

# Surrogate Lawyering: Legal Guidance, *sans* Lawyers

PAUL R. TREMBLAY\*

## ABSTRACT

*Innovative thinkers within the access-to-justice (ATJ) movement have been experimenting with creative ideas for delivering meaningful legal guidance in an efficient way to clients struggling with civil legal needs. These efforts respond to the long-standing crisis in the delivery of legal services to disadvantaged persons, and the overwhelming need for legal advice in areas such as debt collection, housing, family, and immigration. One such imaginative proposal is what this Article calls “surrogate lawyering.” This innovation envisions public interest law firms using some scarce lawyer time to train and advise community-based organization (CBO) staff members to respond, in real time and in context, to the legal problems their constituents encounter. Crafted well and complemented by technological aids being developed by ATJ entrepreneurs, surrogate lawyering could substantially improve the lives of the clients in need.*

*This Article assesses the ethical implications of the surrogate lawyering venture. It concludes that the lawyers who advise the CBO staffers would not inadvertently trigger an attorney-client relationship with the constituents/clients who benefit from the staffer’s guidance. Nor would those lawyers have agency-driven commitments to the constituent/clients. The public interest law firm likely would, though, have attorney-client duties to the CBO, and would need to account for that reality in its operations.*

*This Article proceeds to address the potential concern involving the unauthorized practice of law (UPL) and the lawyers’ assistance with that activity. It concludes that the surrogacy model most likely triggers UPL concerns in light of existing substantive law and policies. But this Article then critiques those UPL concerns, demonstrating that neither the constituent/clients nor the legal profession would be likely to suffer any appreciable harm by permitting surrogate lawyering ventures to operate. This Article closes with suggestions for*

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\* Clinical Professor of Law and Dean’s Distinguished Scholar, Boston College Law School. I thank Tony Alfieri, Susan Carle, Scott Cummings, Russell Engler, Judy McMorrow, Fabio de Sa e Silva, Eli Wald, and the participants at the Boston College Law School summer colloquium series and the Georgetown Journal of Legal Ethics symposium for raising important questions and suggesting helpful insights. Special thanks to Yintian Duan, Tyler Brown, and Leila Souhail for valued research assistance. I also thank Boston College Law School and Dean Vincent Rougeau for generous financial support for this project. © 2018, Paul R. Tremblay.

*some adjustments to the usual UPL constraints that would permit surrogate lawyering strategies while minimizing any risks associated with that means of delivering legal advice.*

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## INTRODUCTION

This Article represents a thought experiment at the intersection of access-to-justice (ATJ) and legal ethics. It examines the legal ethics implications of an ATJ innovation, not yet implemented in practice but considered with some frequency in recent years, that we might call “surrogate lawyering.”<sup>1</sup> Surrogate lawyering represents a mission-driven strategy of a public interest legal services organization to provide guidance to its intended client community through social service agency staff members. A component of legal aid provision for years,<sup>2</sup> this model serves as the basis for several innovative nonprofit initiatives being considered or created across the country.<sup>3</sup> Its driving insight is that the scarce legal resources represented by available poverty lawyers may be multiplied through the use of existing social service providers who encounter individuals and families in need on a regular basis. The surrogate model promises useful legal information delivered at street level by savvy and experienced nonlawyers, and in an interdisciplinary way. It contrasts with the traditional model of lawyers providing “bespoke” legal services to clients,<sup>4</sup> and serves as an alternative and supplement to technology-based innovations within the ATJ communities.<sup>5</sup>

The goal of this Article is to identify the legal ethics challenges presented by a model of delivering legal help to those who need it by using intermediaries, and to generate ideas for resolving or ameliorating those legal ethics hurdles. Because

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1. I use the term “surrogate lawyering” with some hesitation, as the model described here provides legal guidance to consumers through lay intermediaries, with lawyers decidedly at the periphery. Because the term “lawyering” has come to include the provision of legal advice, I have opted to use the phrase here.

2. Community-based legal aid organizations have long been known to offer training to tenant advocates, for example, or to social workers, to assist them to provide better services to their clients. *See, e.g.*, Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1999) (describing examples); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241 (1999); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 216 (1990) [hereinafter Rhode, *Delivery*].

3. *See, e.g.*, THIRD MASS. ACCESS TO JUSTICE COMMISSION, ANNUAL REPORT ON ACTIVITIES 13 (2017) (describing a developing program to be called “Legallink,” through which social workers will be trained by lawyers to assist clients); *FAME Legal Clinic*, FIRST AFR. METHODIST EPISCOPAL CHURCH OF L.A., [http://www.famechurch.org/free\\_legal.html](http://www.famechurch.org/free_legal.html) [<https://perma.cc/MVM5-NFWB>] (last visited May 13, 2018) (using lay advocates and law students, supervised by lawyers, to deliver advice); *Housing Advocates Training*, FAIR HOUSING CENTER OF SOUTHEAST AND MID-MICHIGAN, <http://www.fhcmichigan.org/get-involved/hat/#.WYw5XFGGM2x> [<https://perma.cc/DJD9-XWCU>] (last visited May 13, 2018) (training lay housing advocates). The more robust surrogate lawyering projects to be described below have not yet been implemented, in part because of the ethical challenges discussed in this Article.

4. *See* RICHARD E. SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 29, 271 (2013) (describing the diminishing role of an individualized, personalized legal service delivery model); Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 612 (2015); Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEO. J. INT’L L. 665, 667–69 (2016).

5. *See infra* notes 30–34 and accompanying text (describing technology-based innovations).

the model separates the lawyers from the “clients,”<sup>6</sup> through the intermediary staffers employed by community-based organizations (CBOs), ethics issues do emerge. The most prominent are threefold: (1) the attorney-client relationship and attendant duties between the legal services lawyers and the individuals helped by the CBO staffers; (2) the prospect that this model involves the staffers in the delivery of legal services without a license, creating an unauthorized practice of law (UPL) worry for the staffers and the lawyers assisting them; and (3) the quality, or, to phrase it in the language of the ethics rules, the competence questions arising from the model.

This Article will explore these three ethics topics in the following way. After a brief review of the ATJ crises and the creative, usually technology-driven innovations emerging in response to the crises, this Article describes the surrogacy model. That model represents an ethical triage judgment about how best to employ the scarce, finite resources available to public interest legal services providers. This Article examines, without an in-depth critique, that strategic choice. It concludes that the choice will be, in appropriate circumstances, a principled and justified allocation of attorney time and expertise. This Article then proceeds to develop the three ethical issues that the model generates.

On the first issue, this Article concludes, albeit with some uncertainty, that the model, structured carefully, does not create an inadvertent or implied attorney-client relationship between the law firm and the recipients of the legal guidance. It is true that legal advice, and often tailored advice, does travel between the lawyers with the expertise to the individuals who rely on it. But the presence of the intermediary and the absence of any knowledge by the law firm or by the “client” of the other’s identity means that the trappings of an attorney-client relationship are absent. Nor does the law firm assume any fiduciary duties to the clients based on agency considerations. Those assessments influence the resolution of the second issue. With no attorney-client relationship between the legal services organization and the clients, but tailored legal advice provided to the clients, some of that activity inevitably qualifies as the practice of law and, arguably, unauthorized practice. This Article examines the limitations on nonlawyer advice to clients and articulates what assistance is permitted and what is forbidden absent a supervising lawyer with responsibility for the client matter. That analysis shows that much of what the surrogacy model hopes to accomplish—that is, some useful suggestions that will offer protections to the clients’ interests in matters involving court-related actions—qualifies, under just about every available definition, as the practice of law. This conclusion is worrisome, of course. For the CBO staffer, it raises the prospect of civil or even criminal penalties for violation of the state’s UPL statutes; for the law firm, it exposes the lawyers to discipline for violation of the

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6. As this Article discusses below, calling the recipients of the legal guidance “clients” represents a misnomer, but that term serves our purposes here. See *infra* note 41.

rule, applicable in all states, that prohibits a licensed lawyer from assisting in UPL.

A robust and effective surrogacy project must account for this apparent barrier to its open operation. This Article addresses that barrier by exploring the third legal ethics issue triggered by the model—that of competence. If the model is to be defended, we must have some assurance that the advice communicated to the clients by the nonlawyer staffers is sufficiently reliable to achieve the goals of the project. This Article unpacks that competence question, searching for distinctions within the universe of legal advice to discern what kinds of guidance the surrogacy model ought to provide, discourage, or prevent. This Article concludes that, as others have noted, in many ways a savvy nonlawyer with some legal training can be just as, if not more, effective than a licensed attorney in guiding low-income individuals in distress.

If it is true, as this Article argues, that the surrogacy model has promise as an effective addition to the access-to-justice campaign by providing effective guidance to those who need legal help in an efficient way, the surrogacy model nevertheless still confronts the reality that the UPL laws as currently written, and (sometimes) enforced, prohibit its explicit operation. The final part of this Article considers some adjustments to the UPL regimes that would not bar a surrogacy project, while also not sacrificing the principles and goals of the UPL doctrine. This examination accepts, for present purposes, a premise that is in fact quite contested in the literature—that UPL laws serve some justified, principled purposes of protecting vulnerable consumers from shoddy and unethical purveyors of legal services. Even accepting that premise as valid, this article surveys some possible carve-out or safe-harbor provisions that would be workable, enforceable, and protective of the interests of the bar and of clients.

## I. THE ACCESS-TO-JUSTICE CRISIS

### A. THE NEED

Every reader knows all too well that a serious problem exists for low- and moderate-income clients who encounter legal problems. Access to a lawyer, or to the guidance that a lawyer can provide, is often essential to the protection of rights and liberties.<sup>7</sup> But lawyers are expensive.<sup>8</sup> Employing a private lawyer to assist a client with a contested legal matter can easily cost several thousands of dollars.<sup>9</sup>

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7. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 240–48 (1988); Russell Engler, Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice, 7 HARV. L. & POL’Y REV. 31, 34–36 (2013) [hereinafter Engler, Turner].

8. See D. James Greiner et al., *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1122 (2017); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT’L REV. L. & ECON. 43, 48 (2014).

9. See Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 75 (2016) (“[l]itigation can cost tens of thousands of dollars in the United States”); Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1639 (2016) (“even a routine encounter between

The advent of legal incubators has helped to develop delivery methods that are much more affordable,<sup>10</sup> but even the lawyers participating in those settings must still charge fees sufficient to earn a living wage and repay educational debt.<sup>11</sup>

For the lowest-income Americans, the relative cost of private legal services is almost irrelevant because they have insufficient resources to participate in that market at all.<sup>12</sup> They require free legal services or some equivalent to assist them as they navigate the complexities of the legal systems. As Stephen Wexler famously observed, “poor people are always bumping into sharp legal things.”<sup>13</sup> The availability of conventional, community-based legal services is shrinking by many reports,<sup>14</sup> but even in its most well-funded days it was remarkably inadequate.<sup>15</sup> The availability of private pro bono services does not come close to making up the shortfall. Virtually all observers agree:<sup>16</sup> there is a serious need for more and better access to legal services for lower-income persons,<sup>17</sup> especially in the crowded metropolitan courts, such as the housing,<sup>18</sup> family,<sup>19</sup> debt-collection,<sup>20</sup> and immigration<sup>21</sup> fora.

## B. THE RESPONSES

Efforts and proposals abound to respond to the serious need to provide guidance to those who cannot afford a lawyer when they need one. Most of those efforts fall into four camps. First, and most obviously, observers urge state and

the litigants could generate legal fees amounting to tens of thousands of dollars”); Rebecca L. Sandefur, *Moderate Income Households’ Use of Lawyers’ Services*, in MIDDLE INCOME ACCESS TO JUSTICE 224 (Trebilcock et al. eds, 2012).

10. See Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 28–30 (2014).

11. *Id.* at 13–14.

12. See AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994); Brenda Star Adams, “Unbundled Legal Services”: A Solution to the Problems Caused by Pro Se Litigation in Massachusetts’s Civil Courts, 40 NEW ENG. L. REV. 303, 304 (2005).

13. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970).

14. See Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 209 (2016) (“the austerity regime of a shrinking government sector has hit legal services and public defender offices hard”); Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23 HARV. J.L. & TECH. 259, 281 (2009) (noting “overburdened and shrinking legal aid groups”).

15. LUBAN, *supra* note 7, at 241–43.

16. The assertion in the text is no doubt an overstatement. See, e.g., Markovic, *supra* note 9 (challenging the notion that cost of counsel is the most significant hindrance).

17. Rhode, *Delivery*, *supra* note 2, at 219.

18. See MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010).

19. See BOS. BAR ASS’N, STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 3 (2014).

20. See Ron Smith, *Unauthorized Corporate Law Practices in Small Claims Court: Should Anybody Care?*, 33 WASHBURN L.J. 345 (1994).

21. See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 551, 568 (2011).

federal lawmakers to fund the subsidized legal services network in a more sustainable fashion.<sup>22</sup> Those efforts are unlikely to have much success given the current and foreseeable political climate.<sup>23</sup> Second, calls continue for more pro bono services from the private bar, even if some uncertainty remains about the effectiveness of pro bono as a delivery system.<sup>24</sup> The prospects of much success in that area are not promising, since even a large increase in pro bono activity is unlikely to make a noticeable difference.<sup>25</sup> Third, an organized and well-developed campaign has emerged in recent years for what its proponents call “Civil Gideon,” a right to state-funded counsel in those legal areas whose importance rivals that of criminal defense.<sup>26</sup> While some states have implemented Civil Gideon laws in recent years,<sup>27</sup> few observers foresee much short-term benefit from that avenue.<sup>28</sup>

The fourth response is possibly the most vibrant and actualized. It consists of the development of technological devices and programs that can deliver legal services, or the functional equivalent of legal services, to persons who do not have access to a lawyer when they need one. Building off the success of computer-based legal assistance like LegalZoom<sup>29</sup> and Rocket

22. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004); JEANNE CHARN & RICHARD ZORZA, *THE BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVICES PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS* 14–17 (2005).

23. See Liza Q. Wirtz, *The Ethical Bar and the LSC: Wrestling with Restrictions*, 59 VAND. L. REV. 971, 1015 (2006).

24. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2370 (2010).

25. See Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 923 (1995). As Leslie Levin has noted, “[E]ven if every lawyer in the country performed 100 hours of pro bono work annually, it would not fill the enormous gap in the need for legal services.” Leslie Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2614 (2014).

26. See, e.g., David J. Dreyer, *Déjà Vu All Over Again: Turner v. Rogers and the Civil Right to Counsel*, 61 DRAKE L. REV. 639 (2013); Engler, *Turner*, *supra* note 7. See also Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106 (2013).

27. See Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32-SUM HUM. RTS. 8 (2005); Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL’Y 683, 685 (2011) (describing the states’ efforts); Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21, 58 (2007).

