these questions must be based on hard evidence. State bars should take the time and devote the resources to look closely at their systems' actual performance. The specifics will inform the nature of the services that need to be delivered, the qualifications required to deliver them, and what rule changes or other actions are necessary to enable them.

B. Articulate the Overarching Mission of the Rules

In the second step, state bars should refresh and renew their understanding of the fundamental objectives of their regulatory models. States bars should ask themselves: Why do we have these rules? What are we solving for? What does success look like?³⁹ Beyond the platitude of serving the "public interest," states should dig deeper and be more specific about what they want their rules to accomplish. The assessment should start with the overarching mission of the rules as a whole, followed by consideration of the objectives of individual rules that appear to be contributing to the access-to-justice crisis. At both levels, nearly all

practice/aba-sides-against-opening-law-firms-up-to-new-competition [https://perma.cc/JUV2-46MZ].

38. Skolnik, *supra* note 37.

39. Many scholars have examined these questions over the years. State bars would benefit from consulting their work. *See, e.g.*, Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1192-1203 (2016); Rhode, *Policing the Professional Monopoly*, *supra* note 27, at 3-11; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 801-18, 873-87 (1992).

states would benefit from a fresh look in light of how much the world has changed since they adopted their systems and their rules.⁴⁰

As a framework for this exercise, it will be helpful to consider three possible objectives articulated in discussions of potential regulatory reform: protecting consumers, protecting the lawyer monopoly, and enabling legal service for all.

Protecting consumers is the most commonly suggested rationale for the rules – particularly by those resisting change. It posits that the rules are designed to assure that the legal service clients receive is ethical, competent, and otherwise in their best interest. This objective is certainly laudable. Unfortunately, however, most people and small businesses across the country have no legal service at all. The system quite clearly does not protect consumers.⁴¹

Another, more controversial rationale suggested for the rules is *protecting lawyers' monopoly over legal service*. This rationale is more commonly identified and criticized by those who advocate change. As Gillian K. Hadfield documented in an illuminating article in 2006,⁴² the justification for state bars' exclusive control of legal service has drawn "withering critiques" for decades.⁴³ While the criticism targets an array of issues, a central concern throughout is the orientation of the self-regulated bar to create rules for their own benefit without adequate concern for the impact on the public.⁴⁴ Critics assert that the breadth of the ban on others participating in legal service, the arduous and expensive prerequisites to acquire a license, and the prescriptive business models that create unnecessary complexity and excessive lawyer fees all stem from bars "us[ing] the rubric of consumer protection . . . to justify rigorous protection of the legal services monopoly enjoyed by lawyers."⁴⁵

The approach Younger takes in his essay is subject to this criticism. He justifies Rule 5.4 in the very first paragraph of his essay by disapproving the

40. The rules have their origins in the late nineteenth and early twentieth centuries. In the ensuing century, law has become a much more common part of life and business, and new service models, business models, and technologies have developed. The need for legal service has increased dramatically, along with the tools available to deliver it. Our rules should permit contemporary tools to help meet the contemporary need for legal service.

41. As discussed previously, under the current rules, most consumers and small businesses end up with no legal service at all. See *supra* Part I.

42. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV 1689 (2008) (providing an informative summary of research and analysis of the operation of bar rules, their expressed justifications, and their actual impact).

43. *Id.* at 1690.

44. See *id.* at 1690-95.

45. *Id.* at 1694.

participation of “nonlawyers” in legal service.⁴⁶ As though any reader would readily see the logic, Younger states that the purpose of Rule 5.4 is “to prevent nonlawyers from interfering with the lawyer’s independent judgment.” Why would one suspect that everyone who is not a lawyer would seek to interfere with lawyers’ judgment? I will talk about this more below,⁴⁷ but it sounds like a very broad and unwarranted indictment of 99.6% of the population⁴⁸ that conveniently reserves the market exclusively to the lawyers. More significantly, Younger chronicles in detail lawyers’ record of fending off reforms that would open the legal system to competition.⁴⁹ He describes case after case in which the ABA, or a state bar association, or a state supreme court launched an effort to improve

46. Younger, *supra* note 24, at 259-60. I find the term “nonlawyer,” itself, demeaning to other professionals who work in legal service. I believe it reflects an unwarranted sense of superiority of lawyers compared to others. No one in a medical office is called a “nondoctor.” I will only use the term in this Essay where I am referring to what others have said and adopting their terminology.

47. See *infra* Section IV.B.2.

48. Jay Reeves, *There’s One Lawyer for Every 240 US Residents*, LAWS. MUT. LIAB. INS. CO. OF N.C. (Sept. 16, 2020) <https://www.lawyersmutualinc.com/blog/theres-one-lawyer-for-every-240-us-residents> [https://perma.cc/KF3D-KFQT]. The current rules exclude 99.6% of the U.S. population from sharing in the profits or ownership of law firms on the sole ground (according to Younger) that they might adversely influence lawyers’ judgments. Confronted with this objective reality in my Essay, Younger says it is “nonsense” to characterize it as an “indictment” of people he calls “nonlawyers.” Younger, *supra* note 24, at 287 n.154. Instead, he says it is merely a recognition that “nonlawyers” might “prioritize profits over client interests” and, as a result, cause the lawyers to violate their ethical obligations. *Id.* We can trust the lawyers, he contends, because they have spent hours learning the ethical rules, promised not to violate them, and face consequences if they do. See *id.* at 268. If the rule did not reflect a negative view of nonlawyers, it could require a similar set of training, promises, and sanctions of those who share in the success of the firm. But to take the extreme step of excluding all “nonlawyers,” no matter what, reflects an unmistakable assumption that they cannot be trusted. That is an indictment.

49. See Younger, *supra* note 24, at 269-74. Younger incorrectly says that most lawyers oppose changes to Rule 5.4. See, e.g., *id.* at 273-74. In my experience, most lawyers do not have a strong view one way or the other. Very few people participate in public-comment opportunities when state bars consider regulatory reform. Jim Sandman, longtime President of the Legal Services Corporation, now on the faculty at the University of Pennsylvania Carey Law School, has assembled data from public comment on proposed reforms in California, Utah, and Arizona. While the data are unpublished, I have been authorized to discuss them in this Essay, and they are on file with Sandman. The data show overall low participation, with comments from state-bar members ranging from 0.24% to 1.2% of the membership. The data do show that the majority of lawyers who elected to participate opposed reforms; it also shows that the majority of the public that chose to participate *supported* reform. With such a small number of participants, all of whom are self-selected, we cannot draw meaningful conclusions, and we certainly cannot conclude what the view of the majority of all lawyers is. I do not think anyone speaks for the majority of lawyers, nor for the public on these issues. This debate needs to be expanded to a larger audience.

our justice system by opening things up. In most cases, a task force of trusted experts was empaneled, and a report recommending reform was prepared. And each time, lawyers rose up and vanquished the efforts at the final stage. As Younger observes, these experiences reflect that the bar has, “for the last two decades, *successfully* opposed most attempts to revise Rule 5.4.”⁵⁰ Put another way, in decades that saw the need for legal service rise and access to legal service plummet, the bar has “successfully” excluded anyone who was not a lawyer from participating.

