REGULATORY BARRIERS TO JUSTICE IN MISSISSIPPI

Benjamin P. Cooper*

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In a country that is widely considered to have the greatest justice system in the world, access to that system remains an embarrassing problem. As president, Jimmy Carter lamented, “Ninety percent of our lawyers serve ten percent of our people,” and that remains true today.¹ Many statistics illustrate this point, but my current favorite (or, perhaps I should say, least favorite) is the 2011 World Justice Project Rule of Law Index that ranked the United States twenty-first out of the sixty-six countries studied in providing access to civil justice and a woeful twentieth out of twenty-three countries in its income group.² What do those numbers mean for ordinary Americans with legal problems? At

* Assistant Professor of Law, University of Mississippi School of Law. I would like to thank Debbie Bell for her helpful comments on an earlier draft.


least eighty percent of the legal needs of the poor, and two-thirds of the legal needs of middle-income Americans are not met. Further, the access-to-justice problem has grown exponentially worse since the economic crisis hit the United States in 2008: more people need free legal services, but federal and state funding for legal services has plummeted.

What makes this situation particularly disconcerting is the role that lawyers and the organized bar have played in perpetuating it. As Deborah Rhode and other commentators have long noted, lawyers say they want to be part of the solution, but they are regrettably part of the problem: “[T]he bar’s performance concerning access to justice reveals a dispiriting disjuncture between principle and practice.” This is unfortunately true in Mississippi, just as it is elsewhere. For example, two years ago, when the Supreme Court Rules Committee on the Legal Profession issued a proposal that would mandate twenty hours of pro bono service for all members of the bar, the proposal drew

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4 Deborah L. Rhode, ACCESS TO JUSTICE 3 (2004).

5 See e.g., Anne Barnard, Top Judge Makes Free Legal Work Mandatory for Joining State Bar, N.Y. TIMES (May 1, 2012), http://www.nytimes.com/2012/05/02/nyregion/new-lawyers-in-new-york-to-be-required-to-do-some-work-free.html?_r=0. The New York Times reports that in New York, since the beginning of the economic downturn, requests for assistance have grown forty percent for health care issues, fifty-four percent for unemployment insurance and work-related problems, sixteen percent for domestic violence and eight hundred percent for foreclosures. Id.


7 Deborah L. Rhode, Lawyers as Citizens, 50 WM. & MARY L. REV. 1323, 1330-31 (2009) (“It is a shameful irony that the nation with the world’s highest concentration of lawyers has one of the least adequate systems for making legal services accessible.”).

8 Id. at 1329; see also David A. Hyman, When and Why Lawyers Are the Problem, 57 DEPAUL L. REV. 267, 273-74 (2008).
sharp criticism from the state’s lawyers\(^9\) and remains stalled, with no prospect of being adopted.\(^10\)

This Article focuses on another example: the state’s unauthorized practice laws that limit consumer choice. In an ideal world, all consumers with legal problems could hire good lawyers at a reasonable cost, but most consumers cannot afford a lawyer. These consumers might benefit from the assistance of a nonlawyer professional at low or no cost. In some cases involving routine work—obtaining an uncontested divorce, drafting a simple will, filing a tax return—nonlawyer assistance might serve consumers just as well and at a lower price. After all, in many law firms, paralegals do most of the work on these kinds of mundane matters. As one commentator colorfully described the use of lawyers in such matters: “[F]or many routine conveyances, retaining counsel may be tantamount to ‘hir[ing] a surgeon to pierce an ear.’”\(^11\) In other cases where consumers desperately need a lawyer but cannot afford one—a tenant trying to halt an eviction or a victim of domestic violence seeking an order of protection—nonlawyer assistance is often better than no assistance.

Mississippi’s current court-defined definition of the practice of law and the new proposed definition currently awaiting the Supreme Court’s approval are both so broad they prevent competition from nonlawyer professionals who might be able to provide the same services as lawyers at low or no cost. Part I provides a short background on unauthorized practice of law regulation. Part II


\(^10\) See MISS. RULES OF PROF’L CONDUCT R. 6.1 (proposed amendment Mar. 24, 2005 & Aug. 1, 2011), available at http://courts.ms.gov/rules/rulesforcomment/2010/RPC6.1.pdf. The deadline for comments expired on October 1, 2010. *Id.* No action, however, has been taken to implement the proposed changes since the initial deadline expired. *Id.*

\(^11\) Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 88 (1981) (quoting Robert Ellickson); see also *Hulse v. Criger*, 247 S.W.2d 855, 861 (Mo. 1952) (“[G]eneral warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training.”).
examines Mississippi’s unauthorized practice of law rules and their effect on access to justice.