28. See Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 970 (2012). The prospect of significant progress on the ATJ front through a Civil Gideon project is not great, as even committed ATJ theorists concede. The likelihood of comprehensive provision of subsidized counsel for civil matters is rather slim in the current political climate. See Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1231 (2010) (“Civil Gideon is . . . very unlikely to occur.”). Furthermore, the most viable proposals for a civil right to counsel leave many individuals and issues unaddressed. See ABA House of Delegates Resolution 112A, Aug. 7, 2006, *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/Is\\_sclaid\\_resolution\\_06a112a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/Is_sclaid_resolution_06a112a.authcheckdam.pdf) [<https://perma.cc/G5UB-84QN>] (urging legislation requiring appointment of counsel only in “categories of adversarial proceedings where basic human needs are at stake . . .”); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. ON POVERTY L. & POL’Y 473, 504 (2015).

29. LEGALZOOM, <https://www.legalzoom.com/> [<https://perma.cc/JA4V-QYMH>] (last visited Jan. 30, 2018).

Lawyer,<sup>30</sup> social entrepreneurs are developing computer programs and smart-phone apps that can direct users to the appropriate places, forms, and guidance when they encounter identified legal controversies or needs.<sup>31</sup> Courthouses are installing kiosks for use by litigants and other visitors,<sup>32</sup> and legal aid organizations are providing advice to clients through on-line chat-room arrangements.<sup>33</sup> Some of the more creative efforts in this regard include “hackathons,” where coders and legal services experts combine their expertise to develop programs that can meet client needs in specified substantive or procedural areas.<sup>34</sup>

What these efforts to respond to the ocean of need have in common is their reliance on lawyers or lawyer-overseen computer programs to provide the help needed by those enmeshed in the legal system. That kind of response makes intuitive sense, particularly given the increasing complexity of the legal systems that all Americans confront.<sup>35</sup> A different, but complementary, reaction to the ATJ crisis has been the plea for better use of nonlawyers in the provision of certain basic legal services.<sup>36</sup> Lawyers are expensive, both because legal education is expensive<sup>37</sup> and because of the monopoly of the marketplace.<sup>38</sup> Lay advocates can, for those reasons, provide assistance in a more affordable way.<sup>39</sup> Jurisdictions have been experimenting with tailored plans that permit nonlawyers to provide independent services that might otherwise be considered legal services to customers, if certain licensing and consumer-protection requirements have been met.<sup>40</sup>

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See generally Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?*, 63 CASE W. RES. L. REV. 1419 (2013).

30. ROCKET LAWYER, <https://www.rocketlawyer.com/> [<https://perma.cc/C5Y7-ZRB5>] (last visited Jan. 30, 2018).

31. See Brescia et al., *supra* note 4; Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 759 (2012).

32. See REBECCA SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 3 (2011); Engler, *Turner*, *supra* note 7 (discussing the role of court clerks as well as court technology); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 437 (2016) [hereinafter Rhode, *What We Know*].

33. Cf. Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1305 (2013).

34. See Brescia et al., *supra* note 4, at 595–96.

35. See Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1337 (2000) (“In many fields of law, increasing complexity has encouraged increasing specialization. Lawyers know more and more about less and less, and their intellectual horizons have correspondingly narrowed.”); Wirtz, *supra* note 23, at 1011 (noting “a legal system growing ever more complex”).

36. See Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883 (2004); Rhode, *What We Know*, *supra* note 32.

37. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 182–83 (2012).

38. Jack P. Sahl, *Cracks in the Profession's Monopoly Armor*, 82 FORDHAM L. REV. 2635 (2014).

39. See Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259 (2014).

40. See Lori W. Nelson, *LLLT—Limited License Legal Technician: What It Is, What It Isn't, and the Grey Area in Between*, 50 FAM. L.Q. 447 (2016) (cataloguing those initiatives).



The model to be described and assessed here fits within the world of expanded lay lawyering. As we shall see, it differs from the typical lay advocate regimes in some notable ways. The next section will describe the surrogate lawyering project, showing its likely benefits but also its ethical challenges.

## II. SURROGATE LAWYERING

### A. A SAMPLE SURROGATE LAWYERING PROJECT

A particularly innovative ATJ response aims to combine the expertise of public interest lawyers with the availability and sophistication of staff members of community-based social service agencies and institutions to effectively reach more “clients”<sup>41</sup> in need. To help us frame the discussion, let us imagine such an arrangement:

Montrose Community Legal Assistance (MCLA) is a state-funded<sup>42</sup> legal services organization whose mission is to provide access to legal services to low-income residents of Essex County in civil legal matters. MCLA has two neighborhood offices and a staff of fifteen lawyers, seven paralegals, and a group of administrators and support personnel. Its traditional model of providing legal services has been a tailored mix of direct client representation, brief service through clinics and lawyer-for-the day programs,<sup>43</sup> and “impact” work, including focused case representation and class action-type projects.<sup>44</sup> The nonprofit also coordinates with the state bar to encourage pro bono services that might complement its efforts. While it accomplishes a great deal through these services, MCLA’s staff is discouraged that so many litigants within Essex County remain without counsel. The vast majority of litigants in the county family and housing courts appear *pro se*, and the wait list for MCLA direct representation services remains unacceptably high.

MCLA has now embarked on a pilot project to increase the number of individuals it might assist. It has reassigned four of its fifteen lawyers from direct representation and brief services work to a new project it has dubbed Lay

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41. I remind readers that, for purposes of this Article, I will refer to the recipients of the filtered, “surrogate” legal services as “clients” for ease of discussion, without assuming (and, in fact, denying) that the individuals will qualify as clients of the public interest law firm from which the legal advice originates.

42. After Congress imposed severe restrictions in the mid-1990s on the activities of legal aid programs receiving federal funds from the Legal Services Corporation, many organizations dropped their federal funding and arranged for state and nonprofit resources to support their work. In all such jurisdictions, separate organizations emerged that would accept the federal funding and comply with the Congressional restrictions, which included limits on representation of undocumented immigrants, on welfare reform challenges, and on maintenance of class actions. For a discussion of that strategy, see Wirtz, *supra* note 23, at 992–98.

43. “Lawyer-for-the-day” programs are a common form of legal assistance provision, typically involving volunteer lawyers setting up advice tables at busy courthouses (usually family, housing, or debt-collection) at which they can provide brief advice to litigants who have come to court for a civil legal event. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1999–2000 (1999).

44. Much commentary has assessed the best way for a legal aid organization like MCLA to use its finite resources in the most effective way. For a sampling of that literature, see, e.g., LUBAN, *supra* note 7, at 347–54.

Advisors for Community Involvement, or LACI. The LACI lawyer team will spend most of its time researching those community-based settings where the MCLA client population tends to appear, including the domestic violence prevention programs, homeless shelters, neighborhood health centers, senior centers, immigrant rights advocacy groups, community hospitals, and similar local service organizations. LACI will then propose to train the street-level staffers and the service providers at the CBOs to recognize and to respond to the typical legal issues that their clientele encounter, including eviction and housing condition worries; welfare, food stamps and disability benefits problems; family law matters including custody and visitation disputes and child support enforcement; domestic violence and elder abuse and exploitation; immigration enforcement concerns; unfair debt collection; and wage-and-hour mistreatment and similar employment problems.

Most of the lawyers' time will be spent not representing any clients directly or filing or defending lawsuits, but instead in developing training methods for staffers, who will include professionals—such as social workers, mental health providers, nurses, geriatric specialists, librarians, doctors, etc.—and nonprofessional case workers, receptionists, aides, and support staff. The training protocols will include printed materials (including handouts to be distributed to the clients and more detailed manuals for use by the staffers), workshops, and computer programs and apps that respond to the issues likely to arise in a given setting. Along with the training, the lawyers will then serve as back-up support for the staffers on an as-needed basis, to answer telephone calls or email inquiries from staffers as they encounter nuances and specific problems whose resolution is less clear.

The LACI program will coordinate with MCLA's direct representation component and its pro bono services program, in that staffers may refer individuals who have the greatest need for direct representation to MCLA in the hope of obtaining a lawyer's help. But MCLA recognizes that this possibility is remote. Most of the clients assisted through LACI will never have a relationship with a lawyer—but, MCLA recognizes, they would not have had an individual lawyer prior to LACI's establishment.

With that example in mind, let us assess the ethical implications, and the risks and benefits, of this kind of ATJ arrangement.

## B. THE TRIAGE CONSIDERATIONS

The rationale for LACI within MCLA has several elements. MCLA is committed to using its finite legal resources in a manner that does the most good for its client community.<sup>45</sup> Assigning some of its full-time lawyers to LACI ensures that many more clients will receive *some* legal guidance and support than would occur if MCLA assigned the lawyers to direct representation or even to a series of brief

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45. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

services programs. The CBO staffers will see many more clients than the lawyers would ever see in their various institutional settings, and they will encounter legal problems, or potential legal problems, in real time. The staffers often will have genuine relationships with the clients and accompanying trust that can be a challenge within legal aid settings.<sup>46</sup> The staffers will also appreciate the context for the issues in ways that would be harder for lawyers who might meet the clients at, say, an eviction clinic or at a lawyer-for-the-day table. The blend of legal guidance and social service provision also promises a more holistic and integrated approach to the client's difficulties.

The LACI project has significant advantages over the technology programs that it will ordinarily include within its structure. While smartphone apps, computer programs, and courthouse kiosks provide useful, decision-tree functional guidance to litigants, sometimes in a far superior way to even a lawyer's help,<sup>47</sup> those vehicles have disadvantages that the surrogate model hopes to address. Besides the concern that not all low-income clients who need the help have adequate access to smartphone technology and sufficient internet connectivity,<sup>48</sup> the technological solutions lack the interpersonal touch that staffers can provide.<sup>49</sup> The staff interactions can be more tailored, personalized, and iterative, given their ability to address nuance, respond to changing circumstances, and attend to the cultural background of the client.

For these reasons MCLA has opted to allocate a significant portion of its available legal resources to LACI. Its staff has concluded that the benefits to the client community of the widespread and responsive access to legal guidance that LACI represents outweighs the cost of forfeiting the direct representation that the MCLA lawyers would otherwise provide. For purposes of this Article, we may accept that triage judgment as justified and principled.<sup>50</sup>

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46. See Robert K. Vischer, *Big Law and the Marginalization of Trust*, 25 GEO. J. LEGAL ETHICS 165, 168 (2012).

47. The most impressive advantage of the technology-based provision of legal guidance is that the program can know pretty much *everything*, in an accurate and immediate fashion, compared to the inevitably-incomplete memory and pattern recognition of even the most experienced lawyer. In addition, an effective decision-tree quality of a program will respond appropriately to the specific information provided by the user, leading to reliable information and forms generated by the program. See Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 FORDHAM L. REV. 985, 1016 (2001). For a discussion of court-based technology, see Russell Engler, *Nonlawyer Forms of Assistance*, in MIDDLE INCOME ACCESS TO CIVIL JUSTICE COLLOQUIUM 145 (M. Trebilcock, Anthony Duggan & Lorne Sossin eds., 2012).

48. Cf. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 256 (2012).

49. Cf. Cantrell, *supra* note 36, at 888–89.

50. Legal services organizations like MCLA need to make such judgment calls about resource allocation all the time. For a discussion of that responsibility, see, e.g., LUBAN, *supra* note 7, at 347–54; I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 222 (2013); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012).

Additionally, the LACI model includes a necessary component of backup by the MCLA lawyers to respond to questions by staffers. The LACI model anticipates that most staffers will assist their constituents through the use of the limited expertise they possess as a result of their work for their agency and the trainings and materials provided by the LACI lawyers. But, with some regularity the staffers will be spurred to search for more detailed, or more sophisticated, legal understanding in order to help a client with an urgent or atypical legal problem. The LACI model includes a commitment to the staffers that allows them to consult with the lawyers, either by email, telephone, or on occasion in person, to refine the guidance they will offer to the constituent. Here is one example of the model's effectiveness and propriety:

Daria Bond, with a B.A. in political science, has been working for the past eighteen months as a staff assistant at HelpingPartners, a food pantry and homeless center in Essex County. She plans on applying for graduate school in social work soon. She has come to know Maria Jackson, a regular visitor to the center. Maria is disabled, receives a monthly SSI check and SNAP benefits, and lives in a rooming house nearby. She comes to the center for food and companionship.

Last week, Maria came to the center with a paper she received under her door, from the Essex County Housing Court. The paper includes the word "default," and is easily recognized as a court judgment for eviction. Daria knows the basics about how the eviction process works, including how tenants file answers and prepare for their hearing date. She also knows that tenants who default may file a motion to attempt to get out from under that judgment. But that is an area in which Daria is far less comfortable (compared to the typical questions about the standard court filings and procedures). So, Daria emails MCLA to get advice from one of the LACI attorneys, but does not reveal Maria's name or any other identifying information.

Wendy Perlstein, a staff lawyer at MCLA assigned to the LACI project, responds to Daria's questions. Wendy explains that a tenant like Maria can get a hearing on a "motion to remove default" if she files certain papers quickly. The forms can be generated through a program that MCLA has made available to HelpingPartners. Wendy adds the following summary: "The bottom line: If your client had good reason for not appearing at the court hearing, and gets the papers filed on time and properly, she has a reasonable shot of getting this default removed."

In her email, Wendy cautions Daria not to reveal to her client the identity of the lawyer or law firm that has provided the advice. Wendy's email includes this suggestion:

"I give you permission to cut and paste my response, explaining to the client that you consulted with a colleague who has a lot of housing law experience and who shared the following information: [then insert what I have given you].

We want your client to have the information, but we don't want her to have the misimpression that she has a lawyer representing her now."<sup>51</sup>

Daria proceeds to advise Maria about her rights and shares Wendy's language with her, but never discloses Wendy's identity or where she works. Daria then assists Maria to complete a motion document to file with the Housing Court.

The example of Maria, Daria, and Wendy crystallizes the tensions inherent in the operation of a surrogacy delivery system. What follows is an effort to unpack the ethical complexity of this innovative effort.

### III. AN ETHICS ANALYSIS OF SURROGATE LAWYERING

It is a truism that the LACI model just described ought to comply with the ethical obligations of the lawyers administering it, as well as any other state laws applicable to its participants. It is equally true, though, that the innovations crafted by creative public interest practitioners might benefit from operating more in the shadows, without inviting scrutiny from the organized bar saddled with its entrenched interests.<sup>52</sup> For present purposes, let us explore the tensions that will arise. The surrogacy model invites scrutiny on two ethical risks—the concern on the part of the lawyers that an inadvertent attorney-client relationship has been created, and the danger that the lawyers have assisted in the unauthorized practice of law.

#### A. THE ATTORNEY-CLIENT RELATIONSHIP QUESTION

The first tension that must be addressed is whether the LACI project inadvertently establishes an attorney-client relationship between MCLA and the clients who benefit from the legal advice provided by the staffers. For purposes of this analysis, let us assume as true a premise that the next subsection will unpack—that the legal guidance provided from the MCLA lawyers to the clients through the CBO staffers counts as legal advice. The question becomes particularly intriguing in those settings where the staffer seeks further clarifying information from the MCLA lawyers.