Younger recently put an exclamation point on this issue by publicly celebrating the ABA House of Delegates action to discourage states from regulatory reform designed to address the access-to-justice crisis. He called the action “a huge victory for all lawyers.”⁵¹ Not a victory for consumers, not a victory for access to justice. A victory for the lawyers.

I suggest state bars do some institutional soul-searching on this very important issue. To what extent is the bar permitting its members to ward off much-needed new entrants to the marketplace because it threatens their success? Self-serving decision-making often happens in member-governed organizations. It is not hard to wonder whether this is occurring in state-bar rulemaking. Indeed, it is hard to imagine it is not.

Finally, consider the objective of *enabling legal service for all*. This rationale is not commonly suggested—but it should be. In the context of twenty-first-century realities, our regulatory models should seek to enable every person and organization to have access to the legal service they need. Such an affirmative⁵² mission comports with our national vision of the rule of law.⁵³ In contemporary America, law is in every person’s life and every business’s business. Accordingly,

50. Younger, *supra* note 24, at 274 (emphasis added).

51. Skolnik, *supra* note 37. Younger now contends that he was actually complimenting action by the ABA that would “preserve the independence of the legal profession, which in turn helps to protect consumers.” Younger, *supra* note 24, at 272 n.74. If Younger intended to laud the ABA, he would have said so. If he thought this was about “independence” or “consumers,” he would have ascribed the victory to one or both of those. Instead, Younger said, in public, who he thought was the “victor” in the ABA action: the lawyers. He may not have intended to be so revealing, but he was.

52. The first two objectives are negative: (1) protecting against mistreatment of the consumer and (2) protecting against erosion of the lawyer monopoly over the provision of legal service.

53. “Justice for all” is an idea at the very heart of the American ethos. One of the first objectives named in the preamble to the U.S. Constitution is to “establish justice.” U.S. CONST. pmb. The final words of the Pledge of Allegiance are “justice for all.” 4 U.S.C. § 4 (2018). We cannot have justice for all, especially in the complex reality of the twenty-first century, unless all of our people and businesses have access to the legal service they need to understand and interact with the law. Without such legal service, everyone is *subject to the law*, but they do not have the ability to acquire justice *under the law*.

state bars should enact rules with a goal of enabling legal service, not restricting it.

Whatever state bars decide, this second step identifies the tenets of public policy to which they commit to remain faithful as they examine possible rule changes. It is, essentially, confirming the ground rules before playing the game. If done sincerely, the policy-review process will be therapeutic, leading to a heightened consciousness of why the state bar has rules to begin with.

Before discussing the third and final step, I want to reinforce the importance of sequence. Once state bars begin the process of reexamining the rules, they will be met with stiff and often vitriolic opposition.⁵⁴ Those who benefit from the status quo will come out of the woodwork and vigorously resist change.⁵⁵

Younger confirms that this will be so. His essay describes the record of lawyers rising up to resist reform in Florida, California, and nationwide through the ABA.⁵⁶ Younger reports how lawyers dashed the recommendation of the ABA Commission on Multidisciplinary Practice in 2000, the suggestion by the State Bar of California's Board of Trustees for innovations in legal services in 2019, and the recommendations of a special committee of the Florida Supreme Court to adopt a regulatory sandbox in 2021.⁵⁷ Indeed, Younger says states will only be able to achieve reforms like those adopted in Utah and Arizona "if they can overcome strong lawyer opposition."⁵⁸

For state bars to evaluate this resistance in the way duty requires, they need to have a solid foundation on the crisis they seek to address and the policy objectives they seek to serve. If they are not on firm footing before the battle begins, it will be nearly impossible to get there through the din of advocacy.⁵⁹

Moreover, even if they are fully prepared, doing their duty will require leadership in the face of fierce resistance. This is where the courage I mentioned earlier comes in.⁶⁰ Some excellent role models of courage in this setting are former ABA presidents William Hubbard and Judy Perry Martinez, who led the ABA

54. It will often involve scapegoating or fear mongering. Younger, for example, cites the recent opposition to reform in California which expressed "concerns" about "unscrupulous actors" who seek to "do business in the legal field." Younger, *supra* note 24, at 265. These "concerns" are almost always evidence-free. Tort and criminal law protect the public from "unscrupulous actors," as do the ethical duties of lawyers with whom they associate.

55. See Reeves, *supra* note 48.

56. See Younger, *supra* note 24, at 269-74.

57. See *id.*

58. *Id.* at 265.

59. See *supra* note 36.

60. See *supra* note 36 and accompanying text.

Commission on the Future of Legal Services in 2016;⁶¹ former Utah Supreme Court Justice Deno Himonas and former Utah State Bar President John Lund, who led Utah's reexamination of their rules in 2020;⁶² Arizona Supreme Court Vice Chief Justice Ann Timmer, who led Arizona's reexamination in 2020;⁶³ and Michigan Supreme Court Chief Justice Bridget Mary McCormack, who has led all of us, including judges, in facing up to the flaws in our legal system and helping fix them.⁶⁴

C. Examine Possible Rule Revisions

With a firm grip on the problem to be solved and the public policy to be addressed, state bars should proceed to the third step: examining possible rule changes. Which state rules appear to be contributing to the problems the state has identified? How might they be modified to avoid unintended consequences while remaining faithful to regulatory objectives? If we open the system to new participants, what new requirements and oversight should we establish?

There will be no silver bullets, no surefire solutions, no risk-free ideas. Anyone who suggests otherwise underestimates the complexity of the challenge. What state bars must look for are changes that reasonably give their systems a *better chance* to achieve their goals, with potential for benefit that outweighs potential costs. Which rules to change, and in what way, will be up to each state given its particular circumstances and norms. But it is each state's *duty* to consider what changes need to be made and to *make them*.

61. See Comm'n on the Future of Legal Services, *Report on the Future of Legal Services in the United States*, AM. BAR ASS'N 1 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [https://perma.cc/3S82-4RPY].

