Surrogate Lawyering: Legal Guidance, *sans* Lawyers

Paul R. Tremblay

*Boston College Law School*, paul.tremblay@bc.edu

Follow this and additional works at: [https://lawdigitalcommons.bc.edu/lsfp](https://lawdigitalcommons.bc.edu/lsfp)

Part of the [Civil Procedure Commons](https://lawdigitalcommons.bc.edu/civilprocedure), [Legal Ethics and Professional Responsibility Commons](https://lawdigitalcommons.bc.edu/lepr), [Legal Profession Commons](https://lawdigitalcommons.bc.edu/lawprof), and the [Social Welfare Law Commons](https://lawdigitalcommons.bc.edu/socwelfare)

Recommended Citation


This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
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 effect a substantial improvement in 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. The Article does conclude, though, that the surrogacy model generates a significant concern involving the unauthorized practice of law (UPL), and the lawyers’ assistance with that activity.

The Article proceeds to critique the 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. The Article closes with suggestions for 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.
TABLE OF CONTENTS

I. INTRODUCTION

II. THE ACCESS-TO-JUSTICE CRISIS
   A. THE NEED
   B. THE RESPONSES

III. SURROGATE LAWYERING
   A. A SAMPLE SURROGATE LAWYERING PROJECT
   B. THE TRIAGE CONSIDERATIONS

IV. AN ETHICS ANALYSIS OF SURROGATE LAWYERING
   A. THE ATTORNEY-CLIENT RELATIONSHIP QUESTION
      1. WHY THE RELATIONSHIP QUESTION MATTERS
      2. DOES LACI TRIGGER INADVERTENT ATTORNEY-CLIENT RELATIONSHIPS?
         a) The Attorney-Client Relationship Test
         b) Agency Implications
         c) The Relationship Between MCLA and the CBO
   B. THE UNAUTHORIZED PRACTICE OF LAW QUESTION
      1. WHAT QUALIFIES AS UNAUTHORIZED PRACTICE
      2. SURROGACY WITHIN UPL BOUNDS

V. IMAGINING A MORE ROBUST SURROGACY PROTOCOL
   A. ASSESSMENT OF RISKS
   B. SAFEGUARDS

VI. THE UPL IMPLICATIONS OF A SURROGACY INNOVATION

VII. CONCLUSION

I. 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, as yet theoretical but considered with some frequency in recent years, that we might call “surrogate lawyering.” 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, this model serves as the basis for several innovative nonprofit initiatives being considered or created across the country. 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. In contrast to the traditional model of lawyers providing “bespoke” legal services to clients, and as an alternative and supplement to technology-based innovations within the ATJ communities, the surrogate model promises useful legal information delivered at street level by savvy and experienced nonlawyers, and in an interdisciplinary way.

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 the model separates the lawyers from the “clients,” 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 for 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.

---

1 I use the term “surrogate lawyering” with some hesitance, 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, 216-21 (1990) [hereinafter Rhode, Delivery].
3 See, e.g., Third Massachusetts 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); Fair Housing Center of Southeast and Mid-Michigan, Housing Advocates Training, available at http://www.fhcmichigan.org/get-involved/ha/#!.WYw5XFGGM2x (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.
5 See text accompanying notes 30–34 infra (describing technology-based innovations).
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 text accompanying note 41 infra.
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, the 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. The Article examines, without an in-depth critique, that strategic choice. I conclude that the choice will be, in appropriate circumstances, a principled and justified allocation of attorney time and expertise. The Article then proceeds to develop the three ethical issues that the model generates.

On the first issue, the 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, then inevitably some of that activity qualifies as the practice of law and, arguably, unauthorized practice. The Article examines the limitations on nonlawyer provisions of 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 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 proceeds to address that barrier. It explores 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 might and ought to arrange 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, in that it could provide effective guidance to those who need legal help in an efficient way, it nevertheless still confronts the reality that the UPL laws as currently written and (sometimes) enforced prohibit its explicit operation. The final part
of the 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, I survey some possible carve-out or safe-harbor provisions that would be workable, enforceable, and protective of the interests of the bar and of clients.

II. 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. But lawyers are expensive. While nothing close to a “typical” legal matter could be described, it is very difficult to find a private lawyer to assist a client with a contested legal matter for less than several thousands of dollars. The advent of legal incubators has helped to develop delivery methods that are much more affordable, but even the novice lawyers participating in those settings must still charge fees sufficient to earn a living wage, whose calculation includes the costs of repayment of educational debt.

