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The Overreach of Limits on "Legal Advice"

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ABSTRACT. Nonlawyers, including court personnel, are typically prohibited from providing legal advice. But definitions of "legal advice" are unnecessarily broad, creating confusion, disadvantaging self-represented litigants, and possibly raising due-process concerns. This Essay argues for a narrower, more explicit definition of legal advice that advances, rather than undercuts, access to justice.

INTRODUCTION

Those who work in courts—including judges and clerks—are extremely wary of and typically prohibited from providing legal advice. This Essay argues that current definitions and applications of "legal advice" are overly and unnecessarily broad, confusing those bound by them, severely disadvantaging pro se litigants, undermining the purpose of such limitations, and, in more extreme cases, implicating due-process concerns expressed by the Supreme Court in *Turner v. Rogers*.[1]

Most of the literature in this area has focused on cabining the unauthorized practice of law by nonlawyer service providers and companies like LegalZoom.[2] There has been little written about the provision of legal advice by court

1. 564 U.S. 431 (2011).

2. *See, e.g.*, Caroline E. Brown, *LegalZoom: Closing the Justice Gap or Unauthorized Practice of Law?*, 17 N.C. J.L. & TECH. ONLINE 219 (2016); Lauren Moxley, Note, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553 (2015); Sarah Knapp, *Can Legal Zoom Be the Answer to the Justice Gap?*, 26 GEO. J. LEGAL ETHICS 821 (2013).

personnel in the local and state venues where it is most needed and likely to occur.[3] The hazards of unauthorized practice are clear in the case of someone who misrepresents themselves as a lawyer or who recommends a specific course of action when they have not had the necessary professional training. Construing the prohibition on legal advice to prevent relaying basic information about the law, however, fails to protect litigants and instead thwarts their attempts to effectively educate and represent themselves.

One recent example of this problem is courts' treatment of the Centers for Disease Control and Prevention (CDC) moratorium on evictions.[4] During the COVID-19 pandemic, the CDC issued an order prohibiting evictions under certain circumstances, such as nonpayment of rent and related fees.[5] But the onus was on renters to assert their rights under the order by submitting a signed declaration of eligibility to their landlords.[6] While some courts made information about the order available to tenants facing eviction — and in some cases, provided copies of the required declaration form — other courts declined to provide any information on the order or declaration form, viewing it as prohibited "legal advice."[7] For many tenants, a court's decision not to provide such information left

3. *See, e.g.*, Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1321 (2021) (describing the volume of individuals in state courts — as many as fifteen million — who navigate the civil legal system alone each year).

4. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

5. Although most commentators have interpreted the Centers for Disease Control and Prevention (CDC) order to apply only to cases filed for nonpayment, others have argued that it covers holdovers as well. *See Q: Does the CDC's Extension of the Eviction Moratorium Mean No One Is Being Evicted Now?*, SHELTERFORCE (Apr. 23, 2021), https://shelterforce.org/2021/04/23/q-does-the-cdcs-extension-of-the-eviction-moratorium-mean-no-one-is-being-evicted-now [https://perma.cc/VR3T-2PPQ] ("[T]he CDC's moratorium is not limited to nonpayment-of-rent cases . . . .").

6. To secure protection under the CDC order, tenants had to complete and sign the declaration form and return it to their landlord or property manager. Tenants who did not or could not complete the declaration form would remain at risk of eviction, depending on other state or local orders in place. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292; *Federal Moratorium on Evictions for Nonpayment of Rent: FAQ for Renters*, NAT'L HOUS. L. PROJECT & NAT'L LOW INCOME HOUS. COAL. 2, 5 (Aug. 2021), https://nlihc.org/sites/default/files/National-Eviction-Moratorium_FAQ-for-Renters.pdf [https://perma.cc/LTJ3-PZ6A].

7. *See* Daniel Pasciuti, Tabitha Ingle, George Usmanov, Joy Dillard Appel & Lauren Sudeall, *Courts in Crisis Part III: The Rising Tide of the Rental Housing Crisis in Georgia*, GA. ST. U. COLL. L. 7 (Aug. 2021), https://law.gsu.edu/document/courts-in-crisis-part-iii-the-rising-tide-of-the-rental-housing-crisis-in-georgia/?wpdmdl=210223 [https://perma.cc/6X5B-697U] (finding that sixty-one percent of courts surveyed "did not direct litigants to the CDC declaration form or provide information about the moratorium to tenants facing eviction").

them unaware of the option to file a declaration form; without any general instructions, there was also a strong likelihood that some tenants would not complete all of the steps necessary to avail themselves of the order's protection.[8]

Courts' handling of the CDC order is only one recent example of a much broader issue. It is widely acknowledged that most Americans experiencing civil legal problems receive little to no legal assistance.[9] But their challenges do not end with the inability to secure legal help. Prohibitions on legal advice that prevent the provision of even basic information about the legal system contribute to this access-to-justice failure and make actors within the system complicit in it. Pro se litigants are forced not only to navigate the system alone, but to do so blindly and often at a severe disadvantage to their opposing parties.[10]

In Part I of this Essay, I discuss the range of "legal advice" limitations promulgated by jurisdictions across the country, which, in many cases, lead to the withholding of critical information from individuals attempting to navigate the legal process. In Part II, I highlight some of the dangers posed by such broadly construed limitations, including constitutional due-process concerns. Finally, in Part III, I argue that courts and legislatures should be more explicit in their definitions of legal advice, eliminating any fear that court personnel may have of violating unauthorized-practice-of-law rules. They should also narrow definitions of legal advice to ensure that they protect rather than undercut unrepresented litigants.