62. See *What We Do*, OFF. LEGAL SERVS. INNOVATION, <https://www.utahinnovationoffice.org/about/what-we-do> [https://perma.cc/XH7D-E6JX].

63. See Maddie Hosack, *Arizona Carries Regulatory Reform Momentum Forward with Historic Vote*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Sept. 22, 2020), <https://iaals.du.edu/blog/arizona-carries-regulatory-reform-momentum-forward-historic-vote> [https://perma.cc/9SGC-YQ72].

64. Commenting on the ethical duty of judges to contribute to making the legal system work better, Chief Justice McCormack wrote in this publication's pages last October:

Our justice system bestows upon us the awesome responsibility of sitting in judgment over matters that affect every dimension of people's lives. Our capacity to do justice in that role is determined by the quality of the system in which we operate. We do not have the luxury of sitting back, passively observing, recognizing problems, and doing nothing. That approach does not make us impartial; it makes us complicit.

Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J.F. 175, 188 (2021).

IV. MY RECOMMENDATIONS

Having said it is up to the state bars, I do have opinions. This Part outlines my recommendations.

At the very minimum, state bars should tailor their overbroad UPL bans, modify Rule 5.4 to permit sharing in financial success and access to equity capital, and adopt a “regulatory sandbox” like the one Utah approved in 2020. I discuss each recommendation below.

A. Replace the UPL Ban with a Tailored Statement of the Legal-Service Roles Requiring a Law License

At a time when we desperately need more people to deliver legal service to individuals and small businesses, the foundational rule of our legal system tells anyone who is not a lawyer: “Don’t you dare lend a hand.” By its vague terms,⁶⁵ its criminal penalty, and enforcement actions by state bars and lawyers resisting competition,⁶⁶ the UPL ban strikes fear in the hearts of all who consider doing work that might be considered the “practice of law.” It is hard to tell what service is prohibited, you might go to jail if you get it wrong, and the state bar and competing lawyers will come after you if you try.

1. The UPL Ban’s Overbreadth

The breadth of this prohibition is the clearest test of the mission of the rules that govern our legal system. If it is to protect the lawyer monopoly, it works like a charm. If it is to ensure justice for all, it is a disaster.⁶⁷

In America’s first century, law practice was not reserved for lawyers.⁶⁸ In the latter part of the nineteenth century, states began to restrict who could appear in

65. See *supra* note 27.

66. Almost all UPL claims are filed by state bars or competing lawyers; they are rarely filed by consumers. See BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 134 (2017); Rhode, *Policing the Professional Monopoly*, *supra* note 27, at 18-20.

67. At best, this cornerstone of legal regulation is based on two policy assumptions, neither of which is sound: that the system will (1) assure that all lawyers are well qualified to serve all clients on matters of all kinds and (2) generate enough lawyers to serve all clients on all matters. I do not believe that our current legal-education and bar-exam system do the first and the data conclusively establish that the system does not do the second.

68. See generally Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. BAR FOUND. RSCH. J. 159 (chronicling the historical development of laws restricting the practice of law by nonlawyers); Matthew

court.⁶⁹ By the end of the nineteenth century, as professional bar associations gained popularity and prominence, states began to adopt broader restrictions.⁷⁰ Over time, state by state, the restriction evolved to its current expansive form and gained criminal penalties for transgressors.

Whatever may have justified this restriction in the nineteenth century, as it has expanded and as it is applied in the twenty-first, UPL rules across the country are unacceptably broad as a matter of common sense, public policy, and law.

i. Common Sense

The UPL statutes effectively treat all elements of service that implicate the law as the “*practice of law*,”⁷¹ as though every single task associated with delivering legal service requires a law degree. Every lawyer knows that is not true (as does, for that matter, anyone who ever watched an episode of *Perry Mason*). Many a first-year associate has had the experience of being assigned to a task they could have done in high school and feeling surprised that a client was willing to pay their high hourly rate to do it.⁷² In truth, legal service requires a set of tasks ranging from the most basic to the most challenging. Some require significant legal training and significant experience. But many, if not most, do not. Even the most complex legal matters involve tasks that do not require a law degree. And the simplest legal matters may not require a law degree at all.

Common sense tells us that in some cases, hands-on experience is more important than law-school education. As Judge Crotty observed in finding the New

Longobardi, *Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043 (2014) (same).

69. Longobardi, *supra* note 68, at 2047.

70. Christensen, *supra* note 68, at 176.

71. The UPL statutes and rules, *see supra* note 27, are vague and circular. Many of them define the practice of law by reference to “what lawyers do.” Since no lines are drawn between those functions that are, standing alone, the “practice of law” and those that are not, it is all treated the same. In the context of a large corporate law firm, this has no meaningful significance because no one is inspecting closely who does what. The issue becomes important for new entrants into legal service seeking to provide some of the services people need. In that context, it is easy for lawyers resisting competition to establish the new service provider to be engaged in “the practice of law.” After all, they are providing a service lawyers also provide.

72. I had that experience as a first-year associate forty-eight years ago. In connection with a municipal-bond financing, documents needed to be filed with a county clerk’s office. Doing so entailed driving from San Francisco to Contra Costa County, finding the clerk’s office, presenting the document and a copy, waiting for the copy to be stamped as received, and driving back to the office in San Francisco. All in my capacity as a lawyer. I could have done that when I was a junior in high school – my three years of law school did nothing to prepare me for the assignment.

York UPL ban unenforceable, “[T]here is some common-sense truth to the notion that a non-lawyer ‘who has handled 50 debt collection matters, for example, would likely provide better representation than a patent lawyer who has never set foot in small claims court’”⁷³ In “common-sense truth,” there are countless meaningful ways people who do not have law degrees can help people with legal issues. It makes no sense to erect a barrier in our legal system that bans them from doing so – particularly when most of our people and small businesses cannot get legal service at all.

ii. *Public Policy*

As a matter of public policy, we should welcome all the help we can get to participate, in appropriate ways, in getting legal service to those who need it. While we should establish standards for roles that actually require a law degree, there is no reason to require such expertise for every role across the entire spectrum of tasks associated with the law. No sensible theory or empirical proof of potential harm to consumers could warrant such a broad prohibition. In fact, there are no empirical data on harm to consumers by virtue of UPL in the United States.⁷⁴

There are data from more open jurisdictions which do not show harm to consumers from legal service by others.⁷⁵ Indeed, they show that consumers often fare better. A study in the United Kingdom, for example, found that lawyers were outperformed by others measured by concrete results and client satisfaction in a variety of matters.⁷⁶ There are similar findings from other jurisdictions.⁷⁷ Commonly, experience with the matter at hand is more important than formal

73. *Upsolve, Inc. v. James*, No. 22-cv-627, 2022 WL 1639554, at *15 n.13 (S.D.N.Y. May 24, 2022) (quoting *Amicus Brief of Professor Rebecca L. Sandefur in Support of Plaintiffs’ Motion for a Preliminary Injunction* at 16, *Upsolve*, 2022 WL 1639554 (No. 22-cv-627)); see also Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT’L & COMP. L. REV. 111, 115 (2016) (“Extensive formal training is less critical than daily experience for effective advocacy.”); Richard Moorhead, Alan Paterson & Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765, 795 (2003) (“[I]t is specialization, not professional status, which appears to be the best predictor of quality.”).

