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Death and Ethics: Suffocating or Saving Nonlawyer Practitioners with Lawyer Ethics

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ABSTRACT

Lawyers are no longer the only legal practitioners. In several states and trending toward more, lawyers now share their so-called monopoly over the practice of law with nonlawyer practitioners (NPs). These NPs may practice law without the supervision of lawyers and, like nurse practitioners who provide greater access to medicine, this newborn class of legal professionals was created to provide the public with greater access to justice. But the creators of NPs have saddled them with restrictive ethical codes that limit their ability to reach and serve new clients. While generally laudable, certain ethical restrictions lead to fewer NPs and reduce access to legal services for low-income clients. This Essay spotlights this ethical chokepoint and articulates for courts and policymakers the delicate balance in imposing and adapting ethical rules to this new class of legal professionals. Although important access-to-justice and client-protection policy choices are made with the imposition of each ethical rule, these decisions have largely flown under the radar, thereby risking the continued existence of NPs.

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I. INTRODUCTION

Failure isn't fatal, but failure to change might be.
—John Wooden[1]

A new class of legal professionals has arrived. Utah calls them licensed paralegal practitioners, Arizona calls them legal paraprofessionals, and Washington calls them limited license legal technicians.[2] This Essay will call them all "NPs."[3] Additional examples beyond Utah, Arizona, and

1. Miles D. White, *The Reinvention Imperative*, HARV. BUS. REV. (Nov. 2013) (quoting John Wooden).

2. *See Legal Paraprofessional Program*, AZCOURTS.GOV https://www.azcourts.gov/cld/Legal-Paraprofessional [https://perma.cc/42TV-2FBN]; Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U.L. REV. 1, 71 (2018) (concluding that Washington's LLLTs offer increased access to legal services only to individuals of moderate, but not low, income and arguing among other things that LLLTs should be able to offer a broader array of legal services); Thomas M. Clarke & Rebecca L. Sandefur, *Preliminary Evaluation of the Washington State Limited License Legal Technician Program*, AM. BAR FOUND. 3 (2017), http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf [https://perma.cc/L87C-L276].

> The evaluation shows that the program has been appropriately designed to provide legal services to those who cannot afford a lawyer but still wish or need assistance. The training program prepares [Limited License Legal Technicians or] LLLTs to perform their role competently while keeping within the legal scope of that role. Customers have found their legal assistance to be valuable and well worth the cost.

Clarke & Sandefur, *supra*, at 3. As of July of 2021, however, Washington's program stopped admitting new applicants, but those who have earned a license and remain in good standing may continue to practice law. *See also* Lyle Moran, *Washington Supreme Court Sunsets Limited License Program for Nonlawyers*, AM. BAR ASS'N J. (July 8, 2020, 3:35 PM), https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/#:~:text=Washington%20was%20the%20first%20state,small%20number%20of%20interested%20candidates [https://perma.cc/7DCW-MPH5]. *See generally* Aebra Coe, *Where 5 States Stand on Nonlawyer Practice of Law Regs*, LAW 360 (Feb. 5, 2021, 4:33 PM), https://www.law360.com/articles/1352126/where-5-states-stand-on-nonlawyer-practice-of-law-regs [https://perma.cc/8F5F-C5AN] (discussing developments in Arizona, California, Utah, Illinois, and New Mexico).

3. In this context, the acronym "NP" stands for nonlawyer practitioner. I refer to these practitioners simply as "NPs" which represents a choice to minimize the lawyer-centric term "nonlawyer" and to evoke the medical field's use of NPs, or nurse practitioners, whose role has been inspirational to the creation and increasing expansion of NPs in the legal field. *See, e.g.*, Becca Donaldson, *Who Accesses Justice?: The Rise of Limited License Legal Technicians*, 4 CTR. ON LEGAL PRO.: PRACTICE (2018),

Washington exist, while others are on the brink of existence.[4] NPs can practice with or without lawyer supervision. Just as nurse practitioners and physician assistants provide greater access to medicine, this newborn class of legal professionals should provide greater access to justice. But the creators of these new professionals have so far saddled NPs with virtually the same ethical code and regulatory regime as lawyers.[5]

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https://thepractice.law.harvard.edu/article/who-accesses-justice [https://perma.cc/RRZ3-H5QL].

4. *See, e.g.*, Michael Houlberg & Janet Drobinske, *The Landscape of Allied Legal Professionals in the United States*, IAALS (Nov. 2022), https://iaals.du.edu/sites/default/files/documents/publications/landscape_allied_legal_professionals.pdf [https://perma.cc/4J25-BA44] (cataloging sixteen states that recently implemented, adopted but not yet implemented, or are actively considering adopting NP programs). As additional examples, Arizona created a certified legal document preparer class and California entertained proposals to permit NP ownership of law firms and NP practice of law for specific matters, such as housing and domestic violence. *See* Lyle Moran, *Will California Be the Next State to Permit Nonlawyer Paraprofessionals*?, AM. BAR ASS'N J. (Nov. 8, 2021, 9:04 AM), https://www.abajournal.com/web/article/will-california-be-the-next-state-to-permit-nonlawyer-paraprofessionals [https://perma.cc/4J7S-6ZLR]; Lee Edmon & Randall Difuntorum, TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS., *State Bar Task Force on Access Through Innovation of Legal Services Report*, attach. A (July 11, 2019), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf[https://perma.cc/FP7P-SDEJ]; *but see* Joyce E. Cutler, *California Restrains State Bar From Expanding Nonlawyer Practice*, BLOOMBERG L. (Sept. 19, 2022, 6:30 AM), https://news.bloomberglaw.com/business-and-practice/california-restrains-state-bar-from-expanding-nonlawyer-practice [https://perma.cc/RND5-EXYR] (noting legislative roadblocks to reform). Court navigators, who are generally not lawyers, have also spread, although they have not necessarily thrived. *See generally* MARY E. MCCLYMONT, NONLAWYER NAVIGATORS IN STATE COURTS: AN EMERGING CONSENSUS, GEO. L. CTR.: JUST. LAB (2019), https://georgetown.app.box.com/s/t2zf6mjv2x74w944t8ejbsku7i2jc7mc [https://perma.cc/4VC8-VTMR]. The ABA has recently started to catalog such innovations:

> In the United States, legal services are primarily regulated by each state or jurisdiction through rules of professional conduct (which are directed at lawyers) as well as statutes and regulations (which are directed at both lawyers and other providers of law-related services). To date, there is no single resource that identifies which U.S. jurisdictions have adopted regulatory approaches that have the potential to innovate how legal services are delivered. This survey seeks to fill that void.