I. WHAT IS "LEGAL ADVICE"?

Precise definitions of legal advice can be hard to find. John Greacen has argued that "legal advice" has no inherent meaning and that many clerks cannot themselves provide a specific definition, resorting instead to no definition at all, a circular definition ("legal advice is advice about the law"), or the more intuitive "I can't define it, but I know it when I see it" approach.[11] In most states, legal

8. *Id.* at 5-8.

9. *See infra* notes 83-85 and accompanying text.

10. *Id.*

11. John M. Greacen, "*No Legal Advice from Court Personnel": What Does that Mean?*, 34 JUDGES' J. 10, 10 (1995).

advice is not actually defined,[12] although the provision of legal advice by nonlawyers is generally prohibited.[13]

A. Relevant Legal Authority

The inability to provide legal advice stems from state statutory provisions, state supreme-court rules, and case law prohibiting the unauthorized practice of law.[14] There is no generally accepted definition of the practice of law, and some states have concluded that an exhaustive definition is impossible.[15] But there have been some attempts—in both statutory and case law—to define "legal advice" and limitations on the provision thereof. Deborah L. Rhode has observed, however, that one common feature of these statutory and common-law prohibitions "is their broad and ambiguous scope."[16]

Under these statutes, nonlawyers may not present themselves as attorneys, take legal action on others' behalf, appear on behalf of clients, prepare legal documents, provide advice as to how legal tasks might be done, or render a judgment as to the legality of others' actions.[17] One might then understand the law to forbid nonlawyers from assuming a position of authority on the law, falsely holding themselves out to others (whether the court or a client) as a lawyer, or purporting to apply the law to the facts of an individual's specific circumstances. Michele Cotton has summarized case law on the subject by explaining that "[l]egal advice includes interpreting the law for another person, expressing an opinion about what law applies to a person's situation, and recommending ways that a person might use the law to obtain her objectives."[18]

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12. *See* 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) (explaining that "[a] number of jurisdictions simply prohibit without defining the practice of law by nonlawyers"); Bruce E. Meyerson, *Mediation Should Not Be Considered the Practice of Law*, 18 ALTERNATIVES 107, 123 (2000).

13. Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111, 111 (2017).

14. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 8-9, 12 (1981).

15. *See* State Bar of Ariz. v. Ariz. Land Title & Tr. Co., 366 P.2d 1, 8-9 (Ariz. 1961), *modified*, 371 P.2d 1020 (Ariz. 1962).

16. Rhode, *supra* note 12, at 431; *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 835, 838 (1986) ("[S]tate law has been characterized by its broad sweep and imprecise definition. . . . [M]any definitions of unauthorized practice are obviously inadequate because they would proscribe almost all areas of commercial and governmental activity.").

17. *See Appendix A: State Definitions of the Practice of Law*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.pdf [https://perma.cc/Y4DJ-VYYU].

18. Cotton, *supra* note 13, at 111 (footnotes omitted).

Some states' definitions of what nonlawyers may or may not do are oddly circular or nondefinitional.[19] Take Georgia, for example, which prohibits anyone other than a licensed attorney from "render[ing] or furnish[ing] legal services or advice."[20] Kentucky defines the practice of law as "any service rendered involving legal knowledge or legal advice."[21] Maine's definition, by contrast, is narrower and more specific. It defines "practice of law" as "connoting much more than merely working with legally-related matters" and instead asks "whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent."[22]

Case law on the topic of legal advice provides some additional guidance, but often leaves room for interpretation. For example, the West Virginia Supreme Court has held that magistrates and magistrate court personnel should not provide "legal advice," but may provide "legal information."[23] Unhelpfully, however, the court has failed to elaborate further on the distinction between legal "advice" and legal "information."[24] Some courts have been more specific, underlining the primacy of the lawyer's role. For example, the United States Court of Appeals for the Second Circuit has explained that "legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct . . . [and thus] requires a lawyer to rely on legal education and experience to inform judgment."[25] Other courts, like New Mexico's Supreme Court, have been more agnostic, declining to define the practice of law in any generalized fashion.[26]

How and why did these provisions become so pervasive? Prior to the 1930s, most unauthorized-practice statutes focused on limiting nonlawyer appearances in court or distinguishing the role of lawyers from that of other court personnel, like court clerks and bailiffs.[27] With the onset of the Great Depression, however, came a flurry of legislative activity and the passage or expansion of unauthorized

19. Rhode, *supra* note 12, at 432 ("[Some jurisdictions] take a circular approach: the practice of law is what lawyers do.").

20. GA. CODE ANN. § 15-19-51(a)(4) (2021).

21. KY. SUP. CT. R. 3.020 (2021) (defining the practice of law).

22. Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1193 (Me. 2001).

23. State v. Walters, 411 S.E.2d 688, 691 (W. Va. 1991).

24. Greacen, *supra* note 11, at 11.

25. *In re* Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007).

26. State *ex rel.* Norvell v. Credit Bureau of Albuquerque, Inc., 514 P.2d 40, 45 (N.M. 1973) (suggesting that no definition of the practice of law fits all situations and that it should instead be judged on a case-by-case basis).