##### 1. WHY THE RELATIONSHIP QUESTION MATTERS

Let us first explore why this question matters. If the MCLA lawyers have established an attorney-client relationship by providing advice through the surrogates, then certain commitments, duties, and limitations ensue. Those

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51. This exchange is a variation and revised account of an actual transaction in a program for which I have consulted, and which is seeking to develop a LACI-type project.

52. The recent innovation described by Michele Cotton, with its surrogacy elements but unfavorable reactions from bar officials, may serve as an apt example of this sentiment. See Michele Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. FOR SOC. JUSTICE 179 (2012) (describing the Legal and Ethical Studies (LEST) project, using social workers to guide persons with legal needs, and its critical treatment by the state Attorney General).

implications involve competence, confidentiality, and avoidance of conflicts of interests.<sup>53</sup> A brief review will demonstrate that only the latter duty has any constraining relevance in the LACI setting. Because of that one duty, though, MCLA prefers to craft a program that does not implicate an implied attorney-client relationship.

*Competence:* If the LACI project means that the recipients of the filtered advice are clients of MCLA, then the MCLA lawyers owe duties of competence to them.<sup>54</sup> That duty could be enforced not just through the lawyer disciplinary process,<sup>55</sup> but through an action for legal malpractice if the client suffered damages as a result of the sub-standard service.<sup>56</sup> If the recipient is not a client of the law firm, then malpractice liability would most likely not arise.<sup>57</sup> It might appear that MCLA would therefore have an interest in avoiding a finding of an inadvertent client relationship in order to avoid the risk of such liability. However, that is likely not so. Whatever the risks involved in its development of the LACI project, avoidance of malpractice claims should not be one that animates MCLA.<sup>58</sup> This prediction is premised on two related considerations. First, if LACI is to serve its goals, it will need to deliver competent services, and presumably the organization would accept responsibility if its systems failed to do so.<sup>59</sup> Second, the LACI project likely establishes some attorney-client relationship with *someone*, most likely the agencies where the staffers work.<sup>60</sup> If the staffers provide less-than-competent

53. Susan Martyn describes the implications of lawyers having established a cognizable attorney-client relationship as “the 4 C’s, which mean that they must communicate adequately, give competent advice, keep the client’s confidences, and resolve conflicts.” Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 929 (2005). For our present purposes, the communication duty is far less of an issue, given the complete lack of contact between the law firm and the client beneficiary. The other three Cs do have relevance, as the following text describes.

54. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2016) [hereinafter MODEL RULES].

55. Lawyers who provide less-than-competent service to clients may face discipline by the bar regulatory authorities. *See, e.g., In re Fru*, 829 N.W.2d 379 (Minn. 2013); *Att’y Grievance Comm’n v. Sperling*, 69 A.3d 478 (Md. 2013); *Matter of Sharif*, 945 N.E.2d 922 (Mass. 2011).

56. *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 1.1–2(a), (b) (2012–2013 ed.).

57. The general rule is that non-clients may not assert malpractice claims against lawyers. *See, e.g., Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1266 (1990); *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994). In some limited settings, a non-client might successfully assert a duty of care. *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 51 (2000). Section 51(3) of the Restatement may be read to apply to the surrogacy arrangement. That provision permits a claim against a lawyer by a nonclient when “the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the non-client.” *Id.* at § 51(3)(a). If the CBO is a client of MCLA (as seems likely; *see* discussion at *infra* notes 110–32 and accompanying text), then the CBO’s clients may have claims against the lawyer for professional negligence.

58. Whether the law firm’s malpractice liability insurer would agree with the assessment in the text is a different matter. *See, e.g., Anthony V. Alfieri, The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L. J. 1909 (2006) (describing the influence of professional liability institutions on lawyer management and conduct).

59. I have heard from organizational leaders developing a LACI-type program that this is so.

60. That proposition receives examination below. *See infra* notes 116–36 and accompanying text.

service and a client suffers harm, and a lawsuit then arises, the CBO would likely be a defendant, and that party would no doubt implead MCLA if there were any colorable claims that MCLA provided less than competent legal advice given its responsibilities within the LACI project.<sup>61</sup>

For these reasons, the competence question—while one that plays a central role in assessing the wisdom of a LACI-type program, as this Article explores later<sup>62</sup>—is not one that serves as the basis of MCLA’s need to avoid the inadvertent establishment of an attorney-client relationship.

*Confidentiality:* A second byproduct of an attorney-client relationship between MCLA and the recipient of the legal information would be an accompanying duty of confidentiality. The MCLA lawyers owe a duty to those who qualify as clients not to disclose to others any “information related to the [client’s] representation.”<sup>63</sup> This should not be a worry for the MCLA lawyers, even if the substantive law deemed an attorney-client relationship to exist by implication. The operation of LACI separates the lawyers from the clients, and the MCLA lawyers therefore do not learn any information that they would then have to safeguard.<sup>64</sup>

In a conventional attorney-client relationship, the shared understanding of the operation of Rule 1.6 is that a lawyer *may* discuss with others some otherwise-protected client information as long as the lawyer sanitizes the information so that no client-identifying material is disclosed.<sup>65</sup> The LACI arrangement does not include the lawyer’s learning the identity of any clients who receive the guidance from the staffers, so the lawyers have no information to protect.<sup>66</sup>

*Avoidance of Conflicts:* The third component of an attorney-client relationship that would have implications for LACI and MCLA is that of conflicts of interest. In general, an attorney must avoid conflicts of interest with her clients, both current<sup>67</sup> and, in more limited fashion, former.<sup>68</sup> This is the one byproduct of an

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61. A defendant in civil litigation may implead “a person who is or may be liable to him for all or part of the plaintiff’s claim against him.” MASS. R. CIV. P. 14(a). *See, e.g.,* Ford v. Flaherty, 305 N.E.2d 112, 115–16 (Mass. 1973). The fact that the CBO’s clients may qualify as nonclients to whom the law firm owes a duty of competence (*see supra* note 57) further supports this understanding.

62. *See infra* notes 192–205 and accompanying text.

63. MODEL RULES R. 1.6(a).

64. At the same time, if the CBO is considered a client of MCLA (an issue that we reach below), any information that the MCLA lawyer would learn about the client through communication with the staffer would be protected by the organizational attorney-client privilege. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

65. MODEL RULES R. 1.6(a) cmt. 4. *See* Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 554 (2004); Kate Bloch, *Subjunctive Lawyering and Other Clinical Extern Paradigms*, 3 CLINICAL L. REV. 259, 277 (1997); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 411 (1998) (concluding that hypothetical or anonymous consultations are preferred).

66. If the LACI arrangement did imply an attorney-client relationship (and the next subsection concludes that it does not), and if a staffer mistakenly disclosed to the MCLA lawyer the name of the affected client, then the lawyer’s Rule 1.6 duties would apply in the usual fashion.

67. *See* MODEL RULES R. 1.7, 1.8.

68. *See* MODEL RULES R. 1.9.

attorney-client relationship that would have the most serious effect on the operation of a surrogate lawyering project like LACI.

Described broadly, the conflicts provisions of the *Model Rules* prohibit a lawyer and her law firm<sup>69</sup> from opposing a current client on any matter, and from opposing a former client on a matter that is substantially related to the work the law firm performed for that former client.<sup>70</sup> If every person assisted through LACI, or even if every person assisted through a follow-up consultation between an MCLA lawyer and an LACI staffer, were deemed to be a client of MCLA, that conclusion would effectively cripple the LACI project.

Consider, as a simple example, a question posed by a CBO staffer to a MCLA lawyer on behalf of a mother regarding the interpretation and enforcement consequences of a visitation order involving the father of her child. If that mother is deemed to be a client of the law firm, then MCLA would be prohibited from representing, or even offering advice to, the father about his visitation rights, or perhaps even his child support or custody rights, if the mother is considered a current or former client. Law firms have a duty to perform adequate conflict checks,<sup>71</sup> lest they find themselves engaged in an improper representation, requiring disqualification or withdrawal.<sup>72</sup> The only way that MCLA could perform conflict checks would be to learn the identity of the clients whom the staffers are assisting. That requirement would alter considerably the fluid, informal, filtered qualities of the LACI project.

For this reason, then, MCLA prefers that its surrogate lawyering arrangement not deem each assisted client to be a formal client of the MCLA law firm.

## 2. DOES LACI TRIGGER INADVERTENT ATTORNEY-CLIENT RELATIONSHIPS?

### a. The Attorney-Client Relationship Test

The Restatement (Third) of the Law Governing Lawyers articulates the accepted criteria for determining whether an attorney-client relationship exists. The Restatement declares:

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
  - (a) the lawyer manifests to the person consent to do so; or

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69. See MODEL RULES R. 1.10.

70. See MODEL RULES R. 1.7, 1.9. The discussion in the text oversimplifies the complex doctrine of conflicts avoidance, but the description serves the purposes intended here.

71. MODEL RULES R. 1.7 cmt. 2; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009) (noting the duty when lawyers change firms); Oregon State Bar Legal Ethics Comm., Formal Op. No. 2011-183 (2011) (noting the duty when providing unbundled legal services); S.C. Bar Ethics Advisory Comm., Formal Op. 12-03 (2012), available at 2012 WL 1142185 (noting the duty).

72. See, e.g., *Koch Industries Inc. v. Hoechst Aktiengesellschaft*, 650 F. Supp. 2d 282, 288 (S.D.N.Y. 2009) (insufficient conflict checking may lead to a firm's disqualification).



- (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .<sup>73</sup>

Courts have implemented this standard to hold that lawyers have duties to persons that they did not otherwise consider clients. For instance, the Massachusetts Supreme Judicial Court has stated that an attorney-client relationship may be implied, “when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.”<sup>74</sup>

Aside from conventional, express relationships, some common interactions trigger the application of this test, and lawyers on occasion find themselves with clients unexpectedly.<sup>75</sup> Some settings are rather easy to assess. For example, authorities agree that “hotline-type” services, where public-interest organizations or bar associations field brief-service telephone calls, do establish attorney-client relationship duties, given that the lawyer directly provides guidance (even if, at times, through paraprofessionals), in a tailored way.<sup>76</sup> Legal seminars typically do not generate inadvertent attorney-client relationships with those attending the seminars,<sup>77</sup> but could do so if the attorney presenting the material proffers answers to specific participant questions about their rights.<sup>78</sup> Internet “chat rooms,” where lawyers answer questions posed by users, and other internet advice resources, may trigger duties if the lawyer fails to establish sufficient disclaimers.<sup>79</sup> An effort to “crowdsource” legal information (and often legal advice)

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73. RESTATEMENT, *supra* note 57, at § 14.

74. *DeVaux v. Am. Home Assur. Co.*, 444 N.E.2d 355, 357 (Mass. 1983) (quoting *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977)).

75. See Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 168–95 (1999) [hereinafter Lancot, *Cyberspace*].

76. See, e.g., Martyn, *supra* note 53, at 929; Kan. Bar Ass’n Comm. on Ethics/Advisory Servs., Op. 92-06 (1992) (advising a for-profit “900 number” “Dial-a-Lawyer” service, which charged callers at its typical hourly rate, that the firm likely established attorney-client relationships). The drafters of the *Model Rules* recognized that hotline-type programs implicate the duties to a client or a prospective client, and offered a relaxed rule about conflict-checking for purposes of such programs. See MODEL RULES R. 6.5.

77. RONALD E. MALLIN, 1 LEGAL MALPRACTICE, Duty—Existence of duty, § 8:4 (2017 ed.). See *Rosenbaum v. White*, 692 F.3d 593 (7th Cir. 2012). But see *Doe v. Condon*, 532 S.E.2d 879, 882 (S.C. 2000) (seminar on wills and trusts by a paralegal held to be UPL).

78. See, e.g., State Bar of Ariz. Comm. on Rules of Prof’l Conduct, Op. 92-10 (1992) (“It is improper for an attorney, during the seminar to answer questions of laymen concerning their specific individual legal problems.”); Fla. St. Bar Ass’n Comm. on Prof’l Ethics, Op. 75-36 (1977) (a lawyer may not give legal advice on particular legal problems to those attending a class covering general legal subjects). See Lancot, *Cyberspace*, *supra* note 75, at 233–34.

79. See generally Lancot, *Cyberspace*, *supra* note 75, at 244–46; Martin Whittaker, *Ethical Considerations Related to Blogs, Chat Rooms, and Listservs*, 21 THE PROF. LAW., no. 2, 2012, at 3, 5; Ronald D. Rotunda, *Applying The Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 189 (2013). See also N.M. Bar Op. 2001-1 (2001) (attorneys may create attorney-client relationships on the internet notwithstanding disclaimers).

has appeared, but its implication for the triggering of duties has not yet been tested.<sup>80</sup> For instance, the website MetaTalk offers a portal identified as “IAALBIANYL,”<sup>81</sup> the acronym for “I Am a Lawyer But I Am Not Your Lawyer,” where law-related discussions may proliferate but without any user having the right (or so the lawyer participants hope) to claim any reliance or any fiduciary protections.<sup>82</sup>

Law firms recognize the serious concern that an invitation to prospective clients to share information when inquiring about whether to retain the firm might lead to the sharing of confidential information that the firm must then protect, potentially triggering a damaging conflict of interest with a current client.<sup>83</sup> That concern led the ABA to adopt Model Rule 1.18, articulating protective measures a firm may take to avoid conflicts.<sup>84</sup>

In light of that treatment of inadvertent or accidental client relationship formation, would the LACI arrangement be one that triggers such duties? The conclusion suggested here is no.<sup>85</sup> In all reported examples of inadvertent or deemed attorney-client relationships, the attorney has some direct contact with the individual receiving and acting upon the advice. That interface permits the purported client to claim some reliance interest upon which the tort or contract theories of attorney-client relationship formation rest. With the LACI arrangement, no such interface exists, and the client has no knowledge of any lawyer offering any services to him. The challenge is to discern whether that omission matters.

Because of LACI’s innovative quality, no readily-available analogy exists by which to assess the duties the MCLA lawyers might owe to the ultimate users of

80. See Benjamin H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3074–75 (2014) (discussing MetaTalk and Avvo); Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 ARK. L. REV. 75, 85 (2012) (discussing MetaTalk).

81. See Legal AskMe, METATALK, <http://metatalk.metafilter.com/15513/IAALBIANYL> [https://perma.cc/JM5P-V32R] (Last visited April 7, 2018).

82. For a discussion on this crowdsourcing phenomenon, see Robertson, *supra* note 80, at 83–86; Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 203 (2014).

83. See ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010) (discussing lawyer websites). In *Barton v. U.S. Dist. Ct. for the Ctr. Dist. of Cal.*, the court concluded that information provided to a law firm by prospective clients must remain confidential under the circumstances of the firm’s solicitation efforts, even though the solicitation by its terms “[did] not constitute a request for legal advice and that [the user was] not forming an attorney client relationship by submitting this information.” 410 F.3d 1104, 1107 (9th Cir. 2005).