Legal Innovation Regulatory Survey: Executive Summary, AM. BAR ASS'N: CTR. FOR INNOVATION (NOV. 21, 2022), http://legalinnovationregulatorysurvey.info/executive-summary/ [https://perma.cc/NPH7-YP5D].

5. *See* Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 621 (2014) ("[The governing rule] provides that LLLTs will be subject to the same standard of care and ethical standards as lawyers. A subcommittee of the board is preparing recommendations to the supreme court that will

This Essay explores whether the current approach to NP ethics is good for the public and for the professionals. To skip to the conclusion: it likely is not. The approach tends to hinder these new professionals from entering, sustaining, and expanding their new roles. In doing so, the approach risks increasing the cost of justice and decreasing public access without providing countervailing assurances of quality or accountability. As with nurse practitioners in medicine, in whose image NPs in law were created, greater restrictions likely lead to fewer NPs and to reduced access to legal services.[6]

Part II below discusses the purpose and promise of NPs in the legal field. Part III then raises the key ethical tradeoffs and missed opportunities in the creation and expansion of NPs. Finally, Part IV concludes with recommendations for state courts and their access-to-justice task forces, which are actively considering new NP programs at this turning point. To preview, I recommend we move away from the current approach that fails to match innovation in the types of legal service providers with appropriate innovation in ethical regulation. Instead, states should follow a new approach: (1) engage in rule-by-rule scrutiny of proposed ethical rules, especially rules relating to confidentiality, conflicts of interest, legal fees, and entity representation; (2) boost inclusivity in their rulemaking processes by increasing participation from a diverse array of stakeholders beyond lawyers; and (3) seize this opportunity to enact structural improvements to the regulation of both NPs and lawyers.

create a set of Rules of Professional Conduct (RPC) for LLLTs. The process has involved taking the same RPCs for lawyers and adapting them for LLLTs.") (citations omitted).

6. *See generally* Bo Kyum Yang, Mary E. Johantgen, Alison M. Trinkoff, Shannon R. Idzik, Jessica Wince & Carissa Tomlinson, *State Nurse Practitioner Practice Regulations and U.S. Health Care Delivery Outcomes: A Systematic Review*, 78 MED. CARE RSCH. & REV. 183 (2021) (finding "that expanded state NP practice regulations were associated with greater NP supply and improved access to care among rural and underserved populations without decreasing care quality" and noting that "[t]his evidence could provide guidance for policy makers in states with more restrictive NP practice regulations when they consider granting greater practice independence to NPs."); Ying Xue, Zhiqiu Ye, Carol Brewer & Joanne Spetz, *Impact of State Nurse Practitioner Scope-of-Practice Regulation on Health Care Delivery: Systematic Review*, 64 NURSING OUTLOOK 71, 85 (2016) ("States granting NPs greater SOP authority tend to exhibit an increase in the number and growth of NPs, greater care provision by NPs, and expanded health care utilization, especially among rural and vulnerable populations.").

II. THE PURPOSE AND PROMISE OF NONLAWYER PRACTITIONERS AND THEIR ETHICS

This Part highlights the animating purpose of a new class of legal professionals, followed by its promise for legal ethics. Understanding this twofold background is necessary to address the appropriate level of ethical regulation to which we turn in Part III.

The animating purpose of a new category of professionals should inform the new rules and regulatory apparatus regulating those professionals. Although not entirely uniform,[7] the states' purpose appears relatively clear: to provide legal services for those previously unable to afford or access a lawyer.[8] Simply put, the gap in access to justice is vast,[9] and NP programs promise to

7. Some proponents might have other, less commonly announced purposes. For example, those who do not like lawyers might wish to harm their economic or other status by limiting their apparent government-facilitated monopoly over the practice of law. Although lawyers do not technically have a true monopoly over all practice of law, judicial and legislative licensing and enforcement regimes enable lawyers to provide certain legal services that other would-be providers may not currently provide. Other proponents might disagree with market barriers generally and therefore view the additional market participants as a laudable change for reasons having nothing to do with sentiment toward lawyers.

8. For example, the purpose of the Washington LLLT program is "to provide limited legal assistance under carefully regulated circumstances in ways that expand the affordability of quality legal assistance which protects the public interest." WASH. STATE CT. RULES: ADMISSION & PRAC. RULES, r. 28(A). The codified purpose of Utah's licensed paralegal practitioner program is a bit longer-winded:

> Licensed Paralegal Practitioners arise from the November 18, 2015 Report and Recommendation of the Utah Supreme Court Task Force to Examine Limited Legal Licensing. The Task Force was created to make recommendations to address the large number of litigants who are unrepresented or forgo access to the Utah judicial system because of the high cost of retaining a lawyer. The Task Force recommended that the Utah Supreme Court exercise its constitutional authority to govern the practice of law to create a subset of discreet legal services in the practice areas of: (1) temporary separation, divorce, parentage, cohabitant abuse, civil stalking, and custody and support; (2) unlawful detainer and forcible entry and detainer; and (3) debt collection matters in which the dollar amount in issue does not exceed the statutory limit for small claims cases. The Task Force determined that these three practice areas have the highest number of unrepresented litigants in need of low-cost legal assistance. Based on the Task Force's recommendations, the Utah Supreme Court authorized Licensed Paralegal Practitioners to provide limited legal services . . . .

UTAH CODE OF JUD. ADMIN. r. 14–802, cmt.

9. *See, e.g.*, LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017) ("86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.").

help close this gap. Thus, the optimal guidance and regulation of NPs should be evaluated, at least in part, by their effect on increasing access to justice.