For the lowest-income Americans, the relative cost of private legal services is almost irrelevant, as they have insufficient resources to participate in that market at all. They require free legal services or some equivalent to that product to assist them as they navigate the complexities of the legal systems. As Stephen Wexler famously observed, poor persons are forever bumping into sharp legal things. The availability of conventional, community-based legal services is shrinking, but even in its most well-funded days it was remarkably inadequate. The availability of private pro bono services does not come close to making up the

---

9 See Victor Marrero, The Cost of Rules, the Rule of Costs, 37 Cardozo L. Rev. 1599, 1639 (2016); Rebecca L. Sandefur, Moderate Income Households’ Use of Lawyers’ Services, in Middle Income Access to Justice 224 (Trebilcock et al. eds, 2012).
11 Id. at 13–14.
14 See Deborah L. Rhode, What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers, 67 S. C. L. Rev. 429, 430-31 (2016) [hereinafter, Rhode, What We Know].
15 Luban, supra note 7, at 241-43.
shortfall. Every observer agrees:16 there is a serious need for more and better access to legal services for lower-income persons,17 especially in the crowded metropolitan courts, such as the housing,18 family,19 debt-collection,20 and immigration21 fora.

B. THE RESPONSES

Efforts and proposals abound to respond to the serious need to provide guidance to those who cannot afford lawyers when they need lawyers. Most of those efforts fall into four camps. First, and most obviously, observers urge state and federal lawmakers to fund the subsidized legal services network in a more sustainable fashion.22 Those efforts are unlikely to have much success given the current and foreseeable political climate.23 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.24 The prospects of much change in that area are not promising.25 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.26 While some states have implemented Civil Gideon laws in recent years,27 few observers foresee much short-term benefit from that avenue.28

---

16 The assertion in the text is no doubt an overstatement. See, e.g., Milan Markovic, Juking Access to Justice to Deregulate the Legal Market, 29 GEO. J. LEGAL ETHICS 63 (2016) (challenging the notion that cost of counsel is the most significant hindrance).
17 Rhode, Delivery, supra note 2, at 219.
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).
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).
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
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 of the successes of computer-based legal assistance like Legal Zoom and RocketLawyer, social entrepreneurs are developing computer programs and smartphone apps that can direct users to the appropriate places, forms, and guidance when they encounter identified legal controversies or needs. Courthouses are installing kiosks for use by litigants and other visitors, and legal aid organizations are providing advice to clients through on-line chat-room arrangements. 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.

Those efforts to respond to the ocean of need have in common their reliance on lawyers or on lawyer-overseen computer-programs to provide the help needed by those enmeshed in a legal system. That kind of response makes intuitive sense, particularly given the increasing complexity of the legal systems that all Americans confront. 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. Lawyers are expensive, both because legal education is expensive and because of the monopoly of the marketplace. Lay advocates can, for those reasons, provide assistance in a more affordable way. 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.\(^{40}\)

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.

### III. 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 reach more “clients”\(^{41}\) in need in an effective fashion. To help us frame the discussion, let us imagine such an arrangement:

Montrose Community Legal Assistance (MCLA) is a state-funded\(^{42}\) 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,\(^{43}\) and “impact” work, including focused case representation and class action-type projects.\(^{44}\) 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 \textit{pro se}, and the wait list for MCLA direct representation services remains unacceptably high.


\(^{41}\) 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, \textit{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.

\textit{Forthcoming, Georgetown Journal of Legal Ethics (2018)}
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 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 lawsuits, but instead in developing training methods for the 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.

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. 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 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, with accompanying trust that can be a challenge within legal aid settings. with the staffers 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 of course include within its programmatic 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, 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, the tech solutions lack the interpersonal touch that staffers can provide. 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.

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, but real, expertise they possess as a result of their work for their agency and the training sessions 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 they may 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 for purposes of the remaining examination of the model’s effectiveness and propriety:

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. And 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).
49 See 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).
Daria Bond, with a B.A. in political science, has been working for the past 18 months as a staff assistant at Bootstraps, 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 Bootstraps. 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.51

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.

IV. 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

---

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.
practitioners might benefit from operating more in the shadows, without inviting scrutiny from the organized bar saddled with its entrenched interests. 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 with the clients by providing advice through the surrogates, then certain commitments, duties, and limitations ensue. Those implications involve competence, confidentiality, and avoidance of conflicts of interests. 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. That duty could be enforced not just through the lawyer disciplinary process, but through an action for legal malpractice if the client suffered damages as a result of the sub-standard service. If the

---

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. 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).