84. MODEL RULES R. 1.18. It is safe to assume that in avoiding disqualifying conflicts by its compliance with Rule 1.18’s requirements, the law firm would at the same time ensure that it has not created an inadvertent attorney-client relationship, which is a matter of common law and not governed by the *Model Rules*.

85. The conclusion developed here differs in some respects from a recent opinion of the Committee on Professional Ethics of the Association of the Bar of the City of New York. See NYCBA Formal Op. 2017-4, *Ethical Considerations for Legal Services Lawyers Working with Outside Non-Lawyer Professionals* (2017) [hereinafter NYCBA Op. 2017-4]. That opinion, discussing a surrogate-like arrangement, assumes a more direct connection between the advising lawyer and the person receiving the advice as filtered through the staff member.

the filtered legal advice.<sup>86</sup> The closest arrangement would be the lawyer consultant. A review of the treatment of consultations among lawyers may help us to assess the implications of the LACI arrangement.

A respected body of scholarship has addressed the duties of lawyer consultants.<sup>87</sup> That status arises in three related contexts—a lawyer serving as a formal expert witness or an expert consultant, a lawyer acting as an informal advisor, and a faculty member (who may or may not be a licensed lawyer) advising students and colleagues. The analyses of these settings inevitably include reference to two not-fully-consistent ABA ethics opinions. Formal Op. 97-407 concluded that a lawyer serving as a testifying expert has no attorney-client relationship with the person for whom she testifies, while a consulting expert does form such an attorney-client relationship.<sup>88</sup> Formal Op. 98-411, issued the following year, stated that a lawyer who offers consultation services to another lawyer about strategy ordinarily does not form an attorney-client relationship with that other lawyer's client.<sup>89</sup> This latter opinion never mentions Op. 97-407.<sup>90</sup> Commentators have grappled with the implications of the lawyer-consultant at some length, but for present purposes, a brief summary will suffice.

All of the commentators concur, not surprisingly, that if the Restatement elements are met—the consulted lawyer provides legal advice to the consulting lawyer's client, while receiving confidential information on which to base that advice, and in such a way that the client is likely to rely on it—the consulted lawyer ought to treat the client as her client as well, with all of the implications that status generates.<sup>91</sup> That setting is relatively rare (outside of professor-student interactions), or so the participants typically hope. If the consulted lawyer learns no confidential information about the consulting lawyer's client, and offers advice in hypothetical, sanitized fashion, then there is no resulting attorney-client

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86. Compare *id.* (finding an attorney-client relationship between a lawyer and the recipient when the staff member serves as a direct intermediary between the two, and the lawyer's identity is known to the recipient).

87. See, e.g., Samuel Dash, *The Ethical Role and Responsibilities of a Lawyer-Ethicist Revisited: The Case of the Independent Counsel's Neutral Expert Consultant*, 68 FORDHAM L. REV. 1065 (2000); Bruce A. Green, *Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 301 (2001); M.H. Hoeflich & Bill Skepnek, *Reflections of an Ethics Expert and a Lawyer Who Retains Him*, 44 HOFSTRA L. REV. 353 (2015); Rory K. Little, *Law Professors as Lawyers: Consultants, of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345 (2001); Nancy J. Moore, *The Ethical Role and Responsibilities of a Lawyer-Ethicist: The Case of the Independent Counsel's Independent Counsel*, 68 FORDHAM L. REV. 771 (1999); Frederick C. Moss & William J. Bridge, *Can We Talk?: A "Steele-Y" Analysis of ABA Opinion 411*, 52 S.M.U. L. REV. 683 (1999); Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113 (2007).

88. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-407 (1997).

89. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998).

90. As commentators have noted, the two opinions are difficult to reconcile. See Moss & Bridge, *supra* note 87, at 686–89.

91. See, e.g., Moore, *supra* note 87, at 781–82; Moss & Bridge, *supra* note 87, at 687; Rovner, *supra* note 87, at 1126–27.

relationship.<sup>92</sup> In that setting, the consulted lawyer has no duties or limitations, except for those that a contractual agreement with the consulting lawyer may impose.<sup>93</sup>

Observers agree, though, that interactions can, and do, fall between those two relatively manageable paradigm cases. A consulting lawyer will at times consult another lawyer for advice and share some cabined confidential information, requesting that the consulted lawyer promise to keep that information secret (sometimes explicitly, sometimes implicitly<sup>94</sup>). The effect of that contractual arrangement should not, according to the authorities, generate a full attorney-client relationship between the consulted lawyer and the client.<sup>95</sup> The agreement does, however, implicate conflict of interest concerns for the consulted lawyer. That lawyer might not be permitted to represent a different individual with interests adverse to the consulting lawyer's client if the confidential information would be relevant.<sup>96</sup>

None of the worries identified by commentary about consulting arrangements should arise with the LACI interactions. The client and the lawyer have no communication that would lead to reliance by the client on the lawyer's guidance, as described earlier.<sup>97</sup> Because the consulting CBO staffer shares no identifying information with the MCLA lawyer, confidential or otherwise, the limitations articulated by the ABA's ethics opinions and the commentators do not come into play.

Discussion of consulting arrangements, when concluding that an inadvertent attorney-client relationship has been properly circumvented by the lawyers involved, often warns that the analysis does not end there.<sup>98</sup> The participants, and especially the consulted lawyer, must consider the *agency* law implications of the consultations.<sup>99</sup> We therefore need to consider whether agency doctrine affects the responsibilities of the MCLA lawyers.

#### b. Agency Implications

As just described, a lawyer consultant advising another lawyer about the latter's client will typically take all steps necessary to prevent an attorney-client relationship with that client. Even if the consultant succeeds in that goal, commentators point out that she may, nonetheless, assume duties not entirely

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92. See Formal Op. 98-411, *supra* note 89; Moss & Bridge, *supra* note 87, at 688.

93. Moss & Bridge, *supra* note 87, at 692.

94. *Id.*

95. *Id.*

96. *Id.* See also Moore, *supra* note 87, at 790-91; Formal Op. 98-411, *supra* note 89.

97. See *supra* notes 73-78 and accompanying text.

98. See Moore, *supra* note 87, at 787-93; Moss & Bridge, *supra* note 87, at 696; Rovner, *supra* note 87, at 1133-43.

99. See Moore, *supra* note 87, at 790-91; Rovner, *supra* note 87, at 1136-39.

different from those accompanying the attorney-client relationship. That is because of the agency implications of the consultation.

The argument presented by the commentators proceeds as follows. The consulting lawyer is an agent of his client, the principal. As an agent, he owes fiduciary duties to the principal, including a duty of loyalty and a duty of care. When he retains a consultant to assist him, that consultant qualifies as a subagent—an agent hired by an agent to assist in the performance of his duties. The subagent owes fiduciary duties to the agent, according to the Restatement of Agency.<sup>100</sup> The Restatement also provides, however, that the subagent owes some fiduciary duties to the principal,<sup>101</sup> including the duties of care and loyalty. In some consultation arrangements, observers note, the consulted lawyer will therefore owe to the client some of the duties she would assume if she were the primary lawyer, most notably the duty of loyalty.<sup>102</sup> The duty of loyalty in turn implicates conflict of interest concerns.<sup>103</sup>

The MCLA attorney advising the CBO staffer through the LACI program might qualify as a subagent under this paradigm. If so, the preceding analysis, concluding that the MCLA lawyer has no attorney-client relationship with the ultimate agency constituent benefitting from the advice, may not be satisfactory. The most serious concern for MCLA under this arrangement is the possibility of a conflict of interest, as we saw above, and the subagent status can implicate conflicts.

A moment's reflection shows, however, that the agency staffer is, under typical circumstances, not an agent of the client. The MCLA lawyer therefore cannot be a subagent. Even were the staffer to qualify as an agent, the MCLA lawyer would not meet the definition of the staffer's subagent. The lack of notice to, and consent (express or implied) of, the principal would eliminate that possibility. Therefore, the agency concern appears to be unwarranted.<sup>104</sup>

A community organization staffer offering well-intended advice to a constituent is not an agent of the constituent. The Restatement of Agency defines "agency" as follows: "[A] fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."<sup>105</sup>

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100. RESTATEMENT (THIRD) OF AGENCY § 3.15(1) & cmt. d (2006).

101. *Id.* at § 8.01 cmt. c ("A subagent owes fiduciary duties to the principal as well as to the appointing agent."). See also *id.* at § 3.15(1), cmt. d.

102. See Moore, *supra* note 87, at 790.

103. See *id.* at 790–91.

104. One recent ethics committee did find that a staff person contacting a lawyer on behalf of a constituent to clarify permissible legal advice about Medicaid application procedures did qualify as an agent of the constituent. See NYCBA Op. 2017-4, *supra* note 85. In that setting, contrary to the arrangement described here, the staffer expressly (and typically with the client present) offered to serve as a conduit of the advice from the lawyer to the constituent, who thereby became a client of the lawyer. *Id.* at 3.

105. RESTATEMENT (THIRD) OF AGENCY, *supra* note 100 at § 1.01.

One writer, relying on the Restatement's comment, adds to the definition:

The existence of an agency relationship instead is determined by parsing the elements of agency: (1) a consensual relationship; (2) where one person is a representative of another; (3) the representative has the "power to affect the legal rights and duties of the other person"; and (4) the "person represented has a right to control the actions of the agent."<sup>106</sup>

The CBO staffer does not fit this definition in any meaningful way. The lack of a retainer is not dispositive,<sup>107</sup> but the lack of control is critical.<sup>108</sup> The CBO staffer advises his constituent, and does so for the benefit of the constituent (e.g., "You should apply for a housing voucher at this county office before the application opportunity closes at the end of next week, and make sure you bring the following documents, or you will be turned away."). But the constituent has none of the qualities of a principal. She cannot control the staffer and typically does not empower the staffer to speak for her or to act for her.

At the same time, we must concede that the question is a bit more problematic than that facile interpretation seems to show. Advisors often will qualify as agents. For instance, lawyers are advisors, and they are agents.<sup>109</sup> Broker-advisors can be agents, and courts have imposed fiduciary duties upon them.<sup>110</sup> The difference between lawyers and broker-advisors, on the one hand, and helpful CBO staffers, on the other, rests in the lack of a representative role. The agents perform actions *in lieu* of the principal.<sup>111</sup> They act for the principal, and do so at the direction of the principal. It is at that juncture that the element of control enters the picture. The staffer, unlike a true agent, merely advises the constituent, who may or may not act on the advice.

That, at least, is the typical understanding of a street-level, community-based agency staffer aiding the constituents who need the agency's services. If the staffer were to contact the lawyer expressly on behalf of an identified client, seeking advice from the lawyer to be provided to an identified constituent, the agency relationship would be more apparent.<sup>112</sup> Absent that explicit arrangement, no

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106. Thomas Earl Geu, *A Selective Overview of Agency, Good Faith and Delaware Entity Law*, 10 DEL. L. REV. 17, 20 (2008) (quoting *id.* § 1.01 at cmt. c).

107. Agency is not dependent on the payment of fee or on an express written agreement. See RESTATEMENT (THIRD) OF AGENCY, *supra* note 100, at § 1.01.

108. See Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 320 (1998) ("A defining element of the common law relationship of agency is the principal's right to control the agent.").

109. *Id.* at 301; Adam Liptak, *Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 MICH. L. REV. 875 (2012). See William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 DUKE L.J. 733 (1988).

110. See, e.g., *Patsos v. First Albany Corp.*, 741 N.E.2d 841, 850 (Mass. 2001); *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978).

111. RESTATEMENT (THIRD) OF AGENCY, *supra* note 100, at § 1.01; *Redbird Eng'g Sales, Inc. v. Bi-State Dev. Agency*, 806 S.W.2d 695, 700 (Mo. Ct. App. 1991).

112. See NYCBA Op. 2017-4, *supra* note 85 (finding an agency relationship in that circumstance).

authority has found such a staffer to be an agent generally of his constituent with accompanying fiduciary duties.<sup>113</sup>

Furthermore, even if the staffer qualified as an agent by some interpretation of his relationship with the constituent, under the LACI program, the MCLA lawyer would not qualify as a subagent. Subagency status requires consent of the principal. The Restatement of Agency, in its Reporter's notes, states: "Unless a principal has explicitly or implicitly directed the retention of a subagent, an agent who is hired by an agent to carry out the principal's work remains the hiring agent's agent alone."<sup>114</sup> The LACI arrangement by design maintains distance between the client and the lawyer. The client/principal would not direct the CBO staffer to retain the lawyer. Therefore, no sub-agency relationship arises. In addition, given that the lawyer owes her fiduciary duties to the CBO that employs the staffer, as the next section explains, the agency doctrine cannot overcome the bedrock premise that the employees of the CBO are not clients of the lawyer, and the lawyer does not owe duties to them, apart from their role as constituents of the client.<sup>115</sup>

For purposes of evaluating the effects of a well-functioning LACI program, it is prudent to conclude that the sub-agency status is not a concern. The MCLA lawyers advising staffers through LACI are neither attorneys for the clients nor subagents of the staffers.

### c. The Relationship Between MCLA and the CBO

The discussion thus far has left one relationship unexamined: that between the CBO and MCLA. If the MCLA lawyers do not represent the CBO's constituents and are not subagents with duties to those constituents, who serves as the lawyers' clients? Most likely, the CBO will qualify as a client of MCLA.

An attorney who expressly agrees to provide legal advice and training to a non-lawyer most likely has established an attorney-client relationship with that non-lawyer.<sup>116</sup> MCLA ought therefore to treat each separate CBO as its client. The reasoning for this conclusion is not without uncertainty, but any answer other than the establishment of an attorney-client relationship is difficult to defend.

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113. No reported case has held that a community organization staffer is an agent of the constituents served. Cf. Nathan Witkin, *Dependent Advocacy: Alternatives to Independence Between Attorneys*, 32 OHIO ST. J. ON DISP. RESOL. 111, 128 (2017) ("[W]hile social workers can assist clients in dealing with powerful government agencies, they, unlike legal professionals, do not take on a fiduciary duty with regards to the forcible deprivation of their clients' rights"). A licensed social worker will, of course, likely have mandated reporting duties regarding incidents of abuse and neglect, as well as confidentiality duties, but those responsibilities are not the subject of the present inquiry. See Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1207 (2015) (describing the duties of licensed social workers).

114. RESTATEMENT (THIRD) OF AGENCY, *supra* note 100, at Reporter's Notes, subsection c, Creation of subagency (citing *Estate of Smith v. Underwood*, 487 S.E.2d 807, 815 (N.C. Ct. App. 1997) (dictum)).