Indeed, the birth of a profession presents a unique opportunity to revisit timeless legal ethics controversies, including:

- ◊ Should NPs be permitted to own or co-own a law firm?[10]
- ◊ Should investors or corporations be permitted to own some or all of an NP's practice?[11]
- ◊ Should NPs be permitted to form a multidisciplinary practice with, for example, accountants, land-use planners, social workers, or psychologists?
- ◊ Should NPs be permitted to screen other NPs within their firm to remedy otherwise disqualifying conflicts of interest? Indeed, should NPs even have conflict-of-interest prohibitions in the first place? If they should, should such conflicts be imputed to other NPs within their firm?
- ◊ Should clients' communication with NPs be confidential and privileged?
- ◊ Should any confidentiality or privilege have exceptions to save a life, to prevent corporate fraud, or to report child or elder abuse?
- ◊ Should NPs be permitted to enter into contingency fee arrangements?[12]

10. Whether by NPs or anyone else, nonlawyer ownership of law firms is generally prohibited in the United States. Nonlawyer co-ownership has to date been available only to lawyers in Washington, D.C. and outside the United States. *Compare* D.C. RULES OF PRO. CONDUCT r. 5.4(c), cmt. 7 (permitting nonlawyers who perform professional services for the law firm to possess a financial interest or to exercise managerial authority within the firm but prohibiting passive investment), *with* MODEL RULES OF PRO. CONDUCT r. 5.4 (prohibiting such arrangements). Arizona, however, recently deleted its Rule 5.4, paving the way for nonlawyer ownership of and investment in law firms. *See, e.g.*, Lyle Moran, *Citing Access to Justice, Arizona Decided to Embrace Controversial Alternative Business Structures*, Am. Bar Ass'n J. (Feb. 1, 2021), https://www.abajournal.com/legalrebels/article/citing-access-to-justice-arizona-decided-to-embrace-controversial-alternative-business-structure [perma.cc/S2JS-ZZPV]. These new firms or entities are commonly referred to as 'alternative business structures.' *See generally* 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 (2016) (discussing ABS firms in the UK and their mostly icy reception in the US).

11. In Washington, for example, the limited license legal technicians (LLLTs) may not share ownership of their firm with nonlawyers but may do so with lawyers under limited circumstances. *See* WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT rs. 5.4, 5.9; *see also* UTAH SUP. CT. RULES OF PRO. PRAC. r. 5.4.

12. For example, contingency fee arrangements permit those without sufficient funds to retain counsel to seek civil remedies, most commonly in personal injury cases. These arrangements, however, may provide the lawyer with an exorbitant share of any resulting

◊ Should NPs be permitted to solicit business through in-person, telephonic, or videoconference solicitations?

These questions present opportunities to revisit and adapt the current ethical rules. Anticlimactically, however, none of these ethical questions and controversies has thus far been resolved in NPs' favor. That is, when the state regulators have had the opportunity to ease an ethical restriction to potentially boost access to justice, they have declined.

Lawyer ethic rules, as currently drafted and as now increasingly applied to NPs, significantly limit, if not prohibit, nonlawyer ownership and investment,[13] multidisciplinary practice,[14] personal and imputed conflicts of interest,[15] fee and fee-sharing arrangements,[16] business advertising, development, and solicitation methods,[17] among other potential activities. Although these limitations can hamper NPs from providing greater access to justice,[18] the current approach categorically grafts the lawyer ethics rules onto the new professionals.

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settlement or verdict. Furthermore, the arrangement, which by its nature means that the lawyer is having to front the expenses of litigation, provides the lawyer a greater stake in the outcome of the case, potentially decreasing objectivity and increasing pressure to settle the matter on terms best for the lawyer or firm.

13. So far, states have imposed the same rule on NPs. *See, e.g.*, UTAH SUP. CT. RULES OF PRO. PRAC. r. 5.4(b) ("A licensed paralegal practitioner shall not form a partnership with a non-lawyer or non-licensed paralegal practitioner if any of the activities of the partnership consist of the practice of law.").
14. *See* MODEL RULES OF PRO. CONDUCT r. 5.4 (barring lawyers from practicing law in partnership with other professionals, such as accountants, psychologists, or social workers).
15. *See generally* MODEL RULES OF PRO. CONDUCT rs. 1.7–1.10; UTAH SUP. CT. RULES OF PRO. PRAC. rs. 1.7–1.10; ARIZ. RULES OF PRO. CONDUCT rs. 1.7–1.10.
16. States have likewise imposed this constraint on NPs. UTAH SUP. CT. RULES OF PRO. PRAC. r. 5.4(a) ("A licensed paralegal practitioner or firm of licensed paralegal practitioners shall not share legal fees with a non-lawyer or a non-licensed paralegal practitioner . . . .").
17. *See, e.g.*, WASH. LTD. LICENSE. LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 7.2(c) (requiring the LLLT to place the name and office address of the practice on all advertisements, which is burdensome to accomplish in many types of online advertising); UTAH SUP. CT. RULES OF PRO. PRAC. r. 7.2.
18. In addition, these constraints are on top of other, market-cutting constraints. As a key example, NPs generally cannot represent corporations or other entities. *See, e.g.*, WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.13, cmt. 1 ("At present, the authorized scope of LLLT practice does not contemplate representation of an organization."); UTAH SUP. CT. R. PRO. PRAC. 14–802(c)(1) ("Within a practice area or areas in which a Licensed Paralegal Practitioner is licensed, a Licensed Paralegal Practitioner who is in good standing may represent the interests of a *natural person* who is not represented by a lawyer unaffiliated with the Licensed Paralegal Practitioner . . . .) (emphasis added).

In fact, NP ethical codes to date have been more restrictive than corresponding lawyer ethical codes.[19] To some extent, that might be expected: Because NPs have less formal legal education than lawyers, the public might be better protected by strapping tighter ethical constraints onto these practitioners. As discussed in Part III.B. below, however, some ethical constraints could be eased to increase access to justice—the new profession's raison d'être.