74. See BARTON & BIBAS, *supra* note 66, at 104-07; 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, 725-26 (2007) (noting that “critics argue there is little proof that UPL harms the public to justify its prohibition”).

75. Moorhead et al., *supra* note 73, at 785-87.

76. *Id.*

77. See, e.g., Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT’L L.J. 1629, 1634-36 (2011).

training.⁷⁸ It thus makes little sense as a public-policy matter to issue a blanket criminal prohibition on anyone other than a licensed lawyer participating in any kind of legal service.

iii. Questionable Legality

There are also meaningful and increasing questions about the legality of the overbroad UPL rules under the Sherman Act and the First Amendment.

State UPL statutes arguably violate the Sherman Act as a restraint of trade. In *Goldfarb v. Virginia State Bar*, the Supreme Court established that the Sherman Act applies to lawyers and state bars.⁷⁹ Their actions are only immune if the state has clearly approved the anticompetitive conduct and actively supervises it.⁸⁰ The Court found that the Virginia State Bar did not meet that standard in a case involving the prescription of mandatory minimum fees.⁸¹ In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the Supreme Court held that a dental association did not qualify for immunity for its ban on the “unauthorized practice of dentistry” when it prohibited others from engaging in teeth whitening.⁸² In the wake of that decision, the North Carolina State Bar settled its litigation with LegalZoom and revised its UPL ban to permit certain online and automated document services.⁸³

Both the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have also long contended that state UPL statutes are overbroad and advised states to narrow them.⁸⁴ With the evident and serious harm experienced by American consumers and businesses from the anticompetitive effect of overbroad UPL statutes, it is increasingly hard to justify them under the Sherman Act.

UPL bans are also vulnerable to challenges based on the First Amendment. In *Upsolve, Inc. v. James*, the U.S. District Court for the Southern District of New

78. See sources cited *supra* note 73.

79. 421 U.S. 773, 793 (1975) (holding that “certain anticompetitive conduct by lawyers is within the reach of the Sherman Act”).

80. *Id.* at 790-91.

81. *Id.* at 791-92.

82. 574 U.S. 494, 504 (2015).

83. *LegalZoom.com, Inc. v. N.C. State Bar*, No. 111 CVS 15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. Oct. 22, 2015) (consent judgment).

84. See, e.g., Letter from U.S. Dep’t of Just. and Fed. Trade Comm’n to Task Force on the Model Definition of the Practice of Law, Am. Bar Ass’n (Dec. 20, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf> [<https://perma.cc/2BBB-KATF>].

York held the New York UPL statute unenforceable due to its breadth.⁸⁵ The case involved an organization that trained and deployed “non-lawyers” to advise low-income New Yorkers facing debt-collection actions.⁸⁶ The court found their legal advice was “speech” and, under the First Amendment, the UPL statute could not withstand strict scrutiny having neither a compelling interest nor being narrowly tailored.⁸⁷ As the court observed, “[T]he UPL rules could hardly be broader.”⁸⁸

I believe there will be more cases like *Upsolve, Inc.* and that many will prevail.

2. *Substitute a Sensibly Tailored Statement of Roles that Require a Law License for the Overbroad UPL Ban*

For all these reasons, I believe it is time to reform overbroad UPL bans that unjustifiably limit the supply of legal service.

State bars should replace UPL bans with tailored statements of the roles in which only licensed lawyers may engage. They should draw on their collective experience with the law and identify the roles that *actually* require a law-school education and limit who can do those.⁸⁹ Beyond those roles, state bars should welcome assistance. State bars cannot protect the public if they foreclose the help they need. Their rules should encourage participation, not discourage it.

In my view, it would be sufficient to articulate two roles that require a law degree: (1) advocating on behalf of another in state- or in federal-court proceedings and (2) advising another regarding rights and obligations conferred by law. This approach encompasses the roles that require deep legal education and avoids sweeping in services that do not. Beyond that, I believe states can reasonably trust consumers to inform themselves, count on market forces to generate information from providers and evaluators, and rely on standards of care in tort law and prohibitions in the criminal law to enable a more open system to operate safely.

If a state bar concludes that some other legal-service roles, while not requiring a law degree, nonetheless require a particular level of training and experience,

85. *Upsolve, Inc. v. James*, No. 22-cv-627, 2022 WL 1639554, at *16-17 (S.D.N.Y. May 24, 2022) (granting preliminary injunction).

86. *Id.* at *1.

87. *Id.* at *14-17.

88. *Id.* at *16.

89. While state bars are reexamining their rules, I believe they would be well advised to take a look at the current licensing criteria for lawyers. In my view, the legal-education curriculum, the bar exam, and CLE administration are all out of date and need material overhauls to assure the public that those who are licensed as lawyers have all the skills and knowledge they need and remain up to date in our rapidly changing world.

then that state bar can specify necessary prerequisites and processes for those roles, as other states have considered.⁹⁰

State bars will not find it easy to convert from their current blunt instrument approach to a more refined and appropriate structure. The UPL ban is long established—there will be a range of views among the members of the governing entities and spirited argument from advocates for and against change. If state bars have identified their access-to-justice issues and refreshed their understanding of the purpose of their rules, as I have recommended, the task will be easier. But whatever the degree of difficulty, the stakes warrant the effort.

State bars have a few models from which to learn as they consider this issue. A more conservative approach than the one I suggest was developed by a task force empaneled by the ABA in 2002.⁹¹ It developed a definition of “the practice of law” under the existing UPL structure as “the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.”⁹² Although somewhat tautological, this definition is a step in the right direction. The 2002 ABA task force also enumerated four settings that would be presumed to be “the practice of law”:

- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) Negotiating legal rights and responsibilities on behalf of a person.⁹³

90. See Zachariah DeMeola & Michael Houlberg, *To Close the Justice Gap, We Must Look Beyond Lawyers*, INST. ADVANCEMENT AM. LEGAL. SYS. (Nov. 4, 2021), <https://iaals.du.edu/blog/close-justice-gap-we-must-look-beyond-lawyers> [<https://perma.cc/G2SW-WNK7>].