27. Rhode, *supra* note 14, at 7.

practice provisions.[28] As Rhode has noted, the motivations behind such legislation are poorly documented and thus unclear; although "public demand" was later advanced as a justification for such prohibitions, historians have found little evidence to support that claim.[29] Yet courts and bar associations continue to rely heavily on protection of the public as the reason for the existence and enforcement of unauthorized-practice provisions.[30]

The fear that nonlawyers might take advantage of unsuspecting and vulnerable litigants is not ungrounded — as evidenced by the example of "notarios publicos" posing as immigration lawyers.[31] Outside of the immigration context, however, there is little evidence that nonlawyer practitioners are a danger to consumers.[32] Empirical research analyzing reported unauthorized-practice-of-law cases and interviews of state bar and state officials engaged in unauthorized-practice enforcement has shown that such claims are unlikely to originate from the public or to document harm to consumers.[33] To the contrary, some research suggests the public is actually skeptical of the profession's motivations for prohibiting unauthorized practice.[34] Further undermining the argument that the public demands such protection is the fact that most lawsuits bringing unauthorized-practice-of-law claims against internet legal providers are brought by

28. *Id.* at 9.

29. *Id.*

30. *See, e.g.*, Lowe v. Presley, 71 S.E.2d 730, 733 (Ga. Ct. App. 1952) (explaining that the Georgia statute is "intended to protect the public against exploitation by incompetent and unqualified practitioners").

31. *See* Chris Kudialis & Camalot Todd, *Notary Scams a Grave Danger for Immigrant Community*, AP NEWS (Apr. 13, 2018), https://apnews.com/article/9de9e4cea01c463faac7e072473df2a1 [https://perma.cc/4TE8-B93W]; Jessica Weisberg & Bridget O'Shea, *Fake Lawyers and Notaries Prey on Immigrants*, N.Y. TIMES (Oct. 21, 2011), https://www.nytimes.com/2011/10/23/us/fake-lawyers-and-notaries-prey-on-immigrants.html [https://perma.cc/D7CV-UM6Z]; Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 588-89 (2009) (describing the harms perpetuated by such individuals, including the charging of excessive fees and the mishandling of legitimate claims); *see also* Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425, 428 (2011) (suggesting that government training, accreditation, and regulation of immigration consultants would be a better response to immigration-consultant fraud than ex post facto enforcement).

32. Rhode, *supra* note 12, at 434; Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2617-21 (2014).

33. Rhode, *supra* note 12, at 432-33; Rhode, *supra* note 14, at 33-34 (describing the low frequency of consumer complaints and allegations of specific injury); Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 139 (2000) (noting that "there is strikingly little case law involving injury to individuals from unauthorized practice [of law]").

34. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2599 (2014).

lawyers and unauthorized-practice committees rather than consumers; such lawsuits often settle without any showing of harm.[35]

Another factor in the proliferation of such prohibitions—following as a natural segue from the above point—has been protectionism within the legal profession.[36] Historically, the profession has been hostile to others' entry into the field,[37] creating a monopoly on legal services that "drives up prices, reduces competition, and creates a one-size-fits-all approach to serving the public's legal needs."[38] To that end, professional legal organizations like the American Bar Association have often fought broad distribution of self-help materials and access to nonlawyer assistance.[39] Many aspects of the legal regulatory regime aim to insulate and compensate those who have made a significant investment in the specialized knowledge and expertise gained from a professional legal education. These sentiments are reflected in guidance from the Iowa Supreme Court regarding the distinction between lawyers and nonlawyers: "The essence of professional judgment of the lawyer is [the] educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . [T]hus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment."[40] But the court went on to distinguish occupations requiring "special knowledge of law" and not involving the exercise of

35. Rhode, *supra* note 12, at 433 (citing Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 722 (2012)).

36. *See* 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, 1194 (2016) (identifying "sheer protectionism" as a primary force driving regulation of the legal profession since the 1930s); Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1519 (2002) (citing economic protectionism as one reason for the legal profession's resistance to assistance by nonlawyers); RICHARD L. ABEL, AMERICAN LAWYERS (1989) (detailing efforts by the legal profession to control the quality and quantity of entrants); *see also* Christopher J. Whelan, *Ethical Conflicts in Legal Practice: Creating Professional Responsibility*, 52 S.C. L. REV. 697, 699 (2001) ("[P]rofessional regulation [of the legal profession] may be more about protecting lawyers from market pressures than about promoting justice.").

37. As Gillian K. Hadfield and Deborah L. Rhode explain, the modern American approach to regulating the practice of law has focused on broadly defining "practice of law" and then promulgating stringent standards to determine who is eligible to engage in such practice (i.e., exclusively lawyers) and excluding others from doing so. Hadfield & Rhode, *supra* note 36, at 1204. This stands in contrast to the regulatory approach of other nations, like the United Kingdom, which focuses on substantive regulatory objectives rather than the preservation of a singular profession. *Id*. at 1204-05.

38. Steinberg et al., *supra* note 3, at 1322; *see also* Hadfield & Rhode, *supra* note 36, at 1194 (explaining that American lawyers have exploited their access to regulatory tools to protect themselves from competition).