But easing ethical restrictions is certainly no panacea. Loosening the ethical rules can be risky and even contrary to the NP purpose of providing access to quality justice to members of the public unable to afford an attorney. As one example, Utah lawyers are required to provide fifty hours of pro bono service annually while NPs need only provide thirty.[20] Because the NPs have been and will continue to be authorized to reach members of the public who could not afford a lawyer, reducing their pro bono focus seems counterproductive. Conversely, easing certain lawyer ethical rules might promote greater access to legal services but not without costs. For instance, loosening confidentiality and conflicts restrictions would likely provide more access to legal services for people in need—potentially at the expense of NPs' existing clients to whom full ethical duties would have otherwise been owed.[21]

What instead seems apt is a rule-by-rule approach that evaluates and tailors each proposed ethical rule in light of the new context, including the purpose of the new class of professionals.[22] Such analysis may result in a more

19. For example, Arizona Legal Document Preparers must avoid even the appearance of impropriety—a broad standard no longer governing lawyer discipline. *See* ARIZ. CODE OF JUD. ADMIN. § 7-208(J) (requiring document preparers to avoid impropriety and the appearance of impropriety). As another example, Arizona Legal Document Preparers, Washington LLLTs, and Utah Licensed Paralegal Practitioners cannot enter into contingency fee agreements, which of course lawyers may do. *Compare* WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.5(d) (barring LLLTs from using contingency fee arrangements with their clients), *and* UTAH RULES OF PRO. CONDUCT r. 1.5(e) ("A licensed paralegal practitioner may not enter into a contingency fee agreement with a client."), *with* WASH. RULES OF PRO. CONDUCT r. 1.5(c) (permitting lawyers in most instances to use contingency fee arrangements), *and* UTAH RULES OF PRO. CONDUCT r. 1.5(c).

20. *Compare* UTAH RULES OF PRO. CONDUCT r. 6.1 (stating that every Utah lawyer should provide at least fifty hours of pro bono service annually), *with* UTAH SUP. CT. RULES OF PRO. PRAC. r. 6.1(a) (stating that paralegal practitioners should provide at least thirty hours of pro bono service).

21. *See infra* Part III.

22. In 2016, the ABA promulgated ten Model Regulatory Objectives for the Provision of Legal Services with an ambivalent eye toward these emerging professionals. Among others, those objectives include: (1) "protection of the public," (2) "delivery of affordable and accessible legal services," (3) "efficient, competent, and ethical delivery of legal services," and (4) "accessible civil remedies for negligence and breach of other duties

or less restrictive rule than its lawyer ethics counterpart.[23] Moreover, states should conduct this rule-by-rule analysis only after implementing procedural improvements designed to alleviate regulatory capture and to ensure realistic rules.[24]

III. ETHICAL FLASH POINTS

This Part frames potential approaches to NP regulation and then exposes a cross-section of the most material and controversial ethical rule tradeoffs in present and future NP programs.

A. Framing Nonlawyer Practitioner Ethics

One way to view the regulation of this burgeoning class of legal professionals is as a better version of lawyers—at least as to their ethical regulation. As many critics have noted, lawyers have historically crafted ethical rules in their own favor.[25] Because lawyers and judges—the two groups that primarily draft the ethical rules regulating lawyers and now NPs—do not

owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs." *Resolution 105*, AM. BAR ASS'N (Feb. 8, 2016), https://www.abajournal.com/files/2016_hod_midyear_105.authcheckdam.pdf [https://perma.cc/FB4F-2LZQ] (adopting the ABA Model Regulatory Objectives for the Provision of Legal Services).

23. The current regulatory approach essentially replicates, on a smaller scale, lawyer regulation. *See generally* Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1, 36 (2018) ("[L]awyers have made the LLLT model in their own image. LLLTs still rely on the state system (the forms, the courts, the resolutions) to assist their clients. Lawyers have designed the LLLT profession not only to preserve the quality of the practice of law but the *manner* in which legal professionals resolve disputes for their clients.") (citations omitted). Implicit in the access-to-justice rhetoric is that the purpose of these new professionals is not simply to deliver additional legal services, but to deliver at least ethical and competent, if not high-quality, legal services. While various rules and regulatory approaches to lawyer ethics may therefore be appropriate for ensuring ethical and competent NPs, the wholesale transfer currently employed by states unnecessarily restricts NPs from fulfilling their laudable purpose.

24. *See infra* Part IV (making recommendations to improve the process of considering and applying ethical rules to NPs). By regulatory capture, I primarily mean that market participants, primarily lawyers, have played a heavy role in crafting and implementing the regulatory regime for NPs.

25. *See generally* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2011); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429 (2016); Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365 (2013); Benjamin H. Barton, *The Lawyer's Monopoly-What Goes and What Stays*, 82 FORDHAM L. REV. 3067 (2014).

have a direct financial interest in NPs, certain NP ethical rules have been crafted without the corrupting effect of money and self-interest. Several examples follow.

Lawyers may enter into business transactions with clients notwithstanding severe conflicts of interest and potential infringements on the lawyers' obligations of confidentiality, loyalty, and independent professional judgment, while Washington's NPs cannot.[26] Likewise, although lawyers' hourly fees are expensive and often leave clients with invoice-shock, the ethical rules generally do not require lawyers to estimate their fees in advance, yet Utah's rules require NPs to do so.[27] Additionally, Oregon and Utah require that NPs, but not lawyers, place a notice in their written fee agreements that "the client may report complaints relating to a licensed paralegal practitioner or the unauthorized practice of law to the Utah State Bar, including a toll-free number and Internet website."[28] Furthermore, lawyers may, under certain conditions, prospectively limit their liability to clients for malpractice,[29] whereas Washington's NPs cannot.[30] Finally, lawyers in many jurisdictions are not required to put their fee agreement in

26. *Compare* WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.8, cmt. 2 ("Under limited and defined circumstances, Lawyer RPC 1.8(a) permits a lawyer to enter into a business transaction with a client, or to acquire a property interest adverse to a client. Because of the limitations on the scope of an LLLT's authorized practice, the analysis and disclosures that suffice under Lawyer RPC 1.8(a) to enable a lawyer to enter into such a transaction despite the existence of a conflict of interest are not feasible in the client-LLLT relationship. For this reason, LLLT RPC 1.8(a) strictly prohibits an LLLT from entering into any business transaction with a current client."), *with* MODEL RULES OF PRO. CONDUCT r. 1.8(a) (generally permitting lawyers to enter into business transactions with clients). Likewise, unlike lawyers in certain instances, an LLLT cannot modify a fee agreement midstream in the representation. *See, e.g.*, WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.8, cmt. 5; *cf.* UTAH RULES OF PRO. CONDUCT r. 1.5(b) ("Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.").