I. A BRIEF OVERVIEW OF UNAUTHORIZED PRACTICE OF LAW (UPL)

A. Regulation

Until the Civil War, there were few limits on the ability of nonlawyers to engage in activity (both in court and out of court) that would be considered the unauthorized practice of law today.\textsuperscript{12} Since then, however, with increasing intensity, lawyers and bar associations have campaigned aggressively against unauthorized practice of law.\textsuperscript{13} Today, almost all states have enacted statutes prohibiting UPL, courts often resort to their “inherent powers” over lawyers to forbid UPL,\textsuperscript{14} and in some states, the professional rules forbid lawyers from “assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”\textsuperscript{15}

The principal justification articulated by the bar for limiting nonlawyer practice is protecting the public from harm caused by incompetent laymen providing legal services; but, upon closer examination, enforcement of UPL provisions appears to be more about the bar protecting itself.\textsuperscript{16} As one critic vividly put it: “If you’re still prepared to believe that professional self-regulation is all about protecting the public, I’ve got a bridge in Brooklyn that you’ll want to take a look at.”\textsuperscript{17}

Why do commentators say this? There is no empirical evidence that consumers have been harmed by lay assistance,\textsuperscript{18} or

\textsuperscript{13} Id. at 2583-84.
\textsuperscript{14} See generally id. at 2587-92 (explaining the approaches used to control UPL via statutes and case law).
\textsuperscript{15} See \textit{e.g.}, MISS. RULES OF PROF’L CONDUCT R. 5.5(b) (2012).
\textsuperscript{16} Rhode, \textit{supra} note 7, at 1330 (The bars’ “policies on nonlawyer practice and pro se assistance reflect traditional anti-competitive bias.”).
\textsuperscript{17} Hyman, \textit{supra} note 8, at 274.
to suggest that lawyers are any better at providing certain routine services than nonlawyers.\textsuperscript{19} Sometimes, a consumer could meet his needs with—or at least benefit from—the assistance of a good standardized form or a qualified nonlawyer practitioner, but the bar has consistently resisted these alternatives. “Over the last half-century, state bars repeatedly have fought publication of self-help law books; opposed introduction of standardized forms; prevented court clerks from providing routine legal assistance; shut down form preparation services; and blocked licensing systems for nonlawyer practitioners.”\textsuperscript{20}

What has harmed consumers is the bar’s campaign to prevent lay competition. The bar’s aggressive protectionism has failed to “acknowledge the social costs of lawyers’ monopoly, particularly for low-income consumers who could neither afford an attorney nor proceed without some legal assistance.”\textsuperscript{21} Those consumers would benefit from the assistance of “qualified lay competitors,” but “[t]he bar’s campaign against the ‘unauthorized practice of law’ by even [these] qualified lay competitors” has precluded this option, thereby “help[ing] to price justice out of reach for the vast majority of low-income individuals.”\textsuperscript{22}

II. UPL IN MISSISSIPPI

A. Mississippi’s Current UPL Regulation

Although the Mississippi Code makes it “unlawful for any person to engage in the practice of law in this state who has not been licensed according to law,”\textsuperscript{23} and renders such unauthorized practice a misdemeanor,\textsuperscript{24} the state has no specific statutory definition for the "practice of law." The Mississippi court rules also fail to define the practice of law.\textsuperscript{25} In \textit{Darby v. Mississippi State}

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\textsuperscript{19} Rhode, \textit{supra} note 11, at 85-90. \\
\textsuperscript{21} Id. at 703. \\
\textsuperscript{22} Rhode, \textit{supra} note 7, at 1330. \\
\textsuperscript{23} Miss. Code Ann. § 73-3-55 (2010). \\
\textsuperscript{24} Miss. Code Ann. § 97-23-43 (2011). \\
\textsuperscript{25} See Miss. R. App. P. 46 (“Attorneys who have not been admitted to practice in the Supreme Court or the Court of Appeals shall not be permitted to argue orally, or file briefs or any paper in any cause in either Court.”).
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Board of Bar Admissions, however, the Mississippi Supreme Court, claiming the “inherent authority . . . to decide what acts constitute the practice of law” has defined it broadly and vaguely:

The practice of law includes the drafting or selection of documents, the giving of advice in regard to them, and the using of an informed or trained discretion in the drafting of documents to meet the needs of the person being served. So any exercise of intelligent choice in advising another of his legal rights and duties brings the activity within the practice of the legal profession.