115. See MODEL RULES R. 1.13(a); Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 951 (2009).

116. See Lanctot, *Cyberspace*, *supra* note 75, at 179.

A CBO participating in LACI requires professional assistance in order to accomplish its mission—to ensure that its staffers sufficiently understand the legal issues that the CBO’s clients encounter. MCLA is a law firm that has the capacity to provide that professional guidance. *If* the training and guidance provided by MCLA to the CBO constitutes “legal services,” the resulting interaction evidences all the elements of Section 14 of the Restatement of the Law Governing Lawyers.<sup>117</sup> If what MCLA provides to the CBO is something other than legal services, then its role could be that of a consultant, and MCLA would then argue that it has no attorney-client relationship with the CBO, and could expressly disclaim any such status.<sup>118</sup>

MCLA would be prudent to treat its guidance to a CBO as legal advice to a client, although the analysis is far from clear, and effectively untested. The prudence stems from these considerations: First, as just noted, the CBO receives from the law firm individualized guidance about legal issues of importance. The CBO constituents rely on that legal information and guidance. Those factors serve as the central guideposts for establishing an attorney-client relationship.<sup>119</sup> Indeed, if a nonlawyer, or a company owned by a nonlawyer, offered to sell such legal guidance to a CBO, the odds are that bar regulators would prohibit the transaction.<sup>120</sup> Second, the *Model Rules* presume that the services provided by an attorney to a client involve representation.<sup>121</sup> And finally, some authority holds that a lawyer performing services that a nonlawyer may also engage in may nevertheless be bound by the ethical rules.<sup>122</sup>

But, those observations notwithstanding, it is not entirely clear that the services offered by MCLA to a CBO qualify as legal services. MCLA offers education to a CBO about legal issues that its employees and volunteers will encounter. No one would claim that a law professor teaching a group of nonlawyers (her law students) about the law in order to permit the students to perform their jobs more

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117. RESTATEMENT, *supra* note 57, at § 14.

118. If the relationship is likely not one of attorney-client, but the beneficiary of the lawyer’s guidance might misconstrue the nature of the relationship, a disclaimer can effectively prevent an inadvertent establishment of the relationship. See Lancot, *Cyberspace*, *supra* note 75, at 155; Paige A. Thomas, Comment, *Online Legal Advice: Ethics in the Digital Age*, 4 LEGAL MALPRACTICE & ETHICS 440, 460–61 (2014).

119. See *supra* text accompanying notes 73–79.

120. See generally Alexis Anderson, “Custom and Practice” Unmasked: The Legal History of Massachusetts’ Experience with the Unauthorized Practice of Law, 94 MASS. L. REV. 124 (2013) (describing the limits on nonlawyer real estate closing firms).

121. Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397, 1410 n. 66 (2006) (citing MODEL RULES pmbL., R. 1.2).

122. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 04-433 (2004) (“[A] lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity.” (quoting ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 335 (1974))); *In re Dwight*, 573 P.2d 481, 484 (Ariz. 1977) (holding that an attorney acting in his capacity as an investment advisor was subject to ethical rules governing attorneys) (“As long as a lawyer is engaged in the practice of law, he is bound by the ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity.”).



effectively is practicing law.<sup>123</sup> Similarly, ethics opinions and commentary consistently conclude that a lawyer offering a community seminar about a legal topic does not establish an attorney-client relationship with the attendees, and is not practicing law while doing so.<sup>124</sup>

The analogy to compliance counseling lends support to this analysis. Consulting firms offering compliance services to corporations treat that product as something other than the provision of legal services to a client,<sup>125</sup> in order to justify nonlawyer participation in the activity as well as nonlawyer ownership of firms that provide the service.<sup>126</sup> While some observers find the arguments not persuasive,<sup>127</sup> no authority has challenged the compliance consulting industry for unauthorized practice,<sup>128</sup> and nonlawyer consultants engage in compliance work regularly.<sup>129</sup> Even law firms, which are presumed to offer to their customers a product that qualifies as legal services, may expressly disclaim an attorney-client relationship when providing compliance consulting, relying on Model Rule 5.7, which authorizes law firms to offer “law-related” services to customers without incurring the duties owed to clients.<sup>130</sup>

There is some risk, though, for a law firm like MCLA to treat its work for the CBO as a form of compliance consulting rather than as advice to a client. The compliance counseling industry offers to its corporate customers a blend of business, management, and regulatory (i.e., legal) expertise.<sup>131</sup> That admixture of inputs serves to support the consultant’s claims that he is providing something different from a lawyer offering focused advice about a legal matter. The LACI training, by contrast, is entirely legal—the staffers need to know the substantive

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123. See Lori K. Miller, *The Non-Lawyer Educator Teaching Legal Issues in Higher Education: Legally and Educationally Defensible?*, 12 J. LEGAL ASPECTS SPORT 205, 206 (2002).

124. See Lancot, *Cyberspace*, *supra* note 75, at 232–35 (reviewing authorities). Interestingly, for present purposes, none of the authorities discussing the practice-of-law implications of legal seminars addresses the question of whether the lawyer might have an attorney-client relationship with the CBO that arranges for the presentation.

125. See Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 35 (2012); Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers’ Monopoly and the Unauthorized Practice of Law*, 82 FORDHAM L. REV. 2961 (2014); Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 DUKE L.J. 1243, 1269–70 (2014); Rostain, *supra* note 121, at 1398–99.

126. DeStefano, *supra* note 125, at 2989–90; Rostain, *supra* note 121, at 1409.

127. See Rostain, *supra* note 121, at 1407 (noting that the activity of compliance consulting often includes all of the elements of providing tailored legal advice to a client).

128. As Tanina Rostain observes, the only exception is a 1997 investigation by Texas authorities into the tax consulting services offered by Arthur Anderson and Deloitte & Touche. See *id.* at 1407 n.53. The complaint against the firms was dismissed. As Rostain notes, tax compliance is a particularly delicate one for unauthorized practice challenges, both because of the cross-profession jurisdiction traditions and the federalism implications. *Id.* See also *infra* note 166 and accompanying text.

129. *Id.*; Remus, *supra* note 125, at 1271.

130. See MODEL RULES R. 5.7; Bos. Bar Ass’n Ethics Op. 1999-B: Law-Related Services (1999) (describing the implementation of Rule 5.7). For a description of that strategy, see DeStefano, *supra* note 125, at 2993; Remus, *supra* note 125, at 1261; Rostain, *supra* note 121, at 1410–11.

131. See DeStefano, *supra* note 125.

law and the civil and criminal procedures relevant to the problems their constituents face. The prediction here is that, if a CBO were to claim client status with its resulting duties, the arrangement would be seen as a provision of legal services, not law-related services.

While it would be a burden for MCLA to treat all beneficiaries who receive guidance from the CBO staffers as clients, it is less of a complication for LACI to treat each CBO as a client. Like with all organizational representation, the client of MCLA would be the CBO itself, and not its staff members, absent some special arrangement.<sup>132</sup> Given the nature of the legal services provided to a CBO, the MCLA lawyers would be unlikely to learn sensitive, confidential information from the organization about its internal operations. The duty of competence, as noted above,<sup>133</sup> is one that MCLA would unquestionably assume as part of the LACI project. The MCLA lawyers will accept their responsibility to train and advise the CBO staffers capably, understanding that liability ought to follow if the lawyers breach that duty and provide less-than-competent advice to the staffers.

Nevertheless, the more confounding duty that the CBO representation entails is that of loyalty. MCLA, as counsel to the CBO, must not engage in representation that triggers a conflict of interest with the CBO.<sup>134</sup> There are settings where that obligation will be constraining for MCLA. Imagine, for instance, a homeless day shelter participating in LACI, with MCLA lawyers training its social workers and housing specialists about how to guide its guests about the legal issues they confront. The day shelter under LACI becomes a client of MCLA, and is entered into its database for purposes of conflict checking. If an individual prospective client (unrelated to the LACI program) were to seek the help of MCLA for a matter in which that day shelter is a possible defendant, or in some other way an adverse party,<sup>135</sup> MCLA would have to reject the prospective client unless the CBO agrees to allow the representation (and the prospective client agrees as well). It is a fundamental reality of conflicts law that a lawyer may not oppose a current client even on an entirely unrelated matter, absent the informed consent of the existing client for sure, and most likely the prospective client as well.<sup>136</sup> If the prospective client's claim relates substantially to the work that MCLA has been doing with and for the CBO, MCLA will no doubt simply refer that

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132. See MODEL RULES R. 1.13(a), (g).

133. See *supra* notes 54–62 and accompanying text.

134. See MODEL RULES R. 1.7, 1.9.

135. It is not uncommon for homeless shelter guests to have disagreements with the shelter's staff about perceived mistreatment or exclusion. See, e.g., Lisa R. Green, *Homeless and Battered: Women Abandoned by a Feminist Institution*, 1 UCLA WOMEN'S L.J. 169, 171–73 (1991) (discussing the rules of shelters that have the effect of excluding certain guests).

136. MODEL RULES R. 1.7(a)(1), (b). The current client's consent is not necessarily sufficient. The lawyer must also be certain that she "will be able to provide competent and diligent representation to" both clients. *Id.* If the matters are unrelated (the only time that the consent would be sought), the current client has little concern. The prospective client, on the other hand, may worry that MCLA's ongoing relationship with the CBO will limit the firm's zeal on her behalf.

prospective client elsewhere. But if the new matter is unrelated, which is most likely given the work MCLA does for the CBO, the prospect of informed consent remains quite viable.

In light of this concern, the LACI project might operate with MCLA seeking from each separate CBO an advance waiver of conflicts of interest involving unrelated matters and not implicating the CBO's confidential information. The advance waiver device is common within large law firm operations, given the interlocking representational commitments that national or international firm practices inevitably generate.<sup>137</sup> Implemented with care, it is ethically proper.<sup>138</sup> The CBO would agree, as a condition of participating in LACI, that it will not object to MCLA representing a later client with a dispute with the CBO in certain defined circumstances. The waiver of the conflict would only apply to matters unrelated to the LACI work MCLA performs for the CBO, and only if the new representation does not risk any of the CBO's confidential information. With an advance waiver in place, MCLA's ongoing work should not be hampered very much, if at all, by the ongoing representation of the community-based organizations that low-income persons interact with on a regular basis.

Here, then, is a summary of the analysis of the attorney-client relationship question: The LACI project allows lawyers from MCLA to provide legal training and ongoing advising to CBO staffers, who will then assist their constituents/clients to recognize and respond to the legal problems that low-income families so often encounter. The work by the MCLA lawyers does not create any attorney-client commitments to the beneficiary constituent/clients, nor any fiduciary duties arising from an agency status. The arrangement would most likely create an explicit attorney-client relationship between MCLA and each participating CBO (but not with any individual staffer), and MCLA will need to manage its client work with that in mind.

If these conclusions are sound, and it is proper in light of those considerations for LACI to proceed, the obvious next question is whether the LACI project runs afoul of the prevailing understandings about unauthorized practice of law.

## B. THE UNAUTHORIZED PRACTICE OF LAW QUESTION

The issue of unauthorized practice of law (UPL) is much-discussed<sup>139</sup> and profoundly unsatisfying.<sup>140</sup> The UPL doctrine does, however, possess enough

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137. See, e.g., RESTATEMENT, *supra* note 57, at § 122 (permitting advance waivers in settings where client protection and understanding are assured); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005) (same; withdrawing differing Op. 93-372); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289 (2000).

138. Formal Op. 05-436, *supra* note 137.

139. A Westlaw search in its Law Review and Journals database turns up more than 4,700 articles containing the term "unauthorized practice of law." Of those, 168 include that phrase in the Article's title. More than 3,300 additional articles with that term appear in Westlaw's "Texts and Treatises" database, of which more than 240 include the term in its title. Westlaw search, July 18, 2017.

140. See, e.g., Cotton, *supra* note 52, at 214 (UPL as a "quagmire" and "unsettled"); Lauren Moxley, Note, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and*

substance for us to examine whether the LACI project could pass muster, either as imagined in its robust form or in some more limited fashion.<sup>141</sup>

# 1. WHAT QUALIFIES AS UNAUTHORIZED PRACTICE

To assess the UPL implications of LACI, we must approach the question in two steps. First, we must understand what qualifies as “the practice of law.” Second, we must explore when, if ever, someone without a bar license may participate in activities that fit that definition.

Discerning the substance of “the practice of law” is remarkably challenging.<sup>142</sup> Some early attempts to define the practice of law demonstrate frustrating circularity, including the ABA’s position that “[f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer.”<sup>143</sup> Slightly better are more recent formulations that connect the advice or advocacy to particularized legal questions faced by a specific person or entity.<sup>144</sup> As one court has described the inquiry, “To determine whether an individual has engaged in the practice of law, the focus of the inquiry should be on whether the activity in question required legal knowledge and skill in order to apply legal principles to precedent.”<sup>145</sup> Professor Catherine Lanctot calls this “the hallmark of the practice of law.”<sup>146</sup> It is apparently settled today (but was not

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*Improving Access to Justice*, 9 HARV. L. & POL’Y REV. 553, 563 (2015) (discussing the lack of clarity in UPL doctrine due to vague definitions of what constitutes the “practice of law”).

141. Programs offering services through nonlawyer providers have explored this concern. *See, e.g.*, Robert T. Begg, *The Reference Librarian and the Pro Se Patron*, 69 L. LIBR. J. 26, 31 (1976) (law librarians); Cotton, *supra* note 52, at 197–98 (social worker assistance); Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 L. LIBR. J. 129, 129–30 (1998) (law librarians); Jonathan A. Beyer, *Practicing Law at the Margins: Surveying Ethics Rules for Legal Assistants and Lawyers Who Mediate*, 11 GEO. J. LEGAL ETHICS 411, 415 (1998) (mediators); Bethany Spielman, *Has Faith in Health Care Ethics Consultants Gone Too Far? Risks of an Unregulated Practice and a Model Act to Contain Them*, 85 MARQ. L. REV. 161, 198–217 (2001) (ethics committees).

142. For an earlier review of the question, see ABA STANDING COMM. ON LAWYERS’ RESPONSIBILITY FOR CLIENT PROTECTION, 1994 SURVEY ON THE UNAUTHORIZED PRACTICE OF LAW NONLAWYER PRACTICE (1996) (surveying definitions of “practice of law” in fifty states). *See also* Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773 (2002).

143. MODEL CODE OF PROF’L RESPONSIBILITY, EC 3-5 (1969). *See also* Louisiana State Bar Ass’n v. Edwins, 540 So.2d 294, 299 (La.1989) (“Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer.”). As Deborah Rhode has observed, “it is also possible to define death as that which is the subject of services by morticians.” Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45–46 (1981) [hereinafter Rhode, *Policing the Professional Monopoly*].

144. For example, Oregon defines the practice of law as “the exercise of professional judgment in applying legal principles to address another person’s individualized needs through analysis, advice, or other [legal] assistance.” Oregon State Bar v. Smith, 942 P.2d 793, 800 (Or. Ct. App. 1997).