27. *Compare* UTAH RULES OF PRO. CONDUCT r. 1.5(a)(10), *with* MODEL RULES OF PRO. CONDUCT r. 1.5 (containing no explicit requirement of an estimate for the client).

28. UTAH RULES OF PRO. CONDUCT r. 1.5(a)(5), cmt. 8a ("This rule differs from the ABA Model Rule by including certain restrictions on licensed paralegal practitioners."); ORE. RULES OF PRO. CONDUCT FOR LICENSED PARALEGALS 1.5(f); MODEL RULES OF PRO. CONDUCT r. 1.5 (containing no such requirement).

29. *See* MODEL RULES OF PRO. CONDUCT r. 1.8(h)(1) ("A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.").

30. *See* WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.8, cmt. 5 ("Unlike a lawyer, an LLLT is strictly prohibited by Rule 1.8(h)(1) from making any agreement that prospectively limits the LLLT's liability to the client for malpractice.").

writing at all or in advance for the client, yet NPs generally must do so.[31] Thus, NP ethical rules to date might be viewed as purer than lawyer ethical rules because the former have largely been crafted with less deference to lawyers' self-interest.

Important counterpoints to this view exist in theory and practice, however. The financial interest of lawyers can spill over into NP regulation. Many lawyers fear that NPs will "eat their lunch," and this fear may lead to anticompetitive behavior.[32] Increased restrictions on the ability of NPs to advertise or unreasonable restrictions on their scope of practice might be immediate areas to scrutinize.[33] Furthermore, beyond the potentially corrupting effects of lawyer self-interest, ethical rules can otherwise stifle greater access to legal services for members of the public unable to afford a lawyer.

B. With Rules Come Responsibilities

The opportunity for scrutiny and change presents itself with virtually every grafted ethical rule.[34] Not surprisingly, the largest opportunities reside

31. *See, e.g.*, ORE. RULES OF PRO. CONDUCT FOR LICENSED PARALEGALS r. 1.5(f)(3); WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.5, cmt. 4 ("Unlike a lawyer, an LLLT is required by APR 28(G)(3) to enter into a written contract with the client before the LLLT begins to perform any services for a fee that includes, among other things, identification of all fees and costs to be charged to the client for the services to be performed. The provisions concerning a flat fee described in (f)(2) of this Rule, if applicable, should be included in that contract. The contract must be signed by both the client and the LLLT before the LLLT begins to perform any services for a fee . . . ."); MODEL RULES OF PRO. CONDUCT r. 1.5 (requiring a written fee agreement only for contingency fee matters).

32. The legal profession has an extensive history of anticompetitive behavior. To be sure, judges—not just lawyers—have been involved in NP regulation, but of course, judges are former lawyers who may return to practice after leaving the bench. *See generally* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2011) (arguing that judges systematically favor the legal profession).

33. For instance, although Arizona's NPs largely have the same ethical rules as lawyers, the smaller scope of practice, coupled with a suspect ban from working on certain cases involving business entities, might partially be seen as the product of financial self-interest in the drafting participants or commentators. *See* ARIZ. CODE OF JUD. ADMIN. § 7-210, § 7-210(F)(2)(a)(2) (prohibiting legal paraprofessionals from providing legal services in a family law matter involving "[d]ivision or conveyance of formal business entities or commercial property"). The expressed concern, however, was that NPs might not be fully competent to handle these business-related matters. Thus, apart from any financial self-interest, the drafters seem to believe that only lawyers could competently handle such matters.

34. Every state has adopted a version of the ABA's Model Rules of Professional Conduct. That set of ethical rules contains fifty-five individual rules, not including terminology

in the most pervasive or controversial subjects in legal ethics: (1) confidentiality and privilege; (2) contingency fees; (3) entity representation; and (4) conflicts of interest. These are discussed in turn below.

1. Confidentiality and Privilege

This Subpart explores whether client communication with NPs should be confidential and privileged and, if so, what exceptions should limit those doctrines.

While these are long-standing doctrines in legal ethics, confidentiality and privilege continue to be controversial because they are designed to keep relevant information hidden from tribunals, alternative dispute resolution venues, and the public. Indeed, at first blush it is surprising that attorney-client privilege is tolerated. It excludes relevant information from court proceedings, even where the proceedings are for fact-finding and involve a search for truth. Confidentiality and privilege nevertheless prevail, largely under the theory that by providing clients and lawyers a safe channel through which to communicate, more information will pass through that channel and clients will thereby receive better legal representation.[35] The rationale often includes a related assertion that by learning all of the facts—including past, present, or future plans in violation of the law—lawyers will counsel clients to follow the law and clients will follow that advice.

Should the doctrines of confidentiality and privilege be extended to the new and growing class of NPs? The operative reasons for NPs generally support confidentiality and privilege. Just as with lawyers and clients, NPs and clients would presumably benefit from the increased flow of information. Thus, if the premises supporting confidentiality and privilege are true, the argument maintains validity for NPs. To be sure, the supporting justifications

and related rules of procedure, such as Rule 11 of the Federal Rules of Civil Procedure. I am sparing the reader fifty-five separate rule examinations and instead highlighting several of the most impactful ethical rules for NP regulation.

35. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (*citing* 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

for the doctrines have flaws,[36] but if anything those flaws are augmented for lawyers whose scope of practice is broader than that of NPs. Conversely, to the extent that scaling back confidentiality and privilege would be justified to increase access to relevant information, scaling it back for NPs also appears justified. Likewise, to the extent confidentiality and privilege doctrines contain or should contain mandatory or permissive exceptions for lawyers' disclosure—for example, to save a life or to prevent corporate fraud—those exceptions appear equally supported for nonlawyers. Nothing in the access-to-justice rationale suggests that risking lives or shielding fraud would be justified.

Notwithstanding the above, does the access-to-justice rationale for NPs otherwise call for a stronger or weaker form of confidentiality and privilege? The programs might be seen as a form of a tradeoff, permitting less prepared practitioners in exchange for less costly and more available legal services for the public. Because privilege and confidentiality keep out relevant information from legal proceedings and the public domain, a piece of the tradeoff could involve a lesser capacity to keep that information secret. In a rough sense, the argument would be that greater access-to-justice does not necessarily have to come with the costs of secrecy attendant to lawyers.

This argument, however, seems weak in the abstract. First, it ties together two only loosely connected concepts—namely, access to justice through NPs and preexisting confidentiality and privilege debates. Second, although attractive, if one believes that confidentiality and privilege currently extend too far, the resulting dichotomy would aggravate class issues in the law. The wealthy would receive the full cloak of privilege and confidentiality while those of more modest means would receive only a watered-down version of privilege and confidentiality or none at all.[37] Keeping confidentiality and privilege approximately the same for lawyers and NPs would avoid this inequality.

36. *See, e.g.*, Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 355 (1989) (observing empirically that "confidentiality's justifications rely upon factually vulnerable premises.").

37. Perhaps for this reason, Arizona applied an identical confidentiality duty and evidentiary privilege rule to its NPs, which are called legal paraprofessionals. *See* ARIZ. RULES OF EVID. r. 503 ("A communication between a legal paraprofessional and a client is privileged if it is made for the purpose of securing or giving legal advice, is made in confidence, and is treated confidentially. This privilege is co-extensive with, and affords the same protection as, the attorney-client privilege.").

A related area ripe for consideration is to what extent general reporting laws, such as mandates to report child or elder abuse, should apply to NPs.[38] Some laws explicitly exclude attorney-client communications from the duty of disclosure, while other laws have been interpreted by courts to implicitly exclude attorney-client communications. For NPs, however, no laws have explicitly excluded communications with NPs, whose existence was perhaps not even contemplated when the laws were drafted, and courts have not yet interpreted these laws as applied to NPs. Unless NP program creators address this issue directly, it will become an active area of confusion for years to come. In theory, what works for the lawyer should also work for the NP.

As new challenges arise, courts should use the opportunity to reexamine the doctrines across both categories of legal practitioners, lawyers and NPs. It may be that protecting the public or children or elders warrants limiting confidentiality or privilege, and where that balance is struck for NPs should generally be where that balance is struck for lawyers. Even though the balance for both lawyers and NPs should presumably be in lockstep for confidentiality and privilege, as noted above, the arrival of NPs presents a key opportunity to reassess the relative value of secrecy vis-à-vis other important interests, such as protecting people from abuse or fraud. Merely conceding and copying the existing doctrines to NPs assumes an unwarranted perfection.

2. Contingency Fee Arrangements

Most NP programs ban contingency fee arrangements.[39] To be sure, contingency fee arrangements are still controversial, but almost all lawyers may permissibly use them.[40] The key question, then, is whether any reason supports prohibiting NPs from receiving contingency fees.

38. *See, e.g.*, Alberto Bernabe, *Through the Looking Glass in Indiana: Mandatory Reporting of Child Abuse and the Duty of Confidentiality*, 92 NOTRE DAME L. REV. ONLINE 22, 25 (2016) (citing Ind. State Bar Ass'n Legal Ethics Comm. Op. 2 (2015)) ("In 2015, the Legal Ethics Committee of the Indiana State Bar Association issued an Opinion . . . addressing a lawyer's duty to conceal or disclose information regarding sexual abuse of a minor. It concluded that, under Indiana law, absent client consent, an attorney may *not* report information about suspected child abuse learned during the representation of the client unless the lawyer believes disclosing the information is necessary to prevent reasonably certain death or substantial bodily harm.").

39. For example, Utah, Washington, and Arizona ban contingency fees for certified legal document preparers while Arizona's Legal Paraprofessional rules permit them.

40. MODEL RULES OF PRO. CONDUCT r. 1.5(c), (d) (permitting contingency fees, subject to certain disclosures, except in criminal and certain family law matters). The literature is relatively vast on contingency fees and the controversies surrounding them. *See generally* Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 813

While there is no obvious reason for this prohibition, one explanation may be that lawyers, as potential competitors, are purposefully limiting NPs from using a particularly attractive and lucrative type of fee arrangement. In addition to or in lieu of this theory, NP regulators may be implicitly sympathetic to the objections to contingency fees yet they are unwilling or unable to impose the same restrictions on lawyers, perhaps again for reasons of self-interest or a status quo bias.

This growing lawyer-NP split is unfortunate. Contingency fee arrangements allow consumers to avoid paying high hourly fees to their legal practitioners, and if authorized for NPs, the arrangements would likely enable more consumers to access legal representation. If a state is going to permit contingency fee arrangements, NPs arguably should be more—not less—able to use these arrangements. Because the explicit purpose of NPs is to provide access to legal services for those who cannot afford lawyers, clients could hire NPs through contingency fee arrangements. To be sure, if all prospective clients could retain lawyers under a contingency fee arrangement, an opponent of NPs might argue that it is unnecessary to permit NPs to offer contingency fee arrangements. But this implicitly necessitates a value judgement that NPs are unnecessary when members of the public can affordably retain a lawyer. Furthermore, would more legal practitioners authorized to use contingency fees mean, at a minimum, that more members of the public would learn of this affordable option? Additional consideration and data are clearly needed to test these assumptions.