91. Task Force on the Model Definition of the Prac. of L., *Definition of the Practice of Law Draft*, AM. BAR ASS'N (Sept. 18, 2002), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition [<https://perma.cc/8LVR-EYPA>].

92. *Id.*

93. *Id.*

While I think this list includes tasks that do not require a lawyer,⁹⁴ it provides more guidance than the current UPL ban on conduct that is restricted to licensed lawyers.

DOJ and FTC have also developed guidance for defining the “practice of law.”⁹⁵ State bars can also look to the experience of the United Kingdom and other more open jurisdictions for guidance. However they get there, state bars should restructure their rules to spell out the specific roles requiring a law license and otherwise welcome and encourage others to participate.

B. Repeal the Ban on Profit and Equity Sharing

Rule 5.4’s ban on nonlawyers sharing in a law firm’s financial success impedes the ability of lawyers and law firms to attract and retain the talent they need to deliver the best possible service to their clients. Any justification for this ban is outweighed by the harm it causes. It should be repealed.

1. Twenty-First-Century Law Firms Need Diverse Expertise

The modern law firm needs more than lawyers to deliver optimal service to its clients. It needs people who can apply the best of contemporary ideas and tools.

Law firms are simultaneously professional-service organizations and businesses. Beyond expertise in law, they need expertise in the disciplines that enable modern business operations and client service, including process design, technology, finance, strategy, and marketing. While this is true for all law firms,⁹⁶ it

94. The first and third elements are similar to my recommendations, although broader. I disagree with the second element that document drafting is a role requiring a lawyer: twenty-first-century technology can draft most documents as well or better than a lawyer. More fundamentally, the lawyering is in helping decide the substance to be expressed in the documents, not the documents themselves. I also disagree with the fourth element: negotiating for legal rights and responsibilities does not require a lawyer any more than negotiating for a major-league baseball player requires a center fielder.

95. See, e.g., Letter from R. Hewitt Pate, Acting Assistant Att’y Gen., Dep’t of Just., Jessica N. Butler-Arkow, Att’y, Dep’t of Just., Timonhy J. Muris, Chairman, Fed. Trade Comm’n, Ted Cruz, Dir. of Pol’y Plan., Fed. Trade Comm’n, to Task Force on the Model Definition of the Practice of Law, Am. Bar Ass’n (Dec. 20, 2002), <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> [<https://perma.cc/R24Q-45JP>].

96. This Essay addresses rule changes that will promote access to justice. These changes will also benefit other stakeholders in the legal ecosystem. They will improve service for all clients (making it faster, simpler, more responsive, and less expensive), improve careers of lawyers (more opportunities requiring less time to deliver more value, relieving them of tasks they find tedious, and likely making more income), and improve the business models of law firms

is *mission critical* for firms that seek to serve the needs of consumers and small businesses. The economics and business challenges of consumer- and small-business-serving firms are distinct from corporate law firms. Firms that serve consumers and small businesses share the high cost of employing lawyers, but their revenue models are lower and less consistent than those of corporate law firms. Consumer and small-business client matters generally involve lower financial stakes and warrant lower fees.⁹⁷ The matters are also more episodic, which makes repeat business uneven and unpredictable. These differences make building a business that can reach consumers and small businesses while serving them at a fee level they can afford much more challenging.

One of the reasons we have inadequate legal service to meet the needs of this part of the legal market is, without a doubt, the difficulty of making the business model work. Given the high cost of preparing to be a lawyer and the financial challenges of serving this market, not enough firms have been able to make it. And newly educated lawyers seem reluctant to try.⁹⁸ Meeting this challenge requires new ideas for how to market to clients not accustomed to using lawyers, how to deliver quality service at much lower fee structures while still making a viable income, and how to leverage technology⁹⁹ to make all this happen. This calls for new process design, new service models, new operating models, new financial models, new software, and new marketing strategies.¹⁰⁰

(higher quality of service delivered, greater workforce stability, greater client loyalty, and likely more income).

97. Lawyer fees should always be reasonable in the context of the value delivered. See MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2020). The lower the amount at stake in an engagement, the less the lawyer should charge. See *id.* r. 1.5(a)(4). And, of course, the lower the stakes, the less the client will be willing and able to pay.
98. A substantial percentage of law school graduates are unable to find legal-service jobs. See, e.g., Debra Cassens Weiss, *As Fewer Law Grads Become Lawyers, the Profession Shows Its Age*, AM. BAR ASS'N (Oct. 22, 2014, 6:15 AM CDT), https://www.abajournal.com/news/article/as_fewer_law_grads_become_lawyers_the_profession_shows_its_age [<https://perma.cc/N4NP-HWQZ>]. Meanwhile, there are millions of consumers and small businesses who cannot find legal service. I doubt we would have this stark paradox of graduates who cannot connect to clients and clients who cannot connect to legal service if our rules were not so restrictive and prescriptive.
99. Technology offers enormous opportunities to enable firms to serve underserved populations. Natural language processing, artificial intelligence, and the proliferation of legal software can enable legal service that is better, more cost effective, and more responsive than ever before. This is particularly true for the types of legal issues consumers and small businesses most commonly face. Making the most of these opportunities will require technology professionals working hand in hand with legal-service professionals.
100. To be clear, I am not saying that firms that have these capabilities will *automatically* increase access to justice. Rather, I am saying these capabilities will enable firms to address the challenges of serving this market better. It will remain for the firms to deploy the capabilities

To do all of this requires personnel who have the requisite skills and experience. Law firms that market services to consumers and small businesses commonly lack the level and regularity of cash flow to afford to meet the market compensation for such personnel with salary alone.¹⁰¹ These firms would benefit from the ability to offer their people *incentive compensation*. If they all work together and make the firm successful, they will all share in the financial rewards. They will receive a share of the profits, and they will receive a share in the equity of the firm. This incentive system has been an indispensable tool in building many of the great modern American businesses. Yet Rule 5.4 prohibits it for law firms.