This definition is troubling. First, it is broad and imprecise: “any exercise of intelligent choice in advising another of his legal rights” sweeps in a large number of activities. Second, the definition places limits on the ability of consumers to seek nonlawyer assistance even when that assistance may improve consumers’ access to justice. The Mississippi Attorney General has opined that under Darby, nonlawyers may not represent employees before the Civil Service Commission. Nor can nonlawyers, including parent advocates, represent a party in due process hearings conducted pursuant to the Individual with Disabilities Education Act. Similarly, a Mississippi bankruptcy judge applied Darby to sanction a party whose pleading had been “ghostwritten” by a knowledgeable nonlawyer family member even though that family member had not been paid for her work. Although the nonlawyer’s assistance clearly improved the quality of the motion—the Court noted, for instance, that the pleading cited the appropriate bankruptcy rules and contained a “fairly sophisticated legal analysis”—the Court held that the family

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26 185 So. 2d 684 (Miss. 1966).
27 Id. at 687-88.
28 Id. at 687.
member had engaged in the unauthorized practice of law and therefore struck the motion.\textsuperscript{32}

\textbf{B. Mississippi’s proposed new rule}

In 2009, the Mississippi Bar created a task force to study unauthorized practice of law issues in Mississippi, and, on June 29, 2011, the Bar recommended significant changes to various Mississippi rules relating to unauthorized practice.\textsuperscript{33} Most importantly, the Bar proposed an extremely lengthy and detailed definition of the practice of law.\textsuperscript{34} The proposed rule provides that:

The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to:

Holding oneself out as \ldots an attorney \ldots .

Undertaking to give advice or instruction to another in any matter involving the application of legal principles to facts \ldots .

Undertaking to prepare, write or dictate for another documents or instruments of any character requiring knowledge of legal principles or legal documents or agreements involving or affecting the legal rights of a person.

Certifying or opining concerning titles to real estate \ldots .

Undertaking to represent the interest of another before any tribunal \ldots .

Giving advice or counsel to any person \ldots in a transaction in which an interest in property is transferred \ldots .

\textsuperscript{32} Id. at *2, *4.


Undertaking to close a transaction involving the transfer of an interest in property . . . .

Engaging in any other act which may indicate an occurrence of the authorized practice of law in the state of Mississippi as established by case law, statute, court rule, ruling, or other authority. 35

After defining the practice of law extremely broadly, the proposed rule carves out a number of exceptions. Some of these exceptions are likely to improve access to justice. Among these is the ability of nonlawyers, at least under very specific circumstances, to assist consumers with legal problems. A nonlawyer may assist consumers in the following ways:

Acting as a lay representative authorized by administrative agencies . . .

Acting as a non-lawyer advocate under the supervision of a court of the State of Mississippi. [and]

Acting as a victim service representative acting with [sic] the scope of the statutes of the State of Mississippi. 36

The exceptions also exempt court employees who interact with the public by permitting them to:

Provid[e] clerical assistance to another to complete a form provided by a court for the protection from abuse, harassment, and violence when no fee is charged to do so . . . .

Serv[e] in a neutral capacity as a clerk or a court employee responding to requests for general information from the public. 37

Further, the definition of the practice of law excludes “[p]ublic officials acting within the scope of their official duties.” 38

35 Id.
36 Id.
37 Id.
38 Id.
In addition, the proposed rule specifically exempts the work done by a number of nonlawyer professionals even though their work would likely fall within the rule’s extremely broad definition of the practice of law. This list includes insurance professionals investigating claims, real estate brokers preparing contracts for the sale of homes, lenders preparing loan documents, car dealers preparing documents related to a vehicle sale, licensed certified public accountants “practicing within the scope of practice allowed by the State Board of Public Accountancy,” licensed architects “practicing within the scope of practice allowed by the State Board of Architecture,” licensed professional engineers, Licensed Professional surveyors, Registered foresters and certified or registered Petroleum Landmen.39

Finally, the new rule provides exceptions for lawyers (but not nonlawyers) who are inactive in Mississippi but licensed to practice in some other state to provide pro bono service.40

C. Analysis of New Rule

The bar’s attempt to define the practice of law is admirable; a clear statutory definition is better than the uncertainty wrought by Darby.41 Moreover, the proposed rule permits some nonlawyer assistance and contains several provisions that facilitate pro bono service, but it also raises numerous access-to-justice concerns by limiting various forms of nonlawyer assistance.