Even if the answers to these questions are favorable to the current approach, in which contingency fee arrangements are permitted for lawyers and prohibited for NPs, the answers are unlikely to be dispositive. At present, consumer-side contingency fees are not widely used outside of personal injury cases.[41] Perhaps NPs could permit members of the public of low and modest means to retain legal services in disputes beyond the personal injury arena—for example, in debt collection or landlord-tenant disputes. Absent data that

(1989) ("Contingent fees for attorneys traditionally have been the subject of derision. Critics have long complained that contingency contracts stir up litigation, lead to inflated jury verdicts, overcompensate counsel, and produce sharp practices by plaintiffs' lawyers—to name only the major contentions . . . . More recently, the legal literature has revisited this territory, aided by contemporary economic research on the costs and benefits of various systems for financing the cost of attorney services in dispute resolution.").

41. *See generally* Stuart L. Pardau, *Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of Its Demise May Be Greatly Exaggerated*, 50 IDAHO L. REV. 1 (2013). Contingency fees also are prohibited in criminal and most divorce matters. MODEL RULES OF PRO. CONDUCT r. 1.5.

the new practitioners would abuse contingency fee agreements, the access-to-justice rationale calls for such an extension. The public could then access trained legal practitioners without having to pay upfront retainers or high hourly rates. At present, however, consumer contingency fee arrangements are available only from lawyers and essentially only in personal injury cases.

In sum, the balance seems to tip in favor of permitting NPs to use contingency fee arrangements in select areas, subject to the same constraints as lawyers, absent some credible data indicating that NPs and contingency fees are particularly risky to consumers.

3. Representing Entities

The majority of NPs cannot represent entities, such as LLCs or corporations.[42] The drafters of these restrictions so far have offered little-to-no explanation for this prohibition. Perhaps worries exist that NPs would not be competent to provide business advice. In addition, because entities are more likely to be able to afford counsel, perhaps NPs are unneeded. As noted below, however, these arguments do not capture the whole picture and NPs might well serve certain small businesses or nonprofits. Moreover, as demonstrated by analogy to nurse practitioners, greater restrictions on the scope of practice lead to fewer NPs.

Many small businesses and nonprofit entities do not have sufficient funds available to hire a lawyer but perhaps could afford an NP. In addition, for those businesses and nonprofits that do have sufficient funds to hire a lawyer, depriving NPs of the ability to earn those funds obviously hampers their ability to thrive financially. For example, in a small town or rural area, an NP may not be able to subsist on only modest-income family law cases. Instead, the NP may need some small business matters to pay the remaining bills. By taking away those business matters the ethics rule-makers might be, intentionally or inadvertently, taking away the NP from the town or region.

42. *See* WASH. LTD. LICENSE LEGAL TECHNICIAN RULES OF PRO. CONDUCT r. 1.13, cmt. ("At present, the authorized scope of LLLT practice does not contemplate representation of an organization."); UTAH CODE JUD. ADMIN. 14–802(c)(1)(A) ("Within a practice area or areas in which a Licensed Paralegal Practitioner is licensed, a Licensed Paralegal Practitioner who is in good standing may represent the interests of a *natural person* who is not represented by a lawyer unaffiliated with the Licensed Paralegal Practitioner . . . .) (emphasis added); ARIZ. CODE OF JUD. ADMIN. § 7–210(F)(2)(a)(2) (prohibiting legal paraprofessionals from providing legal services in a family law matter involving "[d]ivision or conveyance of formal business entities or commercial property").

The competence question should also be addressed. Even if it financially harms NPs, if NPs cannot perform competently in small business and nonprofit entity matters, they should be precluded from taking on such matters. The scope of what state policymakers have officially authorized NPs to do, however, suggests that they believe NPs can perform competently in a variety of matters: family law, landlord-tenant, debt collection, and criminal defense, among other areas.[43] Putting aside the potential fear of NPs taking lucrative business law matters, states should carefully analyze whether such matters are actually beyond the ken of NPs. If small business matters typically are more complex and require different training than NPs possess, the current blanket prohibitions might be generally warranted.[44] However, the rule could nevertheless be relaxed, permitting NPs to work on less complex business matters. This would enable them to provide access to legal services to small businesses and nonprofits and increase the likelihood that the NPs can support their practice financially. More complex matters could be reserved for lawyers if necessary to ensure that the public receives competent representation in those matters.

In sum, analyzing the entity representation restriction and scrutinizing potential anticompetitive resistance is needed going forward.

4. Conflicts of Interest

As currently enacted in some states and as proposed in others, restrictions on conflicts of interest apply equally to NPs and lawyers.[45] The conflict-of-interest rules ensure that clients receive—and appear to receive—loyalty, confidentiality, and independent professional judgment from lawyers.[46] Although these are laudable goals, the conflicts rules are naturally

43. *See, e.g.*, MICHAEL HOULBERG & JANET DROBINSKE, INST. ADV. AM. L. SYS., THE LANDSCAPE OF ALLIED LEGAL PROFESSIONALS IN THE UNITED STATES (2022) (surveying sixteen different state NP programs in various stages of development).

44. Interestingly, this blanket approach is not the way in which lawyer competence is handled. Instead, the lawyer individually makes the determination whether the lawyer is competent to take or continue the representation. *See* MODEL RULES OF PRO. CONDUCT r. 1.1. In theory, a lawyer may obtain competence in any type of matter.

45. *See, e.g.*, HOULBERG & DROBINSKE, *supra* note 43 (noting that the rules of professional conduct for NPs in Colorado, Oregon, and Utah are the same as those governing lawyers).

46. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7, cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.").

restrictive, and they may hamper the ability of NPs to provide greater access to legal services. Examples of this danger are provided below.

In any dispute between two or more parties of limited means, the current conflicts rules might limit or outright prohibit the NP from representing all of the parties.[47] Indeed, certain small counties might have only one NP available, likely leaving only one party to receive legal representation.[48] If the conflicts rules were relaxed, more otherwise-conflicted legal representation would be permissible. NP clients might be permitted to consent to all conflicts, for example.