2. *A Ban Without Justification*

As the ABA Commission on the Future of Legal Services found in 2016, “[T]he traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.”¹⁰² Rule 5.4 prescribes that model by banning profit- or equity-based incentive compensation systems.¹⁰³ If you are not a lawyer, you may not share in the profits or

successfully. Nor am I saying that no firms are able to serve consumers and small businesses under the current rules. Many American individuals and small businesses are able to access legal service; the challenge is that most are not. Younger points out that the contingent-fee model works for personal-injury cases. Younger, *supra* note 24, at 280 & n.118. That model only works for clients asserting claims for money damages, and only then in cases where the nature of the dispute and the amount of the potential damages recovery warrant law firms taking the risk of working without fees unless there is a recovery; it is part of the reason at least the minority of consumers and small businesses are served. It does not help clients with legal issues that do not involve a dollar claim large enough to incentive a lawyer to take the case on a contingent basis to be litigated in court. As important as the legal issues are to the clients, most do not involve claims to be paid a lot of money. For more information on how contingent-fee arrangements work, see *Fees and Expenses*, AM. BAR ASS’N (Dec. 3, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses [<https://perma.cc/7QMU-STV9>] (noting that contingency fees are used “most often in cases involving personal injury or workers’ compensation”).

101. The episodic nature of fees in consumer firms, particularly in their early days of building up a clientele and position in a market, is a particular challenge. Firms just do not have much money to pay anyone. It is one thing for the lawyer-owner to count on future earnings during slow times, but firms cannot expect employees with no stake in future financial success to do so.
102. *Report on the Future of Legal Services in the United States*, COMM’N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS’N 5 (2016). https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [<https://perma.cc/8EVX-F92E>].
103. MODEL RULES OF PRO. CONDUCT r. 5.4(a), (d)(1) (AM. BAR ASS’N 2020).

equity of a law firm. What justifies this ban on incentive compensation? Nothing that serves the appropriate goals of the justice system.

The ban on sharing profits originated from a concern for corruption in the way clients were incentivized to choose one lawyer over another.¹⁰⁴ Over the years, it was gradually modified, ingrained, and practically consecrated¹⁰⁵ – all without any plausible justice-based justification.

The Arizona Supreme Court's 2019 Task Force on the Delivery of Legal Services examined the history, rationale, and current effect of Rule 5.4's ban on fee and equity sharing. As to history, the task force found that "the prohibition was not rooted in protecting the public but in economic protectionism."¹⁰⁶ As to the present, the task force concluded that "it no longer serves any purpose, and in fact may impede the legal profession's ability to innovate to fill the access-to-justice gap."¹⁰⁷

Younger justifies Rule 5.4 on a single ground: "[T]o prevent nonlawyers from interfering with a lawyer's independent professional judgment."¹⁰⁸ His essay notes that a lawyer spends "hours"¹⁰⁹ completing a course in professional ethics and faces consequences for violating ethical rules. Sharing the financial rewards with nonlawyers, Younger argues, might lead to lawyers being persuaded by their nonlawyer colleagues to abandon their ethics.¹¹⁰ That's it. No evidence of the moral depravity of nonlawyers, no evidence of such unethical influence in open systems, nothing. Just an assertion that it *might* happen.¹¹¹

This argument proceeds from the arrogant assumption that only lawyers can be trusted to act ethically. There is no basis in real-world experience for that

104. See *Meguire v. Corwine*, 101 U.S. 108, 111 (1879).

105. See Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 615-17 (2013). See generally Rhode, *Policing the Professional Monopoly*, *supra* note 27 (describing the evolution of unauthorized practice enforcement).

106. Task Force on the Delivery of Legal Servs., *Report and Recommendations*, ARIZ. SUP. CT. 15 (Oct. 4, 2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf> [<https://perma.cc/P4EL-7849>].

107. *Id.*

108. Younger, *supra* note 24, at 261. Readers not steeped in the lore of the law likely will find this assertion surprising. As discussed previously, there is no reason to assume 99.6% of the population represent a danger to lawyer ethics. See *supra* Part III.

109. Younger, *supra* note 24, at 268.

110. *Id.* at 268-69.

111. The absence of evidence of actual harm for such a sweeping prohibition as this reinforces arguments that it is, in reality, protectionism.

assumption.¹¹² While I do believe lawyers take their ethical duties seriously, I have no reason to believe that anyone else who engages in legal service cannot be trusted to do so, too. They may need to learn some new rules, but as Younger tells us, that takes only a matter of “hours.”¹¹³

Younger also offers the example of a settlement decision to illustrate how an unethical nonlawyer might interfere with a lawyer’s ethics.¹¹⁴ The nonlawyer, being interested in sharing in the fee (presumably contingent in this example), might push to settle on suboptimal terms rather than hold out for something better. The lawyer, believing it is not in the client’s interest to settle, nonetheless would advise settlement. But this story does not hold water. For starters, there is no reason to believe that ethical lawyers will staff their firms with people who do not embrace their ethical duties. If you assume lawyers take ethics seriously, they will expect their people to do the same. Moreover, even if a nonlawyer advocates settlement out of self-interest, there is no reason to believe the lawyer will abandon her ethics.

Indeed, Younger’s essay seems grounded in the idea that lawyers answer to a higher calling when it comes to ethics. I have enough confidence in lawyers to be comfortable that they can withstand ill-advised pressure from “nonlawyers” regarding the advice they give their clients. Indeed, lawyers commonly face pressure to deviate from their ethics: a client that wants approval to do something they should not do or a law partner that elevates financial issues over client responsibilities. In my experience, lawyers have a good record of resisting such pressure. If I am wrong, then what ethical standard is Rule 5.4 protecting? Either we have confidence in lawyers’ commitment to their ethics, or we do not. I do.

Moreover, if nonlawyers do cause lawyers to violate their ethics, the lawyers will still face consequences¹¹⁵ even if Rule 5.4 is modified. The revised rules can also provide for sanctioning the nonlawyers and the firm for causing the improper conduct.

The argument for retaining Rule 5.4 really seems to boil down to preserving the lawyer monopoly. This was starkly evident in Younger’s comments celebrating the ABA House of Delegates’s most recent resistance to reform. He called it

112. See *Countrywide Home Loans, Inc. v. Ky. Bar Ass’n*, 113 S.W.3d 105, 120 (Ky. 2003) (“[W]e take issue with the implications of Mistler’s statement—that merely because he was able to successfully pursue a law degree and license he is by nature a more honest and ethical person than laypersons who have not made such a commitment.”).

113. Younger, *supra* note 24, at 268.

114. *Id.* at 269.

115. Not only would the conduct violate the lawyer’s duty to the client, relenting to such pressure from the “nonlawyer” colleague likely would violate Model Rules 1.7 and 1.8 as well. MODEL RULES OF PRO. CONDUCT rs. 1.7 & 1.8 (AM. BAR ASS’N 2020).