145. Attorney Grievance Comm’n of Maryland v. Hallmon, 681 A.2d 510, 514 (Md. App. 1996) (quoting *In re Discipio*, 645 N.E.2d 906, 910 (Ill. 1994)).

146. Lanctot, *Cyberspace*, *supra* note 75, at 182.

always so<sup>147</sup>) that providing legal *information* is acceptable, as long as that provision does not turn into legal *advice*.<sup>148</sup> It is the particularized, client-centered interaction that qualifies the conduct as practicing law, and that distinguishes “legal information” from “legal advice.”<sup>149</sup> Because “the boundaries between legal information and legal advice can be hazy,”<sup>150</sup> context matters a great deal.

The second step is to articulate the role of nonlawyers in the delivery of legal advice. State law in every jurisdiction holds, as a general proposition, that only licensed lawyers may practice law.<sup>151</sup> Nonlawyers—used here to refer to everyone who is not a licensed attorney in a jurisdiction, including lawyers licensed in a different jurisdiction, or lawyers suspended or disbarred in their home jurisdiction—may not practice law or deliver legal advice, subject to some well-accepted exceptions or interpretive judgments.<sup>152</sup> Nonlawyers may engage in activities that would otherwise qualify as the practice of law while serving as a legal assistant supervised closely by a licensed lawyer.<sup>153</sup> The absence of the supervision and oversight by a lawyer means that the assistant has practiced law without a license.<sup>154</sup> In the LACI setting, the level of oversight provided by the MCLA lawyers would not satisfy that standard.<sup>155</sup>

Nonlawyers may practice law without attorney supervision in many administrative contexts. Most state<sup>156</sup> and federal agencies<sup>157</sup> authorize nonlawyers to

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147. See, e.g., Catherine J. Lancot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOEFSTRA L. REV. 811, 822–29 (2002) (describing the campaign to prevent Norman Dacey, a nonlawyer, from publishing a book for laypersons about living trusts) [hereinafter Lancot, *Scriveners*]; *Dacey v. N.Y. Cnty. Lawyer’s Ass’n*, 290 F. Supp. 835 (S.D.N.Y. 1968) (concluding that the author possessed First Amendment rights to publish his book).

148. See ABA SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 4 n.5 (2003), available at <http://www.abanet.org/litigation/taskforces/modest/report.pdf> [<https://perma.cc/7TZ8-GT2V>]; Lancot, *Cyberspace*, *supra* note 75, at 177–78 (exploring that distinction).

149. See Lancot, *Cyberspace*, *supra* note 75, at 177–78; Matthew 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, 2051–52 (2014); Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, J. PROF. LAW. 79, 95 (2012).

150. Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 FAM. CT. REV. 87, 98 (2013).

151. Longobardi, *supra* note 149.

152. Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653 (2010).

153. *Id.*

154. The attorney who failed to supervise the nonlawyer employee adequately will have assisted the unauthorized practice of law and be subject to discipline under Model Rule 5.5(a). See, e.g., *Matter of Hrones*, 933 N.E.2d 622 (Mass. 2010) (suspension for failure to supervise paralegal); *In re McMillian*, 596 S.E.2d 494 (S.C. 2004) (lawyer who allowed nonlawyer employees to perform nearly all aspects of real estate closings without supervision violated Rule 5.5 counterpart and was disbarred); *In re Sledge*, 859 So.2d 671 (La. 2003) (attorney’s failure to supervise nonlawyer assistants warranted disbarment).

155. Tremblay, *supra* note 152, at 668–69.

156. See Zachary C. Zurek, Comment, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY’S J. LEGAL MAL. & ETHICS 242, 262–63 (2013) (reviewing state administrative exceptions to UPL).

157. See 5 U.S.C. § 555(b) (1966) (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency,

accompany and assist litigants appearing in adjudicative proceedings before the agencies. Those same nonlawyers may, consequently, advise the litigants about the proceedings and their rights—activity otherwise deemed to be unauthorized practice.<sup>158</sup> This permission is not universal, though—some federal and state agencies continue to prohibit representation by nonlawyers, relying on the same UPL rationales relied upon by state regulators for court-based practice. For example, Delaware has barred nonlawyer experts from appearing and advocating for parents in federally-mandated special education appeal hearings.<sup>159</sup> Other state and federal agencies limit practice by nonlawyers.<sup>160</sup>

This gloss on the UPL doctrine has important implications for LACI and MCLA's participation in that project. When the CBO staffers discuss the administrative matters that low-income and vulnerable persons commonly encounter, especially Social Security and SSI disability claims, TANF and food stamp problems, public housing eligibility disputes, and unemployment insurance eligibility, they do not engage in the unauthorized practice of law in most, if not all, states.<sup>161</sup> Therefore, MCLA's assistance to the staffers, both generally and in specific instances, would not contravene the ethical duties of its lawyers. As discussed in the next subsection, that reality is helpful, but not necessarily sufficient for a robust and effective surrogate lawyering project, given the swath of matters that remain off-limits to nonlawyer practice.<sup>162</sup>

One further nuance within the UPL doctrine has important relevance to the LACI project and its viability. Courts and bar opinions have concluded that a nonlawyer may engage in activities that otherwise qualify as the practice of law if those activities are inherent in or incidental to the nonlawyer's professional role

by other qualified representative.”). Many federal agencies permit that practice. *See, e.g.*, Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, S. ILL. U. L.J. 223, 235 (2012) (canvassing the federal agencies that permit non-attorney practice).

158. While not directly relevant to the LACI project, it warrants mention that federal supremacy considerations limit the ability of states to prohibit nonlawyers' practices, like tax advice and representation, that satisfy all of the elements of a state's definition of the practice of law, if a federal law authorizes such practices. *See Sperry v. Florida*, 373 U.S. 379 (1963) (patent law practice); Charles H. Kuck & Olesia Gorinshteyn, *Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in Sperry v. Florida*, 35 WM. MITCHELL L. REV. 340, 347 (2008).

159. *In re Arons*, 756 A.2d 867 (Del. 2000), *cert. denied* 532 U.S. 1065 (2001). *See* David C. Vladeck, *Hard Choices: Thoughts for New Lawyers*, 10 KAN. J.L. & PUB. POL'Y 351 (2001) (reviewing that decision).

160. *See* Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 120 (2007) (reviewing agency practices).

161. Discussion of and assistance with the Social Security and SSI matters are permitted as a matter of federal law, so would be acceptable in every jurisdiction. *See* 20 C.F.R. § 404.1705(b) (2015) (allowing a claimant to “appoint any person who is not an attorney to be [his or her] representative in dealings” with the Social Security Administration); Drew A. Swank, *supra* note 157, at 224 (stating that it is not UPL for nonlawyers to represent claimants in matters before the Social Security Administration). The other matters listed in the text, to the extent they implicate state administrative law, *might* not be permitted, although anecdotally those practices appear to be widely acceptable.

162. *See infra* notes 176–87 and accompanying text.

and accompanying responsibilities. Comment [3] to Rule 5.5 acknowledges this UPL exception: “A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.”<sup>163</sup>

This comment implies a reality that is well-accepted (if fairly ignored<sup>164</sup>): that many other professions use, interpret, and apply the law as an inherent feature of their role responsibilities. Those nonlawyers may serve their customers while informed by legal principles, and lawyers may assist them in doing so. One observer notes that the exemption applies to a practice “that is common in the community, ancillary to another established business, or restricted to ‘routine’ tasks.”<sup>165</sup>

For example, a tax accountant must apply state and federal tax law in her practice, and a lawyer may properly assist an accountant in performing that role.<sup>166</sup> Real estate brokers, who need not be (and usually are not) attorneys, must understand and apply legal principles to specific circumstances in their professional roles, but within (often highly disputed) limits, they may perform their jobs.<sup>167</sup> The Comment to Rule 5.5 also includes social workers, implicitly recognizing that many community-based social workers must understand how legal systems and government agencies function to effectively advise and advocate for their clients.<sup>168</sup>

If LACI represented an example of a law firm assisting nonlawyers to perform their existing responsibilities more capably by learning more about the legal processes that their constituents/clients face, then Comment [3] to Rule 5.5 would offer a welcome argument against any finding that the lawyers were assisting in UPL. That argument fits the LACI model imperfectly, however. It is true that the lawyers at MCLA may lawfully train social workers to understand regulatory

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163. MODEL RULES R. 5.5 cmt. 3.

164. Only three law review articles reference Comment [3] to Rule 5.5. Westlaw search, July 24, 2017.

165. Rhode, *Policing the Professional Monopoly*, *supra* note 143, at 82 n.326.

166. Accountant practice also represents an explicit carve-out for nonlawyer practice that is grounded in a discrete federalism basis, given the federal tax provisions’ authorization of practice by accountants and others. See Charles Wolfram, *Ethics and the Multijurisdictional Practice of Law: Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by the Transactional Lawyer*, 36 S. TEX. L. REV. 665, 675–76 (1995).

167. See, e.g., *Real Estate Bar Ass’n for Mass., Inc. v. Nat’l Real Estate Info. Servs.*, 946 N.E.2d 665 (Mass. 2011); Anderson, *supra* note 120 (reviewing that litigation).

168. See, e.g., Toby Golick & Janet Lessem, *A Law and Social Work Clinical Program for the Elderly and Disabled: Past and Future Challenges*, 14 WASH. U. J.L. & POL’Y 183, 187 n.12 (2004) (“recognizing the need for social workers to receive legal training to understand and deal with their clients’ problems”); Robert F. Seibel et al., *An Integrated Training Program for Law and Counseling*, 35 J. LEGAL EDUC. 208 (1985) (describing integrated training for law students and counseling students); Gale Humphrey Carpenter, *Overriding the Psychologist-Client Privilege in Child Custody Disputes: Are Anyone’s Best Interests Being Served?*, 68 UMKC L. REV. 169, 178 (1999) (“Psychologists and social workers need specialized legal training as well. It is important that they understand the basic law regarding child custody, privileged communication, and rules of evidence in addition to the applicable psychosocial knowledge.”).

systems, court processes, privileges, and the like in order to ensure that the social workers advise and support their clients most effectively.<sup>169</sup> As of yet, no authority has interpreted Comment [3] to authorize social workers, and others similarly situated, to communicate individualized, law-based instruction to those clients in need.<sup>170</sup> A LACI-type initiative in Baltimore, one that utilized only licensed social workers and aimed to limit their involvement to areas that avoided UPL worries, failed after objections by the local bar and the state attorney general that the project nevertheless constituted UPL.<sup>171</sup>

The Baltimore experience aside, little precedent exists to help discern the limits of this exception. The surrogacy theme of LACI imagines a broad collection of CBO staffers, some of whom will have professional training (social workers, reference librarians, gerontologists, nurse practitioners, nurses, doctors),<sup>172</sup> but many who would not (intake workers, housing specialists). Arguments grounded in Comment [3]'s inherent or necessary aspect of a nonlawyer's employment offers some support for the LACI initiative, especially when considered in the context of the professional staffers, whose success in achieving their role-driven goals may be enhanced by their clients' meaningful response to legal issues that arise in their lives. Those arguments seemingly have less force when applied to non-professional staffers.<sup>173</sup>

Therefore, a muscular LACI program, using a wide array of CBO staffers to provide discrete, client-directed advice on the legal issues commonly encountered by their constituents, including court-based matters, would be vulnerable to a UPL challenge. It is plausible that such a challenge would not arise, given the pro bono nature of the LACI project<sup>174</sup> and the well-recognized understanding that almost all UPL challenges are market- and competition-driven.<sup>175</sup> But an

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169. See generally Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998) (social workers serving at settlement houses and community centers); Margaret F. Brown, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J.L. & SOC. PROBS. 279 (2001).

170. An Alabama ethics opinion indicates that in some settings social workers may provide more tailored services: "[T]he State of Alabama ha[s] held that a nonlawyer social worker who interviewed noncustodial parents, arranged agreements, and prepared forms and case summaries was not engaging in the unauthorized practice of law." Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 90-10 (1990) (citing Alabama St. Bar Op. 87-142 (1987)); see also Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2741 (2014) (discussing both opinions).

171. See Cotton, *supra* note 52, at 205–20 (describing the Attorney General's response to the LEST project).

172. See Tom Lininger, *Deregulating Public Interest Law*, 88 TUL. L. REV. 727, 752 (2014) (recommending that professionals, because of their special training, be permitted to assist with low-income advising).

173. No reported attorney discipline case, nor UPL enforcement action, has applied the Comment [3] exception to the limitations on nonlawyer activity, so the best one can do is to speculate about its breadth and application.

174. But see Cotton, *supra* note 52, at 195–96 (describing the immediate challenge to the Baltimore LEST program, an expressly access-to-justice initiative that did not charge clients).

175. See McMorrow, *supra* note 4, at 697; DeStefano, *supra* note 125, at 2979.



innovation such as LACI cannot proceed on the assumption that it would remain under the radar of the bar discipline authorities or the UPL enforcement agency. That conclusion suggests two complementary responses. First, we should consider whether (and if so, how) a streamlined, limited, cabined LACI might operate. Second, we ought to examine what the implications would be if the legal profession and state regulatory actors permitted the most robust LACI project to proceed. What would be the risks, and are they manageable?

## 2. SURROGACY WITHIN UPL BOUNDS

If the architects of LACI proceeded with a risk-averse stance regarding the UPL limitations, they might include three separable components to the surrogacy delivery system. LACI-light, if we might refer to it as such, could include structures to allow or ensure: (1) full, active discussion with, and guidance to, clients on those areas in which nonlawyers may practice, which in most states include most administrative law settings; (2) only generic, non-individualized handouts and referrals to other resources (including technology and, of course, lawyers) on those areas that qualify as the practice of law, which include just about all court-based proceedings; and (3) screening by CBO staffers for available subsidized and pro bono lawyers to make their intake and triage systems more efficient. These components would together offer a useful, if constrained, service to constituents in need. Let us consider each component briefly.

*Active Guidance on Permitted Topics:* As noted above, all states permit nonlawyers to perform activities that would otherwise constitute the practice of law, including advocating at hearings in select settings, almost always administrative in nature.<sup>176</sup> The most apt examples would be claims under the Social Security Act for benefits<sup>177</sup> and public welfare matters.<sup>178</sup> Because nonlawyers may appear as representatives at hearings, they may also advise claimants outside of the hearing settings. Not all administrative areas are included in this dispensation, however.<sup>179</sup> To the extent that the surrogacy project limits the CBO staffers' assistance to those areas of law and regulation that are certain to permit nonlawyers to participate, the risk of UPL enforcement would be minimal.

This qualification serves as a significant limitation on the LACI idea, however. For one, because nonlawyers have traditionally been permitted to advise constituents about the areas covered by this suggestion, this surrogacy project is hardly innovative, and adds little to the ATJ mission. Relatedly, the impetus for a surrogacy project like LACI is the stark need for clients to have guidance on the areas

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176. See *supra* notes 153–57 and accompanying text.