First, the proposed definition of the practice of law arguably limits the effectiveness of any attempt to implement standard forms in Mississippi, a common strategy to increase access to the courts. The development of simple forms for use by pro se litigants was one of the primary recommendations of a recent report issued by the Mississippi Access to Justice Commission.42 Many states have developed forms for use in relatively uncomplicated actions such as contempt, emancipation, name change, and no-fault

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39 Id.
40 See id.
41 See supra Section II.A.
The rule would not prohibit courts or lawyers from making forms available, but would arguably prevent clerks or other nonlawyers from assisting pro se litigants, some of whom are marginally literate, from completing the forms. Without such assistance, these pro se litigants may not be able to successfully complete the forms and accomplish their goals. The rule arguably limits the role of clerks or other nonlawyers by broadly defining the practice of law to include “preparing, writing, or dictating” a pleading. This may or may not cover the assistance that clerks would provide, but the new rule goes on to exempt from the practice of law individuals who “provide clerical assistance to another to complete a form provided by a court for the protection from abuse, harassment, and violence when no fee is charged to do so.” By including this exception, the proposal arguably suggests that completing a form constitutes the practice of law.

Second, the rule seems to define the work of form providers such as Legal Zoom and US Legal Forms as the unauthorized practice of law. These businesses provide standardized legal forms for sale on their websites. According to LegalZoom’s website, the company employs a 3-step process. First, consumers log on and answer “a series of straightforward questions.” The experience is like using TurboTax. Second, “LegalZoom’s document assistants review [the consumer’s] answers for consistency and completeness” and will contact the consumer if they need “clarification or additional information.” Third, LegalZoom “print[s the consumer’s] legal documents . . . and deliver[s] them . . .

43 See e.g., Court Forms, TENN. STATE CTs., http://www.tsc.state.tn.us/node/707185 (last visited Jan. 12, 2013). Tennessee, for example, has developed an extensive online self-help center that includes an array of forms. Id.
45 Id.
46 To solve this problem, Rule 46(3)(b) could be amended to read, “Providing clerical assistance to another by completing a form provided by a court.”
50 Id.
51 Id.
. along with simple wrap-up instructions.” In some cases, LegalZoom will “file [the consumer’s] documents with the appropriate government agency.” LegalZoom is engaged in litigation in several states over whether its services constitute the unauthorized practice of law. In a recent case of first impression, a federal district court in Missouri found that LegalZoom was engaged in the unauthorized practice of law, because the company “sells more than merely a good (i.e., a kit for self help) but also a service (i.e., preparing that legal document).” Because the proposed Mississippi rule uses language similar to the Missouri statute—both provide that preparing legal documents constitutes the practice of law—a Mississippi court might also find that LegalZoom is engaged in the unauthorized practice of law thereby depriving consumers the option to use LegalZoom’s services.

Third, the rule’s exceptions are uneven. The new rule contains an exception permitting “an employee or principal of a business entity” to represent the entity “in Justice Court for the collection of a debt owed to the entity or for the eviction of a tenant from property of the entity.” This means that nonlawyers can represent creditors in collection actions and landlords in

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52 Id.
53 Id.
56 MO. ANN. STAT. § 484.010 (West 2004) (“The ‘practice of the law’ is hereby defined to be . . . the drawing of papers, pleadings, or documents . . . .”); MISS. R. APP. PRO. 46(2)(c) (proposed amendment) available at http://courts.ms.gov/rules/rulesforcomment/2011/Rules2and46MRAP.pdf. (defining the practice of law to include “[u]ndertaking to prepare, write or dictate for another documents or instruments of any character requiring knowledge of legal principles or legal documents or agreements involving or affecting the legal rights of a person.”); see e.g., Janson, 802 F. Supp. 2d at 1064-65.
landlord-tenant disputes, but that debtors and tenants cannot benefit from the assistance of nonlawyers. This imbalanced approach to nonlawyer assistance is troubling. Permitting this nonlawyer assistance undercuts the task force’s articulated goal of protecting the public from unscrupulous and incompetent nonlawyers.\textsuperscript{58} Moreover, it is a tacit acknowledgement by the rulemakers that some nonlawyer assistance is valuable. Most consumers would benefit from nonlawyer assistance in Justice Court, but the proposed rule prevents any such assistance.