In addition, another type of conflict rule, imputation, might deserve reexamination. Even when at least two NPs, or an NP and a lawyer, operate in the same locale and could potentially serve more clients in need, they would both be conflicted and could not take on the matter if they work in the same firm or other association. Conflicts are generally imputed to other members of a law firm, public defender office, or legal aid firm.[49] Thus, if one member of an NP's firm or other association represents one party, the other members would generally be precluded from representing the other party, who of course may be in equal or greater need of representation in the matter. As authorized in other areas, the imputation rules could be relaxed to permit this representation with or without an ethical screen.[50]

These relaxations of the conflicts rules appear attractive as a means of reaching more members of the public in need of legal services. Indeed, the prevailing lawyer ethical rules already contain a rough and limited analogue to relaxing the conflicts rules. Model Rule 6.5, which was designed to increase access to legal services for those of limited means, slightly dilutes the conflicts rules for lawyers working with nonprofit limited legal service programs.[51] NPs could operate under a similarly diluted conflicts rule. As with some of

47. In brief, although some conflicted representations may be pursued after the clients provide informed consent, other conflicts are prohibited even with consent. *See* MODEL RULES OF PRO. CONDUCT r. 1.7. In essence, this ethical rule has been adopted in all states.

48. *See, e.g.*, Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018) (surveying the lack of counsel and other legal resources in rural areas in several states).

49. *See* MODEL RULES OF PRO. CONDUCT r. 1.10 (imputing most conflicts of interest to members of a law firm or other association); *id.*, r. 1.0 (defining associations broadly).

50. *See* MODEL RULES OF PRO. CONDUCT rs. 1.11, 1.12 (permitting certain former government lawyers, judges, or clerks to be screened so that the firm may avoid imputed conflicts of interest).

51. *See* MODEL RULES OF PRO. CONDUCT r. 6.5 (lessening the conflicts and imputation rules for lawyers serving in nonprofit limited legal services programs).

the earlier suggestions, however, this suggestion runs the risk of providing less effective representation to those of modest means.[52] It also would aggravate the existing disparity between the haves and have-nots in legal representation. Indeed, the very notion of two tiers of legal service providers—lawyers and NPs— already risks aggravating this disparity. However, to some, a lightly conflicted or less educated legal representative may nevertheless be better than no legal representative at all. Conflicts of interest generally rest on a spectrum from severe to immaterial, and a state could plausibly tolerate additional lower-magnitude conflicts in exchange for increased access to justice for its inhabitants.

To conclude, from confidentiality to conflicts, these types of critical policy debates will not realistically be resolved in an Essay.[53] What is concerning, however, is that the debate is not occurring at all in most states. Important access-to-justice and client-protection policy choices are made with the imposition of each ethical rule, and these choices deserve scrutiny. By briefly exemplifying the need for rule-by-rule scrutiny, this Essay aims to spark and inform that debate.

IV. RECOMMENDATIONS

The exciting potential for NPs to spread across legally underserved markets is real and trending upward.[54] To date, however, courts and policy advocates have largely missed critical ingredients at the intersection of access-to-justice and public protection: state ethical rules. To remedy this omission, current and future NP states should consider the following three recommendations.

First, states should give rule-by-rule scrutiny to each proposed NP ethical rule. Any proposed rule should be evaluated and tailored to the new context, including the purpose of NPs. It may be that the ethical rule is justified; indeed, it could even be that the corresponding lawyer ethical rule is too lenient and should be tightened for NPs—and in turn tightened for lawyers. Conversely, the ethical rule might be unnecessarily restrictive,

52. That is, the NPs themselves would possess more conflicts of interest, and those or other conflicts might not be imputed to their partners, appearing at a minimum unfair or suspicious to the affected client or former client.

53. This supplies another reason not to subject the reader to fifty-five different rule analyses. *See supra* note 34 (discussing the number of ethical rules and the selective approach in this Essay).

54. *See supra* note 4 (citing recent NP developments in several states).

inhibiting access to legal services and restricting the ability of NPs to thrive without a corresponding benefit in client protection or in another area.

Second, states should work to improve their procedures for evaluating NPs and the rules that bind them.[55] In particular, in addition to the standard input from lawyers and judges in evaluating the proposed ethical rules, states should include members of the general public and those with relevant knowledge, such as paralegals, court navigators, nonprofit heads, and academics (for example, empiricists whose work addresses legal services or the legal profession). This more inclusive process will not only appear fairer to the governed but will tap into such nonlawyers' insights[56] which may lead to more realistic and effective rules. This inclusion will also dilute the impact of lawyers' self-interest on the new rules.

Finally, states should use this opportunity to improve their regulatory structure applying to the growing number of legal service providers—NPs and lawyers. Further evolution in proactive, rather than simply reactive, management-based regulation is warranted and can be achieved through formative audits, self-assessments, and mentorship.[57] States might also take this opportunity to tackle other controversial yet previously unsettled questions, such as whether legal service providers—NPs and lawyers—should be required to purchase malpractice insurance[58] or provide pro bono service.[59] Many more opportunities for reassessment await.

This Essay has flagged several of these questions and opportunities. The impactful—and potentially suffocating—process of ethical regulation deserves spirited debate.

55. Specifically, states should add additional members of the public to the committees drafting and recommending the ethical rules and to the committees that will later review disciplinary complaints against the NPs.

56. Unlike lawyers and judges, who have chosen their own ethical codes, NPs have not had the opportunity to draft or otherwise meaningfully participate in the code that binds them. Instead, lawyers and judges have thus far chosen and implemented the ethical code for NPs.

57. *See generally* Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233, 265 (2013) (detailing the reasons to "move toward proactive, compliance-based regulation as a complement to reactive disciplinary enforcement").

58. *See, e.g.*, Steve Crossland & Paula Littlewood, *Pro: An Idea Whose Time Has Come LLLTs Provide Qualified Legal Services at an Affordable Price*, L. PRAC., July/Aug. 2016, at 44, 45 ("Another aspect of the program that serves the public interest is that LLLTs are required to carry malpractice insurance . . . . LLLTs in Washington are held to a higher standard than lawyers in that respect.").

59. *See* MODEL RULES OF PRO. CONDUCT r. 6.1 (recommending that lawyers complete fifty hours annually of pro bono legal service). Unlike most ethical rules, Rule 6.1 is aspirational, not mandatory.