39. Rhode, *supra* note 12, at 434.

40. Comm. on Pro. Ethics & Conduct v. Baker, 492 N.W.2d 695, 700 (Iowa 1992) (quoting IOWA CODE OF PRO. RESP. FOR LAWS. EC 3-5 (1992)).

professional judgment, in which nonlawyers may suitably engage.[41] Although the court emphasized the importance of specialized training in advising individual clients, its demarcation thus supports the argument that where only knowledge of the law is needed, nonlawyers may have an appropriate role to play in disseminating such information.

B. Local Court Guidance

Beyond statutory and case law at the federal and state level, many local jurisdictions provide practical guidance as to what types of information nonlawyers may or may not provide.

Guidelines promulgated by Texas agencies for clerks and other court personnel working with self-represented litigants define legal advice as follows: "Court users are asking for legal advice when they *ask whether or not* they *should* proceed in a certain fashion. *Telling a member of the public what to do rather than how to do it may be giving legal advice*."[42] The guidelines explicitly define "legal advice" as a "written or oral statement" that "[i]nterprets some aspect of the law, court rules, or court procedures; [r]ecommends a specific course of conduct a person should take in an actual or potential legal proceeding; or [a]pplies the law to the individual person's specific factual circumstances."[43] The guidelines further clarify that clerks and court personnel may not recommend a specific course of action, interpret the application of a particular law, perform legal research, or predict the outcome of a case,[44] although they may identify and refer self-represented litigants to court forms.[45]

In Fulton County, Georgia, court clerks can explain court rules, practices, and procedures; provide public case information and cites to or copies of relevant law; explain available options; provide forms with instructions; and tell the

41. *Id*. I find it interesting, given the Iowa court's observation, that although many jurisdictions remain skeptical of allowing nonlawyers to advise clients, many jurisdictions do not require judges to be lawyers. *See, e.g.*, GA. CODE ANN. § 15-10-22 (2021) (setting forth qualifications for magistrate judges, which do not include the authorization to practice law). Until relatively recently, this included Iowa as well. *See* IOWA CODE ANN. § 602.6404 (2021) (grandfathering in those magistrates not admitted to practice law who were holding office as of April 1, 2009).

42. Tex. Off. of Ct. Admin., Tex. Access to Just. Comm., Tex. Access to Just. Found. & Tex. Legal Serv. Ctr., *Legal Information vs. Legal Advice: Guidelines and Instructions for Clerks and Court Personnel Who Work with Self-Represented Litigants in Texas State Courts*, TEX. CTS. 5 (Sept. 2015), https://www.txcourts.gov/media/1220087/legalinformationvslegaladviceguidelines.pdf [https://perma.cc/59XB-WHMM].

43. *Id.*

44. *Id*. at 6.

45. *Id*. at 5.

potential litigant how to make a complaint.[46] They cannot, however, provide instructive or predictive information, such as which procedures a litigant should follow, whether they should file a case, what the court might do in their case, or what the litigant or their lawyer should say in court.[47]

Similarly, court staff in Clermont County, Ohio "cannot provide legal advice or interpretations, or recommendations about what to do."[48] In general, guidelines issued by the county's common pleas court specify that court personnel can provide "factual information — these are generally questions that start with 'who,' 'what,' 'when,' 'where,' or 'how.'"[49] But they cannot direct litigants as to what they should do — which generally includes responding to questions starting with "should" or "whether" — or provide opinions.[50] As a result, they can explain court rules and procedures and define unfamiliar words or phrases, but cannot suggest "which of several available procedures [a litigant] should follow" or what steps a litigant should take in light of the definition provided.[51]

In contrast, guidelines promulgated by the Jefferson Parish Clerk of Court in Louisiana assume a high degree of self-sufficiency on the part of self-represented litigants and forbid court personnel from providing almost any advice:

> *A Self-Represented Litigant is presumed to know the law.* This means that an SRL is expected to know what the law requires and how to accomplish this in accordance with the appropriate statutes and court rules. . . . Court employees (i.e., judges, hearing officers, docket clerks, clerks of the court and all personnel connected with the court) are not authorized to tell you what you have to do, how you are to do it, or what you should do under the circumstances.[52]

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46. *Court Resources*, MAGISTRATE CT., FULTON CNTY., GA., https://magistratefulton.org/150/Court-Resources [https://perma.cc/4WLZ-EC6K].

47. *Id.*

48. *What Court Staff Can and Cannot Do For You*, COMMON PLEAS CT., CLERMONT CNTY., OHIO, https://clermontcommonpleas.com/court-and-judge-information/what-court-staff-can-and-cannot-do-for-you [https://perma.cc/7X8F-47VF].

49. *Id*.

50. *Id*.

51. *Id.*; *see also Employee Guide to Legal Advice*, MICH. JUD. INST. (2016), https://mjieducation.mi.gov/documents/resources-for-trial-court-staff/6-employee-guide-to-legal-advice/file [https://perma.cc/ZHT9-Z2AV] (providing detailed guidelines, reasons, and examples for what does and does not constitute legal advice, highlighting the problematic nature of inquiries and responses that include "should").

52. Jon A. Gegenheimer, *Self-Represented Litigants*, PAR. OF JEFFERSON, https://www.jpclerkofcourt.us/courts/24th-judicial-district-court/self-represented-litigants [https://perma.cc/TR3D-2FJC].