“a huge victory for all lawyers,”¹¹⁶ with no reference to client welfare or ethical integrity. If the real motive here were either of those ideas, Younger would have celebrated them, rather than the lawyers Rule 5.4 shields from competition.

C. Repeal the Ban on Equity Capital

Building a successful law firm requires capital. Most businesses have three options to raise it: self-funding, debt financing, and equity financing. Law firms have only the first two because Rule 5.4 bans the third. Even though equity is the most attractive form of capital for many startup or cash-flow-challenged firms – earning its return by spreading the risk of the new or innovative business – law firms cannot use it. Rule 5.4’s ban on access to equity capital thus further impedes the innovation our legal system needs, particularly the legal-service providers who serve consumer and small-business clients. As Justices Kourlis and Gorsuch put it: “This restriction on capital investment reduces the number of market participants, which in turn prevents competition from reducing costs.”¹¹⁷

As discussed previously, one of the reasons for the inadequate supply of lawyers serving consumer and small-business clients is the challenge of building a business model that can serve a relatively low-revenue client base with unpredictable cash flow and a traditionally high cost of delivering service. To address the access-to-justice crisis, we need more law firms with creative new models to surmount this challenge. Such firms will need capital at the outset and as they develop to support their investments and navigate the ebbs and flows of their income statements. Our rules, therefore, should enable equity capital, not ban it.

Adherents claim that outside investors will infect lawyers with a profit motivation and cause them to disregard their ethical obligations. As Younger says, “[N]onlawyers . . . might prioritize profit over the duties the lawyer owes to clients.”¹¹⁸ This claim does not comport with reality. For starters, lawyers do not need outsiders to give them the profit virus. Partners in leading American law firms have organized their firms so that partners earn millions of dollars each year, with many firms *averaging* more than three million dollars in profits per partner and the highest-performing partners earning substantially more.¹¹⁹ If

¹¹⁶. Skolnik, *supra* note 37.

¹¹⁷. Kourlis & Gorsuch, *supra* note 14.

¹¹⁸. Younger, *supra* note 24, at 261-62.

¹¹⁹. *The 2022 Am Law 100: Ranked by Profits per Equity Partner*, LAW (Apr. 26, 2022, 10:03 AM), <https://www.law.com/americanlawyer/2022/04/26/the-2022-am-law-100-ranked-by-profits-per-equity-partner> [<https://perma.cc/9KMU-B3F2>].

lawyers were going to put profits ahead of ethics, it has already happened. But I do not think that is what lawyers do.

To the contrary, I think the record suggests the opposite. It shows that firms with the highest ethical standards can build very profitable businesses.¹²⁰ In legal service, profits and ethics can coexist. Every lawyer wants to make a living, and many would like to charge high fees. But lawyers, I contend, see themselves as true professionals first and businesspeople second. That is, in fact, at the heart of Younger’s thesis. As I said previously, I am confident that lawyers can and will resist pressure to abandon their ethics as, if, and when it arises. And, if we cannot trust lawyers’ so-called higher calling, they can be sanctioned – as can the investors who persuaded them to act unethically.

D. Create a Regulatory Sandbox

As an alternative or additional response to the access-to-justice crisis, state bars should consider creating regulatory “sandboxes” in their respective states to allow experimentation, invite innovation, and gather data on how effectively and safely new ways of delivering legal-service work.

Regulatory sandboxes have been used successfully in financial services and other settings.¹²¹ A regulatory sandbox for legal service would normally involve several steps.¹²² First, the state bar determines that it wants to encourage innovative approaches to delivering legal service, including ones that may not presently be permitted by its rules. It then creates a regulatory body to oversee the process. That regulatory body sets up processes and criteria for applicants to seek approval to deliver legal service in a particular way. Each proposal is evaluated and, if approved, is granted temporary permission during a trial period to deliver legal service according to their proposal. During the trial period, the entity’s

120. The firms posting the highest levels of partner income represent some of the most sophisticated and fully informed clients in the world. Those firms are entrusted with highly confidential and proprietary information, and to advise and advocate concerning matters of enormous consequence. They would not be chosen by these clients for these engagements, year after year, engagement after engagement, without operating at the highest level of professional ethical standards.

121. See, e.g., Alessandra Carolina Rossi Martins, *A Sandbox for the U.S. Financial System*, REGUL. REV. (Aug. 19, 2021), <https://www.theregview.org/2021/08/19/rossi-martins-sandbox-for-us-financial-system> [<https://perma.cc/AK4E-SPAU>] (noting how the United Kingdom’s “fintech regulatory sandbox . . . has been an inspiring success for other countries”).

122. These are the elements adopted by Utah. See OFF. LEGAL SERVS. INNOVATION, *supra* note 62; see also *Innovation Office Manual*, OFF. LEGAL SERVS. INNOVATION 2-9 (Aug. 25, 2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/08/IO-Manual-Published-Aug.-25-2021.pdf> [<https://perma.cc/HQ6F-8XEG>] (laying out the steps to apply to and participate in the sandbox in detail).

performance is monitored by the regulatory body. At the end of the trial period, the regulatory body evaluates the entity's performance and, if warranted by the evidence, issues permanent permission to pursue its new model. Throughout the sandbox process, the regulatory body assembles data on innovative ideas and the performance of all entities admitted to the sandbox.

The sandbox signals to all stakeholders that the state bar wants to foster innovation in the way legal service is delivered. In turn, it generates new processes and models that will inform us all. It also gathers invaluable data about how these models actually work. And it will do it all under the supervision of the regulatory body, ensuring safety.¹²³

The state of Utah set the standard for others to follow in adopting a regulatory sandbox in 2020¹²⁴ – both in how it decided to adopt the sandbox and what it did. Utah decided to adopt a sandbox through collaboration between the state bar and the state supreme court. Both the Utah State Bar president, John Lund, and a Utah Supreme Court Justice, Deno Himonas, believed the regulatory model needed reform and that the sandbox was the best way to proceed.¹²⁵ Having these two leaders on board from the outset facilitated the process significantly.

The Utah sandbox is overseen by the Office of Legal Services Innovation, which John Lund agreed to head in its formative years.¹²⁶ As a companion action, Utah modified Rule 5.4 to permit fee sharing and equity ownership while requiring such arrangements to go through the sandbox process.¹²⁷ The sandbox also specifically contemplates proposals in which “nonlawyers” deliver legal service and reserves discretion to grant waivers for other innovations that applicants may propose.¹²⁸

123. The sandbox format permits the state bar to create as much supervision and as many limitations as are warranted. Utah, for example, monitors participants closely, requires monthly reports, and conducts audits. See OFF. LEGAL SERVS. INNOVATION, *supra* note 122, at 15-16.