177. See Swank, *supra* note 157.

178. See Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917, 918 (2002); Marlene M. Remmert, Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U. L. REV. 567, 577 (1981).

179. See *supra* note 160 and accompanying text.

that this suggestion excludes, most notably housing, family, employment, and debt collection disputes. This limitation also restricts considerably the holistic advantages of the guidance offered by the CBO staffers.<sup>180</sup>

*Constrained Guidance on Legal Matters:* The UPL restrictions arguably prohibit the more ambitious elements of LACI. A CBO staffer likely cannot, given accepted interpretation of UPL limits, discuss with a constituent how she might respond to her eviction notice, how the courts might treat her claims in response to the court complaint, or what tactics might improve her chances of avoiding the loss of her housing. That staffer could not counsel a worker who has received court papers seeking to collect a debt about his rights to protect his wages against the attachment or garnishment processes.<sup>181</sup> Instead, to avoid any UPL violation, the staffers could only provide to the clients (but not explain to them) printed materials describing tactics and substantive law,<sup>182</sup> and refer the clients to the most user-friendly and appropriate technology to guide the clients in a more interactive fashion.<sup>183</sup>

One as-yet-unanswered question arises in this setting. A nonlawyer CBO staffer, in the risk-averse LACI environment, will not explain to a client how to interpret a state statute or regulation as it might apply to that individual's circumstances.<sup>184</sup> The staffer may *provide* the statute or regulation, but may not discuss its relevance, given current UPL restrictions. How, then, would the UPL doctrine treat the staffer collaboratively walking the client through an interactive online program made for low-income clients facing court-based legal issues? The better answer to that question, both from a policy standpoint and analytically, would be that such collaborative assistance would be entirely proper. Imagine a staffer using his computer with a client to follow the online resource about how to respond to eviction court papers.<sup>185</sup> As long as the staffer simply reads the screen guidance along with the client, with the two together deciding which box to check, or how to understand what the resource means by its instructions, there is no law being practiced by the staffer. The staffer never tells the client what the law is or what his suggestions are for making law-related decisions; instead, the staffer relies on the legal resources on the screen to ensure that the client understands them and responds with the correct inputs.<sup>186</sup>

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180. See Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 485 (2015).

181. See Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 107–08 (2017) (describing the prevalence of consumers defaulting in debt-collection lawsuits).

182. See Lanctot, *Scriveners*, *supra* note 147, at 849–50.

183. See Greiner et al., *supra* note 8, at 1130–35 (evaluating pro se assistance devices and systems).

184. See Lanctot, *Scriveners*, *supra* note 147, at 849–50.

185. *Id.* at 841–49 (discussing assistance with Bankruptcy Court forms).

186. See *In re Moffett*, 263 B.R. 805, 815 (Bankr. W.D. Ky. 2001) (“This Court has no problem with [the non-lawyer] using a computer program, but she is only permitted to receive information from potential debtors on official bankruptcy forms.”).

If that assessment is sound, this service could be useful to many clients, and especially those who do not have access to the needed technology that the online services require, or the ability to process online information without assistance.<sup>187</sup>

*Screening and Triage Opportunities:* A limited LACI project would likely use the resources of the CBO staffers to aid existing legal service providers to refine their intake choices, by screening potential clients and making tailored referrals. Some existing access-to-justice projects have implemented this component.<sup>188</sup> No authority has claimed that the process of screening and providing referrals to legal service providers qualifies as the practice of law, and observers have recognized this as a proper role for nonlawyers.<sup>189</sup> But the limitations of this service are readily apparent. The existing subsidized legal services delivery mechanism is already overwhelmed with clients, so the chances of the CBO staffers' constituents getting access to bespoke legal services are slim.<sup>190</sup> That is, indeed, the rationale for exploration of surrogacy projects like the robust version of LACI.<sup>191</sup>

There is considerable benefit, though, in this aspect of a lawful LACI, even if it fails to achieve the goals of the surrogacy mission. Because the CBO staffers see constituents/clients on a regular basis and often know the context of their family, housing, employment, financial, and health conditions better than any intake worker or screener at a legal aid organization can discern from that setting, legal issues might be recognized sooner, and those with the most need for tailored, direct legal assistance could get it. The efficiency and reliability of the triage system operating at the legal aid agency could be improved considerably through this interaction. That, in combination with the staffers' connecting constituents to technology resources in ways that could be most useful to them at the time that they need such guidance, could make some difference advancing access to legal help.

#### IV. IMAGINING A MORE ROBUST SURROGACY PROTOCOL

This Article will now imagine a regime where a more robust LACI arrangement would be acceptable. This Article examines the risks, benefits, and

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187. See JOHN M. GREACEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE "STATE OF THE ART" (2011), available at <https://www.srln.org/system/files/attachments/Greacen50StateReviewReportNationalEdition2011.pdf> [<https://perma.cc/CD4H-Y44R>].

188. See, e.g., Bertelli, *supra* note 169, at 22 (describing the Women's Re-Entry Resource Network (WRRN) in Cleveland).

189. See, e.g., Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOTIATION L. REV. 235, 290 (2002) (noting the benefit of nonlawyer mediators making informed referrals to lawyers).

190. See Latonia Haney Keith, *Poverty, The Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 96 (2016) ("[T]he system is currently drinking from a fire hose.").

191. That reality serves to undermine the mission of the programs described by Anthony Bertelli. See Bertelli, *supra* note 169. The justification for the reentry program was ultimately to make referrals to legal aid and pro bono lawyers. *Id.* at 22. But the very need for the program was the absence of available lawyers to serve those in need.

safeguards that such an arrangement would entail, and concludes that a more just system would permit a surrogacy project that used existing CBO resources more directly, while acknowledging that the benefits of that project impose some costs that its users would need to accept. It first explores the risks of a robust LACI, and then sketches out some systemic safeguards that might minimize, though not eliminate, those risks.

#### A. ASSESSMENT OF RISKS

A robust surrogacy project will use nonlawyer CBO staffers to advise clients on critical, if basic, legal rights, duties, deadlines, and tactics that the clients need to appreciate in order to avoid suffering losses within the legal system.<sup>192</sup> If UPL bars the CBO staffers from providing that service, it would be because of a worry that the staffers, not having graduated law school or passed the bar examination, do not have the training, expertise, or judgment to provide useful, reliable guidance.<sup>193</sup> In addition to competence concerns, nonlawyers do not assure the clients the same ethical commitments that lawyers provide,<sup>194</sup> and no licensing agency oversees nonlawyers making such commitments.<sup>195</sup> The risks to the constituents/clients, then, are readily stated—they might very well receive bad advice, lose rights, and risk unfaithful assistance. Purely for purposes of this analysis, let us accept these components as understandable.<sup>196</sup>

Equally obvious, though, and almost as well-rehearsed, is the rejoinder that the UPL justifications implicitly compare the predicament of a client aided by a nonlawyer with a client aided by a lawyer.<sup>197</sup> In that comparative setting, it is straightforward (if sometimes misleading<sup>198</sup>) to conclude that the client would be much better with a lawyer providing assistance instead of a less-trained, less-monitored nonlawyer. But that comparison is inapt—even cruelly inapt. The more candid assessment would be to compare the benefits to a low- or moderate-income client of assistance from a nonlawyer CBO staffer versus no assistance at all, and operating within the legal system on his own. With that comparison, as many have pointed out, the answer is just as obvious as with the first, inapt comparison. There is little doubt that having some reasonably informed and educated

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192. See Cantrell, *supra* note 36.

193. This is an obvious and well-established rationale for UPL protections. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.1.2, at 828–32 (1986). See also George J. Annas, *Ethics Committees: From Ethics Comfort to Ethical Cover*, 21 HASTINGS CTR. REP. 18, 21 (“[E]ncouraging a group of lay people to attempt to practice law makes no more sense than encouraging a group of lawyers to attempt to perform surgery.”).

194. See Denckla, *supra* note 2, at 2593 (summarizing the argument).

195. See Longobardi, *supra* note 149, at 2049.

196. Each of the risks identified in the text is subject to considerable uncertainty. For one source that canvasses the competing arguments, see WOLFRAM, *supra* note 193, §15.1.2, at 828–34.

197. See, e.g., RHODE, *supra* note 22.

198. See *infra* text accompanying notes 200–02.

guidance from an experienced participant in the systems that matter to the client is better overall than no guidance at all.<sup>199</sup>

The point might be asserted even more strongly. Given the nature of the “sharp legal things”<sup>200</sup> into which low- and moderate-income clients so often bump, and the lived experiences of the clients and their struggles, it is a fair question to ask whether social workers and CBO staffers might be *better qualified* than lawyers to offer guidance,<sup>201</sup> or at least the kind of guidance needed for the preliminary, out-of-court, responsive tactics that the surrogacy project contemplates. Recall that the LACI project would not involve CBO staffers appearing in court, or drafting pleadings other than through available forms or templates,<sup>202</sup> tasks for which lawyers are, at least arguably, better suited in light of their professional training. But a CBO staffer who is familiar with the typical procedures faced day after day, crisis after crisis, by her constituents, could end up knowing better than some pro bono lawyers from private law firms how to navigate the systems that the clients must survive.<sup>203</sup>

While the staffers would not appear in court or draft free-style pleadings, they would strategize with clients, suggest actions that would have real, and at times irrevocable, consequences,<sup>204</sup> and aid them to understand the relevant deadlines. If the array of options available to a client enmeshed in a court proceeding were (a) representation by a lawyer; (b) assistance from a CBO staffer with limited access to a lawyer and full access to online assistance; or (c) handling everything on his own, the first choice is likely the most preferred, but if the first option is not available, the second option will often be preferable to the third. If the UPL

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199. See Cantrell, *supra* note 36, at 885–90; Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 207 (2014).

200. Wexler, *supra* note 13, at 1050.

201. Commentators have argued that nonlawyers are as capable as lawyers in some settings. See Cantrell, *supra* note 36, at 885 (reporting on some limited empirical studies showing nonlawyers as capable as lawyers for certain purposes); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1146–49 (2000) (noting and critiquing the argument that nonlawyers are less qualified than lawyers, but acknowledging some settings where it holds true); cf. Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the “Legal Ethics” Perspective*, 73 IND. L.J. 665, 671–72 (1998) (arguing that in the role of guardian ad litem “[s]ocial workers and trained lay people may be better qualified” than lawyers).

202. The surrogacy project could, however, include the CBO staffer assisting a client to complete a court form with which the staffer is familiar, including on-line forms. See *supra* text accompanying notes 122–86. Some court protocols permit laypersons to assist litigants with court forms, such as in domestic violence protection proceedings. See, e.g., 80 Op. Att’y Gen. Md. 138, 139 (1995).

203. Cantrell, *supra* note 36, at 886–87 (summarizing the findings in HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998)).

204. For instance, an intake worker at a housing resource agency might assist a public housing tenant to complete a form answer to an eviction complaint, using an online resource developed for that purpose. The defenses raised in that answer, and any that the tenant-defendant did not raise, would determine the issues that the housing court judge or jury could consider. See, e.g., E. GEORGE DAHER ET AL., 33A MASS. PRAC., LANDLORD AND TENANT LAW § 16:3 (3d ed. 2017) (tenant defenses waived if not raised in responsive pleading).

restrictions have as their goal to protect the interests of those clients, in a benevolent paternalistic fashion,<sup>205</sup> it is safe to assume that those clients would freely choose to take the risks that accompany the assistance by the CBO staffers.

## B. SAFEGUARDS

Let us continue this thought experiment by accepting for present purposes that a surrogacy program like the robust LACI described at the beginning of this Article makes sense as an access-to-justice initiative. Under existing law the initiative possibly falters on UPL grounds, but let us explore ways in which the prevailing UPL enforcement strategies might be adjusted to accommodate such an initiative. This exercise calls for nuance.

Two blunt suggestions warrant only brief consideration. First, the surrogacy proposal need not, on its own, require a wholesale jettisoning of the UPL machinery. Some observers advocate for full access to counseling and advising of clients by nonlawyers, regardless of context,<sup>206</sup> but that stance is not common. Accommodation of surrogacy will more likely call for some more subtle tweaking of the existing restrictions rather than a wholesale abandonment of them.

The second proposal that ordinarily would have considerable currency in a context such as this, but in fact has none here, is the familiar idea of licensing nonlawyers to perform specified duties, having been tested and monitored in a fashion similar to that applicable to lawyers.<sup>207</sup> Some states have developed such protocols in recent years.<sup>208</sup> The licensing concept has substantial merit, but it does not work for the innovation offered by surrogacy projects like LACI. The beauty of LACI is in its organic use of staffers who work within the street-level bureaucracies of CBOs. Those staffers have their important primary day (or night) jobs, providing social work support, housing search help, domestic violence counseling, primary health care, and the like. Some of the CBO staffers may wish to proceed through the steps necessary to be certified as a licensed

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205. See WOLFRAM, *supra* note 193, at § 15.1.2, at 832 (“Nonlawyers are hardly ever consulted about the wisdom of particular [UPL] rules. . . . [T]he protection [of nonlawyers by UPL rules] is probably unwanted and thus paternalistic in a most objectionable way.”); Denckla, *supra* note 2, at 2595.

206. See, e.g., Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1269 (1995) (“Lawyers and nonlawyers would be able to provide legal services, but only those admitted to the bar would be able to call themselves ‘lawyers.’”).

207. The proposal to license nonlawyers to assist in certain low-complexity, routine legal matters has been a familiar one within the access-to-justice universe for decades. For some pioneering examples of this idea, see Kritzer, *supra* note 178, at 920–21; Rhode, *Policing the Professional Monopoly*, *supra* note 143, at 38; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 709–10 (1996).

208. Washington State recently introduced a “limited license legal technician” (LLLT) program. See *Become a Legal Technician*, WASH. ST. B. ASS’N, (Dec. 28, 2017), <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians> [<https://perma.cc/B4RC-VW3K>]. California has had a Legal Document Assistants program since 2000. See CAL. BUS. & PROF. CODE §§ 6400–15 (West 2017); Longobardi, *supra* note 149, at 2075–76.

paralegal authorized to provide certain services, but the odds are that not many of them would, or could, given the demands on their time. If LACI were to work effectively, it would need to be implemented using the existing staff of the CBOs, trained and then supported by the lawyers. The surrogacy model assumes the participation of unlicensed staffers.

The reality presents a challenge, then, to this thought experiment. How would one limit the use of nonlawyers to certain activities or contexts, without a licensing and monitoring scheme? It may be impossible, but some criteria warrant further exploration. Consider this possibility: ATJ proponents might seek dispensation from the state regulatory agency that enforces UPL violations<sup>209</sup> and the state attorney disciplinary authorities<sup>210</sup> for an express, structured program with identified safeguards. The proposal might seek permission for employees and volunteers of community-based service providers to advise, for no compensation, low- and moderate-income clients about identified legal areas, as long as the program is overseen by a local legal services or public interest organization. The lawyers working for the oversight law firm must treat each participating CBO as its client, triggering competence duties and malpractice liability exposure for the firm.<sup>211</sup> As long as the supervising law firm has provided competent oversight, training, and back-up advice, the clients will have no right to hold the CBO or its staffers liable for negligent advising.