A recent study conducted by legal scholars across three local jurisdictions found that many judges adhere to the view expressed by the Jefferson Parish guidelines.[53] Relying in part on self-reported confusion about relevant ethical boundaries, judges did not prioritize simplicity or accommodation for pro se litigants, but instead maintained legal and procedural complexity, offered only the "most limited explanations of court procedures and legal terms," and refused to answer most of the questions posed by litigants.[54]

The above examples demonstrate the wide range of legal advice definitions in use across state courts. Many courts have coalesced around the idea that court personnel can direct litigants to basic, logistical information already in the public domain, but cannot suggest what an individual litigant should do or attempt to predict what may happen in their case. An important gap remains, however, between acts providing litigants with court rules or referring litigants to a website, library, or form, and acts offering individual, case-specific guidance or recommending a course of action. Types of assistance that fall within this gap include supplying information as to possible courses of action, informing litigants about the topics or types of evidence relevant to a form or hearing, and generally translating applicable law into more accessible language for all parties.

None of these more informative actions should be viewed as transgressing on the notion that court personnel cannot specifically advise litigants as to what actions they should take in their case. In the case of the CDC declaration form, for example, there is a difference between informing a tenant about the existence and general applicability of the CDC order (i.e., to whom it applies), when its relevant procedures and forms might be used, or what might happen after filing such a form, and specifically advising a tenant on whether or how the order and its provisions apply to the facts of their individual case. However, in the absence of guidance about how to approach this gap, court personnel often default to silence — even when it comes to providing basic logistical information that most courts find unobjectionable.[55] This is exacerbated by the range of penalties —

53. *See* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. (forthcoming 2022), https://ssrn.com/abstract=3793724 [https://perma.cc/TH23-HUHQ].

54. *See id.* (manuscript at 6-7, 47).

55. *See* Greacen, *supra* note 11, at 10 (noting how frequently clerks invoke the rule against legal advice as justification for refusing to provide information); see *id.* at 12 ("An easy way to 'get rid of' [self-represented litigants], particularly on the telephone, is to cut the questions short with the useful phrase, 'I am not allowed to give legal advice. What you are asking me involves legal advice.'").

including civil fines and injunctions or even criminal sanctions—that, although infrequently enforced, may be imposed as a consequence of violating the rules.[56]

II. "LEGAL ADVICE" KNOWS NO BOUNDS

Several practical problems abound from the limitations placed on information considered "legal advice" by courts and the actors working within them. Given the remote likelihood that litigants in many state and local courts will have access to counsel—particularly in civil cases[57]—self-represented litigants are often left to navigate a labyrinthian system with little to no guidance.[58]

Access-to-justice scholars have detailed many of the obstacles facing self-represented litigants.[59] For example, Jessica K. Steinberg has explained that pro se litigants often fail to meet threshold procedural requirements—such as properly filing pleadings, serving the opposing party with key legal documents, and scheduling hearings with the court—necessary for a judge to hear the merits of their case.[60] She notes that the failure to do so often results "in negative case outcomes, most commonly a default judgment or dismissal of the action for want of prosecution."[61] Should they make it past those initial stages, pro se litigants face a number of other daunting and unfamiliar challenges, including motion practice, discovery, and the application of evidentiary rules.[62] For this reason, Steinberg concludes, "the American court system offers unequal access to

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56. Rhode & Ricca, *supra* note 34, at 2597-98 (demonstrating the range of possible penalties imposed for the unauthorized practice of law, including civil injunctive remedies, civil fines, and misdemeanor and felony charges).

57. *See* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749 (2015) ("In some state systems, up to eighty or ninety percent of litigants appear unrepresented . . . ."); Lauren Sudeall & Ruth Richardson, *Unfamiliar Justice: Indigent Criminal Defendants' Experiences with Civil Legal Needs*, 52 U.C. DAVIS L. REV. 2105, 2111 (2019) ("People facing civil justice issues have no federal constitutional right to counsel and often have no alternative basis for a right to counsel in state or local law.").

58. *See, e.g.*, Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 78-80 (2018).

59. *See, e.g.*, Sudeall & Richardson, *supra* note 57; Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287; Natalie Anne Knowlton, Logan Cornett, Corina D. Gerety & Janet L. Drobinske, *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (May 2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [https://perma.cc/S4YU-6UYF].

60. Steinberg, *supra* note 57, at 744.

61. *Id.*

62. *Id.*

justice—or perhaps more aptly stated, makes equal justice nearly unattainable."[63] Stringent definitions of "legal advice" compound and exacerbate these issues by shrouding the legal process in mystery and confusion. This results not only in missed opportunities to redress wrongs or deliver justice, but also in high levels of frustration, distrust in the courts and legal system, and judicial inefficiencies.[64]

In addition to these more practical obstacles, limitations on "legal advice" raise constitutional concerns. In *Turner v. Rogers*, the Supreme Court held that the Fourteenth Amendment's Due Process Clause does not automatically require the appointment of counsel in civil-contempt cases, even when there is a possibility of incarceration.[65] In doing so, however, the Court emphasized the importance of "substitute procedural safeguards" to avoid an erroneous deprivation of due process.[66] In the context of Michael Turner's case—where he had repeatedly failed to pay child support and faced civil contempt as a result—this included notice to Turner that his ability to pay the support at issue would be a critical issue in the proceedings.[67] It also included "the use of a form (or the equivalent) to elicit relevant financial information."[68]

The Court went on to explain that when these safeguards are not adequate, a due-process violation may result, thereby implying baseline responsibilities on the part of the courts.[69] In Turner's case, the Court ultimately held that due process was violated because he received neither counsel nor the benefit of such alternative procedural safeguards:

> He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated.[70]

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63. *Id.*

64. *See infra* note 77 (describing the inefficiencies that can result in courts where parties are unrepresented); Steinberg, *supra* note 57, at 754-59 (presenting the effects of self-representation on the experiences and outcomes of pro se litigants, including unfavorable case outcomes and lower rates of satisfaction with and confidence in the courts); Knowlton et al., *supra* note 59, at 30-32 (highlighting the uncertainty and frustration that accompany pro se representation).