124. See OFF. LEGAL SERVS. INNOVATION, *supra* note 62.

125. See *id.* In an interview I did with Justice Himonas and John Lund, together with Gillian K. Hadfield, on the *Law Technology Now* podcast in 2020, they describe the process they pursued to achieve adoption of the Utah sandbox. Law Technology Now, *Model for Change: Utah's Data-Driven Approach to Closing the Justice Gap*, LEGAL TALK NETWORK (Sept. 16, 2020), <https://legaltalknetwork.com/podcasts/law-technology-now/2020/09/model-for-change-utahs-data-driven-approach-to-closing-the-justice-gap> [<https://perma.cc/87B3-JT5B>]. It is worth a listen.

126. See *Board and Staff*, UTAH INNOVATION OFF., <https://utahinnovationoffice.org/about/staff-list> [<https://perma.cc/K67T-AZCD>].

127. OFF. LEGAL SERVS. INNOVATION, *supra* note 122, at 2, 60-61.

128. *Id.* at 2-3.

As it has proceeded with the sandbox, Utah has developed ways to categorize, measure, and monitor risks to consumers and is gathering data daily about how the innovative approaches it has approved have fared. To date, Utah has authorized forty-two entities to offer services in the sandbox yielding more than 24,000 legal services to 19,000 separate consumers.¹²⁹ These reforms have won widespread praise, including from Justices Kourlis and Gorsuch, who “encourage others to follow suit.”¹³⁰

E. Opportunities, Not Promises

Younger asserts that advocates for reform do not have “compelling evidence” that their proposals will fix the access-to-justice crisis.¹³¹ I am not saying my recommendations are certain to work. I am saying this: if we open our system to permit it to benefit from people, models, and technology that are currently foreclosed, we are highly likely to do better. I propose that we stop prohibiting possibilities.

We cannot predict the future. The time it will take for reforms to play out, the sequence of events, and the eventual outcomes are not knowable in advance. But we have plenty of reason to be confident that it will be better than the status quo. Indeed, we *do* have “compelling evidence” of this: the current closed system leaves most of our people and small businesses without legal service.

Younger also claims that there is no evidence from the early results of more open systems that such systems are improving access to justice.¹³² Not so. The data available on the Arizona and Utah websites show a significant number of firms participating, a healthy mixture of areas of law being offered by the approved participants, and thousands of people and businesses being served.¹³³ That is progress.

Younger also asserts that many of the firms approved for alternative business structures in Arizona and Utah’s sandbox offer business-law services.¹³⁴ But small-business clients are a significant part of the crisis we need to solve.

129. *Innovation Office Activity Report: Executive Summary July 2022*, OFF. LEGAL. SERVS. INNOVATION 1, 4 (Aug. 17, 2022), <https://utahinnovationoffice.org/wp-content/uploads/2022/08/IO-Monthly-Public-Report-July-2022.pdf> [<https://perma.cc/4LTN-BV9N>].

130. Kourlis & Gorsuch, *supra* note 14.

131. Younger, *supra* note 24, at 275.

132. *See id.* at 276-81.

133. OFF. LEGAL. SERVS. INNOVATION, *supra* note 129, at 1, 4-5; *Summaries of Alternative Business Structures in 2021*, ARIZ. SUP. CT., <https://www.azcourts.gov/Portals/219/Images/Summaries/Approved%20ABS%20summaries.pdf> [<https://perma.cc/LVT4-59CN>] (summarizing the services offered by every firm participating in Arizona’s program).

134. Younger, *supra* note 24, at 278.

Moreover, most of the firms that Younger labels business-oriented also offer services to individuals—specifically divorce, custody, debt-collection, eviction, estate-planning, and immigration legal services.

Younger criticizes some of these entities for deviating from the traditional model in ownership and service. But that is the point. The traditional model does not reach most of our people and small businesses. We need new ways. The traditional model is failing us.

Most important, however, is this: the Arizona and Utah models are just getting going. It is far too early to have enough data to evaluate the impact they will have.¹³⁵ It will take time for people and organizations to react to the new opportunities Arizona and Utah have created.

Younger says that lawyers are innovative and that it would be wrong to claim that there can be no innovation without “nonlawyer ownership.”¹³⁶ I agree. But it is irresponsible to deny law firms access to resources that could make them more innovative and effective than they otherwise would be.

Finally, Younger lauds lawyer pro bono activities and innovative programs “promoted by members of the bar to expand access to legal services.”¹³⁷ I commend these activities too and hope law firms will continue to give generously to this important cause. But pro bono efforts will never be enough to meet the needs of the underserved. The scale of the challenge is too massive. In 2016, scholars calculated that it would cost forty billion dollars to deliver one hour of pro bono work to each person in America who could not access legal service.¹³⁸ One hour will not accomplish much, and rates have gone up—at twenty hours per person and modestly higher rates, the tab exceeds one trillion dollars.

We need to unleash the potential of private enterprise. While the size of the underserved population makes the lack of access to legal service a social crisis, it also creates an enormous market opportunity. We need to permit people with a diverse set of skills to work with lawyers to create new models that can address it. Not all will succeed, but, over time, many will. That is our best realistic hope to close the justice gap.

^{135.} Younger claims that there is no evidence of progress in access in the United Kingdom or Australia. *Id.* at 267 & n.88 (citing *Under New Management: Early Regulatory Reform in the United Kingdom and Australia*, PRACTICE (Jan./Feb. 21), <https://thepractice.law.harvard.edu/article/under-new-management> [<https://perma.cc/SBC2-SDTQ>]). The article actually reports that there has been progress and that there is reason for optimism, but there is not yet enough data to form definitive conclusions.

^{136.} Younger, *supra* note 24, at 284-87.

^{137.} *Id.* at 284-85.

^{138.} Hadfield & Rhode, *supra* note 39, at 1193.

CONCLUSION

America's access-to-justice crisis requires all state bars to take action. It is truly unacceptable that most of our people and small businesses do not have access to the legal service they need. Whatever the history and purpose of the rules, state bars have created a reality at odds with America's dedication to justice for all. Their rules must be reformed.

This will require state bars to lead: to face up to their reality, to pursue their core mission, and to inspire their lawyers to embrace new approaches. Reform will not be easy. Success will not be assured.

But failure to act is a *derelection of duty*.

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