Fourth, the proposed rule is overinclusive because it defines the practice of law to include tasks, like real estate closings,\textsuperscript{59} for which no specialized legal training is required. Many jurisdictions permit nonlawyers to conduct real estate closings with no apparent harm to the public.\textsuperscript{60} Because of this, the United States Department of Justice Antitrust Division has “advise[d] states to reject laws that prohibit non-lawyers from providing real estate closing services.”\textsuperscript{61} Prohibiting laypersons from providing these services limits consumer choice and increases the cost. Mississippi’s overbroad definition of the practice of law is particularly disappointing in light of recent efforts in other states to permit nonlawyer assistance.\textsuperscript{62}

\textsuperscript{58} See supra note 16 and accompanying text.
\textsuperscript{62} A new rule in Washington state permits trained legal technicians to provide certain kinds of assistance including selecting and completing court forms, informing
A final comment about the new rule that is unrelated to access to justice: the new rule does not even achieve what is, on first glance, its primary accomplishment—providing much needed clarification on what constitutes unauthorized practice of law. Although the rule sets forth a lengthy definition of the practice of law—and also provides a lengthy list of exceptions—the proposed rule leaves the definition open-ended by providing that the practice of law includes “[e]ngaging in any other act which may indicate an occurrence of the authorized practice of law in the state of Mississippi as established by case law, statute, court rule, ruling, or other authority.” This provision suggests that instead of supplanting the Supreme Court’s much maligned decision in Darby, the new rule actually codifies it. In other words, under the new rule, the practice of law includes everything listed in the new rule, the definition contained in Darby, and anything else that the Mississippi Supreme Court says is the practice of law.

CONCLUSION

Mississippi’s proposed new definition of the practice of law is overbroad in a number of ways that are likely to have a detrimental impact on access to justice in the state. Protecting the public from unscrupulous and incompetent nonlawyers is a laudable goal, but that goal can be achieved by regulation of nonlawyer assistance rather than prohibition. Moreover, even without regulation, consumers should have a private law remedy (for example a suit for fraud, negligence, or breach of contract) against nonlawyer professionals who provide deficient or dishonest service.

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64 See supra Section II.A.
65 Rigertas supra note 61, at 82, 97-99 (recommending licensing nonlawyer professionals to provide legal advice and representation).
Having criticized the Mississippi rule, however, I feel compelled to make two additional points. First, I want to emphasize that the Mississippi Bar has recently taken important steps to improve access to justice. The Mississippi Access to Justice Commission, which was created by the Supreme Court in 2006, is actively pursuing a number of initiatives to improve access to justice in the state. Moreover, although Mississippi rejected mandatory pro bono service, the state is one of the few to require lawyers to report their pro-bono hours, a requirement that has been shown to increase the number of pro-bono hours that lawyers perform.

Second, it is not easy for me to make recommendations that would harm Mississippi lawyers—including my own former students—who are struggling to find work in a difficult economy. Although I am extremely sympathetic to their plight, keeping lawyers employed is not a sufficient justification for preventing lay competition if that competition will help consumers, as I believe it will. Lawyers need to figure out ways to provide services that are valuable to clients in this increasingly globalized world (and law schools need to figure out ways to help them to do that). Market forces and outside regulation will require them to change if they do not do so voluntarily. As Professor Rhode has said, “Change is inevitable, and the bar’s best interest ultimately lies in constructively assisting the process, not in trying to prevent it.”

See supra note 42 and accompanying text.


Rhode, supra note 7, at 1332 (“Since Florida has required reporting of pro bono work, the number of lawyers providing assistance to the poor has increased by 35 percent, the number of hours has increased by 160 percent, and financial contributions have increased by 243 percent.”).

Rhode, supra note 20 at 707.