65. 564 U.S. 431, 448 (2011).

66. *Id.* at 447.

67. *Id.*

68. *Id.*

69. *Id.* at 448.

70. *Id.* at 449.

Per the Court's finding, the most likely parties to have provided Turner with the relevant notice or the form noted above were the court personnel working in the South Carolina family court. Yet, under many definitions of "legal advice," these personnel—or even the judge—would likely view themselves as barred from providing such information.[71]

In its analysis, the *Turner* Court relied on the three factors set forth in *Mathews v. Eldridge* to determine which safeguards are needed to render a civil proceeding "fundamentally fair."[72] Those factors include: (1) the nature of the private interest at stake, (2) the risk that the procedures used will lead to erroneous deprivation of that interest, and (3) the government's interest in *not* providing such safeguards.[73]

The application of these factors to the provision of basic information about the legal process would counsel toward making more, not less, information available to litigants about where, when, and how to act. For many civil litigants, the stakes are high—their cases may involve family and custodial relationships, basic physical safety, or access to food and shelter.[74] Without access to critical information about when certain actions are required, what information is relevant, and how to present that information, self-represented litigants are at a severe disadvantage. A lack of information could lead to the failure to file a required document, filing it in the wrong venue or without appropriate supporting evidence, and the subsequent issuance of a default judgment or the inability to raise certain issues at trial. These litigants certainly risk erroneous deprivation of the interest at issue.

For example, as referenced above, landlords' legal right to evict was suspended under the CDC moratorium, but only if every tenant on the lease or rental agreement obtained, completed, and submitted an executed declaration form to their landlord.[75] A court's decision not to provide any information about the CDC order—by interpreting such information as legal advice—could easily

71. *See* Carpenter et al., *supra* note 53, at 38-40.

72. 424 U.S. 319, 335 (1976).

73. *Turner*, 564 U.S. at 444-45 (citing *Mathews*, 424 U.S. at 335).

74. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 22 (June 2017), http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/94K6-TKBZ] (explaining that "[c]ommon civil legal problems among low-income households relate to issues of health, finances, rental housing, children and custody, education, income maintenance, and disability").

75. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

result in a lack of awareness of such protections, the failure to file a declaration form, or the failure to return the form to the appropriate recipient.[76]

Finally, it is not clear there is any significant government interest in not providing such information. Indeed, it is hard to see what interest the government would have in preventing users of the judicial process from knowing about and potentially exercising the very rights and defenses it has created. Although one might argue that providing such information harms judicial efficiency, the opposite is just as likely to be true; judges often prefer to work with knowledgeable, represented litigants because it *increases* judicial efficiency.[77] Another argument might be fiscal in nature—that the resources required to provide such information would impose an additional financial burden on the courts. Although *Mathews v. Eldridge* requires consideration of the "fiscal and administrative burdens" procedural safeguards might entail,[78] the cost of providing such information would likely be minimal and, when viewed in the long term, would likely increase efficiency and conserve resources.

In the immediate wake of the *Turner* decision, many scholars and practitioners were hopeful about its potential to improve access to justice, in part through

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76. *Id.* For example, the order says specifically that such forms should be returned to the landlord and not the government. *Id.* at 55,292.

77. *See* Fern A. Fisher, *Why Judges Support Civil Legal Aid*, 148 DÆDALUS 171, 173-74 (2019) (explaining reasons many judges prefer represented litigants, including more efficient administration of justice, avoiding the stress and burdens that come with working with pro se litigants, insulation from charges of impartiality, and a lack of training in working with unrepresented litigants); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 262-63, 263 n.54 (detailing the challenges judges face when dealing with pro se litigants); Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 339 (2016) ("Pro se litigation often results in delays and procedural complications that are detrimental to judicial efficiency."); Knowlton et al., *supra* note 59, at 38 (reporting that a majority of judges feel that proceedings are less efficient and that the court is "negatively impacted" when parties are self-represented); Working Grp. on Civ. Right to Couns., *ABA Toolkit for a Right to Counsel in Civil Proceedings*, A.B.A. 12 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_toolkit_for_crtc.pdf [https://perma.cc/K2AY-5ELA] (positing that assignment of counsel "result[s] in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants"); *cf.* Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 101, 140 (forthcoming 2021) (suggesting that court stakeholders believe lawyers add value less because of their substantive legal expertise and more because of their appreciation for the process and efficiencies of the court).

Although some might argue that the involvement of lawyers can introduce "a degree of formality or delay" into the proceedings that would reduce judicial efficiency, *see* Turner v. Rogers, 564 U.S. 431, 447 (2011), that argument would not apply to information provided to pro se litigants in lieu of actual legal representation.

78. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

increasing the use of procedural safeguards to ensure fundamental fairness.[79] Post-*Turner*, there has been little research on the effectiveness of such procedural safeguards in practice,[80] but the research that does exist suggests that those safeguards will fall short of their intended purpose without additional support or direction to litigants as to when and how to use them.[81] For example, even when forms are required to elicit needed information, litigants often fail to include relevant information or to return the form to its intended recipient.[82] Prohibitions on providing such basic information about the legal process may thus frustrate *Turner*'s due process mandate. At worst, they prevent a full airing of the relevant facts and actively obstruct just outcomes.

III. REDEFINING "LEGAL ADVICE"

The legal profession has interpreted what constitutes "legal advice" too broadly. And as discussed above, although it has done so in the name of the protecting the public, that interpretation has had the opposite effect in practice, creating substantial obstacles for the vast majority of the public who will never have legal representation.[83] The added irony is that, through these prohibitions, lawyers have attempted to create a monopoly on their services, even though they do not actually provide anywhere near the scale of services that is needed.[84] Indeed, there are far too many legal needs and far too few lawyers available to address

79. *See, e.g.*, Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 39 (2013); Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 807 (2012) ("*Turner* may come to be seen as requiring trial courts to provide unrepresented litigants with assistance short of full representation, such as forms, information about court processes, and questions from the bench about essential issues.").

80. Ashley Robertson, Note, *Revisiting* Turner v. Rogers, 69 STAN. L. REV. 1541, 1544 (2017) (observing that five years after *Turner*, there had been "virtually no research . . . on the real-world consequences or effectiveness of the Court's suggested procedural safeguards").

81. *Id.* at 1584-85 (recommending states provide additional resources to ensure forms are actually *used* in a meaningful way as required by *Turner*).

82. *Id.* at 1584.

83. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 450-51 (2016); *see also* Steinberg, *supra* note 57, at 749 (noting that, in some state systems, eighty to ninety percent of litigants appear without legal representation).

84. *See* Steinberg et al., *supra* note 3, at 1318, 1324 (remarking on both the expansive nature of the monopoly lawyers hold on legal services and that lawyers are "not currently providing services to most of the American population").

them.[85] There is arguably no way to close this gap without using nonlawyers to provide assistance in some capacity.

While there is good reason to prevent those without requisite legal training from holding themselves out as lawyers or attempting to interpret how the law might apply to a given set of facts, there is little reason to prevent those working in the legal system from relaying information about what the law requires and the range of possible actions it provides. Indeed, those individuals are the most natural source for such information, and when it is not available there, many individuals will resort to the unregulated territory of the internet, friends, and family — or even the opposing party — for advice.[86] Moreover, at least one study has shown that "lawyers affect case outcomes less by knowing substantive law than by being familiar with basic procedures."[87] Thus, on many topics, it is not unrealistic to think that nonlawyers — particularly those most familiar with court procedures — could be just as helpful in relaying information as an attorney.[88] And, as John Greacen has written, the fact that advice "is helpful does not make it improper;"[89] to the contrary, it can assist the court system in ensuring that disputes are resolved on their merits.

Prohibitions on legal advice should prohibit just and only that — "advice." The law is and should be viewed as a common good about which personnel working in legal institutions can relay basic elements — stopping short of case-specific or directive advice. Because the law governs how courts operate, it is a roadmap to which all participating parties require access. Denying such

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85. LEGAL SERVS. CORP., *supra* note 74, at 6 (noting that, in 2017, "71% of low-income households experienced at least one civil legal problem" and that "86% of the civil legal problems reported by low-income Americans . . . received inadequate or no legal help"); *see also* Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 451 (2016) (suggesting that eighty percent of the legal needs of the poor go unmet).

86. *See, e.g.*, Sudeall & Pasciuti, *supra* note 77, at 138-39 (finding that tenants facing eviction relied primarily on family, friends, and the internet for information, but would also consider consulting with their property manager, who would have better knowledge of the legal process); *see also, e.g.*, Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1148 (2006) (noting that unrepresented criminal defendants often seek help from the prosecutor or trial judge).

87. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 910 (2015); *cf.* Richard Moorhead, Avrom Sherr & Alan Paterson, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & SOC'Y REV. 765, 785-87 (2003) (describing a study in the United Kingdom in which nonlawyers outperformed lawyers in terms of results and client satisfaction).

88. *Cf.* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 201 (1998) (suggesting that formal legal training may be less critical than "substantial experience with the setting" in providing effective advocacy).

89. 424 U.S. 319, 335 (1976).

information to the public creates critical inequities of knowledge and power and may amount to a denial of due process.

Particularly since the term "legal advice" has no inherent meaning, its definitions should provide more explicit guidance to courts and alleviate any anxiety court personnel may have about violating applicable ethical and professional rules. Substantively, limitations should focus on where legal expertise is required—in the application of specific rules and provisions to the facts of an individual's case. It is also in the public interest to ensure that nonlawyers cannot misrepresent themselves as having expertise or training that they do not.