Let us examine each of the elements of this hypothetical surrogacy ATJ initiative, including the implementation challenges each promises.

*Oversight and structural management by a legal services organization:* In this imagined world, UPL restrictions remain in place generally, and well-meaning nonlawyers (as well as other nonlawyers) who advise clients on matters that qualify as the practice of law risk sanctions for doing so, unless they fit within the structured surrogacy initiative. The safe harbor/exemption from UPL enforcement follows from the legal services provider (for our purposes, MCLA) entering into a contractual arrangement with CBOs to organize the advising efforts.

*Identifying CBOs:* It is not obvious that the system needs to identify *ex ante* what types of organizations qualify as appropriate community-based organizations eligible to participate in the surrogacy initiative. The judgment of MCLA may suffice. As a practical matter, MCLA will only enter into a partnership with those organizations that regularly serve low- and moderate-income clients who,

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209. See Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1156 (2008) (describing the array of UPL enforcement agencies).

210. Because assistance with UPL constitutes a breach of the ethical duties of a licensed lawyer, the surrogacy program must include a buy-in from the attorney discipline authority, to provide a safe harbor for the lawyers involved.

211. See *supra* text accompanying notes 123–30 (discussing the prospect that a CBO might not necessarily qualify as a client).

as the CBO knows, encounter common legal issues on a regular basis.<sup>212</sup>

*Applying any safe harbor to pro bono advice provided to low- and moderate-income clients:* A surrogacy initiative seemingly would only garner institutional support, and be justified in light of broadly-accepted UPL rationales, if it supported free advice to clients who cannot afford lawyers in the commercial legal services market. The surrogate lawyering model would not include businesses that charge for their services. This component of a surrogacy initiative is quite self-evident, but it invites complications at the operational level. Not all CBOs offer their services for free. Hospitals and community health centers charge their patients, for example. The safe harbor applicable to a LACI-type program would need to ensure that the health center does not add any further charges for guidance offered on legal matters.<sup>213</sup> While the LACI-type program ought to apply only to low- and moderate-income clients, if a safe harbor were incorporated, it would be impractical to expect income-screening as a condition of participation within the program and the resulting exemption from UPL restrictions.

*Limiting the areas of law permitted to be addressed:* A sensible and workable surrogacy arrangement would need either to identify *ex ante* the legal areas for which the staffers may advise clients, or, alternatively, require that the written agreement between MCLA and the CBO articulate the areas for which MCLA would be responsible, and establish the bounds of advice-giving in that fashion. The primary point is that participating in a LACI-type program should not give the staffers permission to freely advise clients on whatever matters they happen to encounter. There must be some relationship between the training and support offered by MCLA and the guidance provided by the staffers. It is difficult to imagine a surrogacy arrangement that does not include housing, family, and debt collection, all areas traditionally deemed the practice of law<sup>214</sup> and the source of serious need for representation in most courts hearing those matters.<sup>215</sup> Employment law is a plausible candidate as well. The possibility of bankruptcy

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212. For a narrative exposition of the kinds of agencies that poor persons use, and the problems they encounter and share there, see KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 99–105 (2015).

213. Given the funding mechanisms for most health providers, with private or public insurance accounting for nearly all the revenue of the operations, there is little worry that the CBO would add charges for advising patients about the legal matters discussed. Indeed, because one of the legal issues addressed in CBO settings with low-income patients is eligibility for public benefits, including Medicaid, reports show that a medical-legal partnership program can result in increased revenues for a hospital. See Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. SOC. JUST. 139, 144–45 (2010) (reporting the data); Jon D. Levy, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 574–75 (2010) (discussing the studies).

214. See Anderson, *supra* note 120, at 138 (debt collection); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2600 (2014) (housing and family law).

215. See Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 661–69 (2006) (describing the challenges of unrepresented litigants in a crowded urban court setting).



advice serves as a useful test of the limits of a surrogacy model, given the great need for bankruptcy advice but the inherent, and often confounding, complexity of that area of the law.<sup>216</sup>

*The liability exposure:* If in our imagined world a surrogacy initiative proceeded, some clients will receive advice that is misguided—or, that appears to the client to have been misguided because it did not work. That consequence represents an explicit factor in the cost/benefit analysis of permitting some nonlawyer advising in the ATJ setting. The risk exists that nonlawyers might provide guidance that is less sophisticated than that provided by a lawyer, or that overlooks a nuance that the lawyer would catch. But, as the calculus we reviewed concluded,<sup>217</sup> it will often be better, overall, for clients who cannot have access to any lawyer to have access to a trained staffer, should they so choose. The clients will understand that the staffer is not a lawyer, and that disclaimer may be sufficient to protect the CBO. A more ambitious, but also problematic, suggestion is that the clients would agree that should the guidance not work they will have no right to present claims against the staffer or the CBO for providing improper advice, absent intentional misconduct on the part of the staffer or the CBO. Most, and perhaps all, jurisdictions permit knowing waivers of liability in many circumstances that include risks that the participants willingly assume.<sup>218</sup> The surrogacy initiative, much like ski slopes, kayak rentals, sporting events, and the like,<sup>219</sup> could not function without the clients' acknowledging and accepting the risks.<sup>220</sup> As with most waivers used in the business world, claims based on intentional misconduct would survive.<sup>221</sup>

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216. For an in-depth discussion of efforts to assist unrepresented bankruptcy debtors, see Lancot, *Scriveners*, *supra* note 147, at 841–49.

217. See *supra* text accompanying notes 196–202.

218. See RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 2000) (“When permitted by contract law, substantive law governing the claim, and applicable rules of construction, a contract between the plaintiff and another person absolving the person from liability for future harm bars the plaintiff’s recovery from that person for the harm.”); *contra* Peter M. Kinkaid & William J. Stuntz, Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1112 (1983).

219. See, e.g., *My Fair Lady of Georgia, Inc. v. Harris*, 364 S.E.2d 580, 581 (Ga. App. 1987) (holding that agreement that released fitness club “from liability for injury caused by any negligence” was valid and enforceable; member contractually assumed the risk of injury); *Sharon v. City of Newton*, 769 N.E.2d 738, 747 (Mass. 2002) (holding that signed release barred a claim for injuries to a high school cheerleader). For a practical discussion of the use of releases, see Steven B. Lesser, *The Great Escape: How to Draft Exculpatory Clauses that Limit or Extinguish Liability*, 75 FLA. B. J. 10 (2001).

220. The logistical arrangements needed to obtain informed consent within the CBO environments are likely somewhat daunting. Not every homeless person at a shelter or domestic violence victim will agree to receive advice from a staffer, so the informed waiver of any liability claims would, presumably, be discussed and negotiated only when advice is available and sought by the client. The waiver language therefore would not be included in the typical waiver forms signed by all CBO constituents, implying that the advice provided by the staffers would need to be separately identified and agreed-upon.

221. Releases that purport to cover intentional misconduct are often unenforceable as against public policy. See RESTATEMENT (THIRD) OF TORTS, *supra* note 218, at § cmt. d (“Generally, contracts absolving a party from intentional or reckless conduct are disfavored.”); Paula Duggan Vraa & Steven M. Sitek, *Public Policy Considerations for Exculpatory and Indemnification Clauses: Yang v. Voyageaire Houseboats, Inc.*, 32 WM. MITCHELL L. REV. 1315, 1318 (2006).

The clients would also have no claims against the oversight law firm, such as MCLA, given the absence of any relationship between MCLA and the clients, as described earlier.<sup>222</sup> But MCLA would owe the same competence duties to the CBOs as MCLA would owe to a conventional client. Those duties depend on the nature of the legal services that MCLA has agreed to provide.<sup>223</sup> MCLA must therefore provide competent training materials and instruction to the staffers, and provide capable follow-up advice to staffers when appropriate. If the client waiver limits claims against the CBOs, the claims against MCLA would be similarly scarce, since the only likely harm suffered by a CBO would result from a colorable claim presented by a client harmed by the CBO's advice.

## V. THE UPL IMPLICATIONS OF A SURROGACY INNOVATION

With the innovations just described, perhaps a LACI-type program could work. Its safe-harbor conception for certain kinds of nonlawyer advising presents delicate challenges for the established bar that has supported UPL restrictions consistently over the past century. Arguments favoring LACI by ATJ proponents would not have sufficient credibility or persuasion without assimilating in some fashion the conventional UPL rationales. If UPL restrictions are grounded in the values their supporters claim, how can bar leaders accept lawyering activity by unlicensed nonlawyers on behalf of the most vulnerable of client populations?<sup>224</sup>

Critics of strict UPL limits argue that those policies recognize little more than guild protectionism.<sup>225</sup> Bar leaders disagree, but their arguments are, frankly, weaker than those of the critics.<sup>226</sup> The chief—and often the *only*—complainants about nonlawyers encroaching upon lawyers' terrain are lawyers,

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222. See *supra* text accompanying notes 73–97.

223. A lawyer providing “unbundled,” or limited, discrete-task services to a client owes the same duty of care to that client, but understood within the context of the limited service. See, e.g., *AmBase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033, 1036–37 (N.Y. 2007) (holding that law firm was not liable for failure to address an issue because of limited retainer agreement); *Lerner v. Laufer*, 819 A.2d 471, 482–83 (N.J. Super. Ct. App. Div. 2003) (same); Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166 (2012); Nina Ingwer Van Wormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1005 (2007).

224. Protection of vulnerable client populations is a common justification for UPL restrictions. See RHODE, *supra* note 22, at 82–83.

225. *Id.* at 76, 82–83; Denckla, *supra* note 2, at 2581.

226. See, e.g., Wilford A. Hahn, *Fighting UPL—From a Penknife to a Sword*, 50-AUG. RES GESTAE 14, 18 (2006) (“The primary purpose of prohibiting the unauthorized practice of law arises from the need to protect the public from representation by individuals who are not qualified and do not have the legal training necessary to represent others . . .”). For the opposing view, see, e.g., WOLFRAM, *supra* note 193, § 15.1.2, at 832; Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159, 215 (1980) (“Barring actual evidence of serious injury, the profession has no justification, except perhaps for purely selfish reasons, for denying to the public the right to choose from whom it will purchase legal services.”).

not consumers.<sup>227</sup> The otherwise-persuasive arguments on the merits in support of a LACI-type program create an unfortunate “optics” problem for bar leaders. A LACI safe harbor is concededly unthreatening to the interests of the private bar. The clients aided by LACI are not the customers of private lawyers—the choice without LACI, recall, was between a subsidized or pro bono lawyer, or the client proceeding pro se. There is virtually no commercial market for the advice provided freely by the CBO staffers.<sup>228</sup> If ATJ proponents were to succeed in persuading bar authorities to permit a surrogacy experiment like LACI, the cynical reaction—that UPL restrictions are truly driven by market concerns—will be difficult to avoid.

There is yet another, related cynical response that surrogacy proponents must anticipate. Defenders of UPL restrictions have a more-than-plausible collection of arguments for restricting the practice of law to lawyers grounded in the increasingly complex nature of law, the regulatory state, and civil procedure.<sup>229</sup> The consumer-protection justification for UPL limits is central to that enterprise. Employing arguments well-accepted within public health circles, bar leaders prohibit persons with legal problems from trying untested and possibly dangerous remedies, even if the users are willing to take those risks.<sup>230</sup> A LACI exception appears to waive that protection only for the poor and the vulnerable. If the underlying UPL-limiting arguments have merit, one needs to articulate a principled basis on which to depart from those justifications.

The most promising response would build upon insights shared by Lucie White, who argues, “boldly,” as she describes it, that “the social needs of disenfranchised groups should be addressed *sui generis*, in ways that reflect *their own* experiences of need, their embedded historical and cultural realities, the societal power landscapes of their perspectives, their capacities, and their normative aspirations[.]”<sup>231</sup> White critiques efforts to fit the legal representational needs of

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227. Rhode, *Policing the Professional Monopoly*, *supra* note 143, at 33–34; Rhode & Ricca, *supra* note 214, at 2591–92.

228. I acknowledge a developing counter-example to the assertion in the text. Among the most vibrant and exciting ATJ developments in the past decade is the emergence of low-bono incubator projects, where recent graduates developing new solo practices offer unbundled and otherwise below-market legal services to clients who are not served by free legal aid and pro bono. *See, e.g.*, Laura D. Cohen, Luz E. Herrera & William T. Tanner, *Launching the Los Angeles Incubator Consortium*, 83 UMKC L. REV. 861 (2014); Herrera, *supra* note 10. The clients of LACI could be, in some settings, the clients of the incubator lawyers. Given the ATJ orientation of the incubator programs across the country, and given the vast number of underserved clients facing the kinds of legal problems a LACI-type project would aim to address, the likelihood of the incubator bar resisting a surrogacy experiment are exceedingly slim.

229. Larry O. Natt Gannt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699, 740 (“[L]aw is becoming increasingly complex.”).

230. *See, e.g.*, Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007); Austin Winniford, Note, *Expanding Access to Investigational Drugs for Treatment Use: A Policy Analysis and Legislative Proposal*, 19 HEALTH MATRIX 205 (2009).

231. Lucie White, *Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation?*, 67 FORDHAM L. REV. 2573, 2578 (1999) (emphasis in original).

disadvantaged populations into the schemas applicable to those who have means, especially as the gulf between those two groups grows wider. She notes similar themes within progressive public health literature, challenging “a single normative vision of ‘equal health care’ across the wealth spectrum.”<sup>232</sup> The traditional models of addressing legal needs of low- and moderate-income persons remain frustratingly ineffective, and the bar leadership recognizes that reality. Without abandoning the ideals on which the UPL doctrine has grown, those leaders may be open to innovative systems, like LACI, that recognize that (even given the established bar’s assumptions) some guidance is better than no guidance.

### CONCLUSION

A legal guidance program staffed primarily by nonlawyers, with licensed counsel remaining in the background in a purely supportive role, might pass ethical muster, but the bar’s firm control over the practice of law discourages such an effort. While the ambiguity about the definition and limits of the practice of law offer some glimmers of hope for such a program’s success, a more prudent approach would worry about the implications of unauthorized practice. The resulting constraint on innovation in the field of access-to-justice is unfortunate. Some protocols might be included in such a program that, while limiting the effectiveness of the initiative, might ensure its success. A more robust surrogacy arrangement, if approved by a forward-thinking jurisdiction, could achieve important access-to-justice goals at limited risk of societal harm, or harm to the profession. The bar leadership ought to welcome that kind of innovation, as its benefits outweigh its costs by a considerable margin.

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232. *Id.* at n.30 (citing WOMEN, POVERTY, AND AIDS: SEX, DRUGS, AND STRUCTURAL VIOLENCE (Paul Farmer et al. eds., 1996)).