There is a blurrier line, however, when it comes to what nonlawyers should be able to provide. Lawyers may have a monopoly on traditional legal services. But lawyers do not—and should not—have a monopoly over the law itself or legal information that is in the public sphere. Thus, providing information on what the law is, or when it applies generally, should never be prohibited. I would go further to suggest that efforts to simplify legal information and provide explanations about when it might apply should not be prohibited either—they should perhaps even be required. Court personnel should stop short, however, of recommending a specific course of action to an individual, given that advice from someone in their position would likely carry special weight.[90] Nor should court personnel attempt to apply the law to the specific facts of an individual's case, given not only their possible lack of training, but also the fact that such predictive application is, at best, speculative.[91]

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90. Two illustrative examples may be of use here. Assume a pro se litigant asks, "Can I file this appeal today?" The clerk can inform the litigant of the time frame for the appeal (e.g., thirty days from the date of the decision, not counting weekends) and provide examples as to how that time frame might apply, but cannot tell the litigant whether they should file an appeal. Or imagine a welfare case manager who is asked by a client, "I got a new job, but it is temporary—do I have to report it?" The case manager can explain what types of information need to be reported (and which do not) but should stop short of answering the question directly as posed, since it falls into the "should" category.

91. The below provides a helpful example of the distinction:

> "If someone dies without a Will, what happens to their property?"
> The answer is legal information.
> "Do all Wills have to be witnessed and notarized?"
> The answer is legal information.
> "Can I be a witness for my mother's Will?"
> The answer is legal advice.
> "What estate planning documents include protections for minor children?"
> The answer is legal information.
> "What estate planning documents should I have to protect my minor children?"
> The answer is legal advice.

To return to the example of the CDC order, court personnel should have been able to provide litigants with information about what the order said, with a copy of the declaration form (along with the instructions detailed in the order itself, in simplified language laypersons could understand), and with information about when and where the form could be filed. They should also have been able to inform tenants that, even if they did file the form, they would still have to pay rent and follow the other terms of their lease, and that a tenant who filed the form could still be evicted for reasons other than nonpayment. They should have stopped short, however, of advising a tenant as to whether they should file a declaration form, what might happen in their specific case if they did so, and whether they might still be evicted given other specifics of their situation.

To the extent that such an approach would create new responsibilities for court staff or require additional expertise and training, I would argue that due process simply requires courts to make those investments. To that end, courts might employ legal staff—lawyers who possess the requisite expertise and legal training—to simplify information about the process that court clerks can then provide to litigants without having to exercise their own independent judgment. Assisted by clearer guidelines of what types of assistance are permissible, judges and nonlawyer court personnel could play a greater role in assisting pro se litigants.[92] In addition, courts should consider simplifying the process itself to the greatest extent possible.[93] For example, courts might minimize the number of steps involved in any given process.[94] Courts could require—only if and when needed—that the entities most easily able to provide necessary information, such

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Heather Hazelwood, *Legal Information Versus Legal Advice: What's the Difference?*, AMPERSAND L. (Apr. 13, 2020), https://www.ampersand-law.com/blog/legal-information-versus-legal-advice-whats-the-difference [https://perma.cc/L78B-NANF].

92. *See* Carpenter et al., *supra* note 53, at 58-59.

93. *See* Steinberg, *supra* note 57, at 744-46 (advocating for a "demand side" approach to access-to-justice reform and suggesting that rather than focusing exclusively on "supply side" fixes like the provision of counsel, we should also consider overhauling court systems themselves to better accommodate self-represented litigants); Engler, *supra* note 79, at 58 (recommending that "courts reduce the complexity of their procedures, better utilize technology to increase court access, and facilitate the role of judges and court staff in assisting litigants"); *cf.* Sabbeth, *supra* note 59, at 288-89 (highlighting the dangers that simplification—particularly when imposed in the form of faster, cheaper processes—can pose for parties with limited power).

Richard Zorza described simplification as "radically simplify[ing] the legal dispute resolution system so it becomes much more accessible and so the costs of accessing and operating the system dramatically decrease." Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 847 (2013).

94. *Cf.* Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self- Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1027 (2002) (identifying nearly 200 discrete tasks self-represented litigants must perform in civil cases).

as the housing authority or utility company, do so (rather than relying on litigants to identify, seek out, and obtain such information themselves and then determine when and whether it is relevant).[95] Regardless of the means, due process requires change: courts must either provide litigants with basic information required to navigate the system or reform the system so that such help is no longer necessary.

CONCLUSION

The belief that self-represented litigants should know what the law requires and how to navigate the legal system accordingly—without receiving any of that information from the institutions facilitating that process—is not only unrealistic, but also dangerous. At best, it creates unnecessary frustration for pro se litigants and decreases in judicial efficiency; at worst, it makes the judiciary complicit in the creation and maintenance of an unlevel playing field, reduces the likelihood that fair and just outcomes will result from the judicial process, and violates constitutional due-process requirements.

It makes sense as a matter of policy to ensure that litigants are not disadvantaged by nonlawyers providing advice about how the law applies to their specific cases. But the solution to that problem cannot be to ensure that litigants are afforded no guidance at all. Withholding information about when and how litigants can use the law and court processes to assert claims and defend themselves against the claims of others violates principles of fundamental fairness and impermissibly frustrates access to justice for all.

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95. Zorza suggests that guiding principles of simplification include collecting information only if and when needed, in a convenient manner, from the person most easily able to provide it; minimizing the number of steps in a given process (and the number of people involved in each step); and using technology to predict what is needed for a given case and to contextualize information that has already been gathered. Zorza, *supra* note 93, at 868-72. A key element of the simplification approach, according to Zorza, is "having a system in which tasks needed for resolution can be performed by those able to perform them most efficiently and appropriately." *Id.* at 861. Thus, courts could take responsibility for completing tasks or aspects of tasks previously assigned to self-represented litigants.