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 (2013).

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* 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.).
recipient is not a client of the law firm, then malpractice liability would most likely not arise.57 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.58 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.59 Second, the LACI project likely establishes some attorney-client relationship with someone, most likely the agencies where the staffers work.60 If the staffers provide less-than-competent 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.61

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 later62—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.”63 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.64

---

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); RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 51 (2000). In some limited settings, a non-client might successfully assert a duty of care. See RESTATEMENT, supra, at § 51. 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 nonclient.” Id. at § 51(3)(a). If the CBO is a client of MCLA (as seems likely; see discussion at text accompanying notes 110–32 infra), 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 an LACI-type program that this is so.

60 That proposition receives examination below. See text accompanying notes 110–32 infra.

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 note 57 supra) further supports this understanding.

62 See text accompanying notes 193–98 infra.

63 MODEL RULES, supra note 54, at 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).
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.65 The LACI arrangement does not include the lawyer’s learning of the identity of any of the clients who receive the guidance from the staffers, so the lawyers have no information to protect.66

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 current67 and, in more limited fashion, former.68 This is the one byproduct of an 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 firm69 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.70 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,71 lest they find themselves engaged in an improper representation, requiring disqualification or withdrawal.72 The only way that MCLA could perform conflict checks would

65 Model Rules, supra note 54, at 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 and 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 Model Rules, supra note 54, at r. 1.7, 1.8.
68 Id. at r. 1.9.
69 Id. at r. 1.10.
70 See id. at 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.
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 standard 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

(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 . . . .73

Courts have implemented this standard (relying on the reasoning of the Restatement, if not always citing it) to hold that lawyers have duties to persons that they did not otherwise consider as 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.”74

Aside from conventional, express relationships, some common interactions trigger the application of this test, and lawyers on occasion find themselves with clients in an unexpected way.75 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

73 Restatement, supra note 57, at § 14.
guidance (even if, at times, through paraprofessionals), in a tailored way. Legal seminars typically do not generate inadvertent attorney-client relationships with those attending the seminars, but could do so if the attorney presenting the material proffers answers to specific participant questions about their rights. Internet “chat rooms,” where lawyers answer questions posed by users, and other internet advice resources may trigger duties on the part of the lawyer if the lawyer fails to establish sufficient disclaimers. An effort to “crowdsource” legal information (and, often, legal advice) has appeared, but its implication for the triggering of duties has not yet been tested. For instance, the website MetaTalk offers a portal identified as “IAALBIANYL,” 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.

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. That concern led the ABA to adopt Model Rule 1.18, articulating protective measures a firm may take to avoid conflicts.

---

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” services, 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, supra note 54, at r. 6.5.


81 See http://metatalk.metafilter.com/15513/IAALBIANYL.

82 For a discussion of this crowdsourcing phenomenon, see Robertson, supra note 80, at ; 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. Court, 410 F.3d 1104 (9th Cir. 2005), 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 at 1107.

84 MODEL RULES, supra note 54, at 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.

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. 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 the filtered legal advice. 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. 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. Formal Op. 98-411, issued the following year, stated that a lawyer who consults with another lawyer about strategy ordinarily does not form an attorney-client relationship with that other lawyer’s client, while never mentioning Op. 97-407. 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 consulting lawyer provides legal advice to the consulted 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. That setting is relatively rare (outside of the

88 As commentators have noted, the two opinions are difficult to reconcile. See Moss & Bridge, supra note 85, at 636–40.
89 See, e.g., Moore, supra note 85, at 781-82; Moss & Bridge, supra note 85, at 687; Rovner, supra note 85, at 1126-27.
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 relationship. In that setting, the consulted lawyer has no duties or limitations at all, except for those that her contractual agreement with the consulting lawyer imposes.

Observers agree, though, that interactions can, and do, fall between those two relatively manageable paradigm cases. A consulting lawyer will at times ask the consulted lawyer for advice and share some cabined confidential information, requesting that the consulted lawyer promise to keep that information secret (sometimes explicitly, sometimes implicitly). The effect of that contractual arrangement should not, according to the authorities, generate a full attorney-client relationship between the lawyer and the client. The agreement does, however, implicate conflicts 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.

None of the worries identified by commentary about consulting arrangements should arise with the LACI interactions. The client and the lawyer have no communications that would lead to reliance by the client on the lawyer’s guidance, as described earlier. Because the consulting CBO staffer shares no 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.

The discussion of the 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. The participants, and especially the consulted lawyer, must consider the agency law implications of the consultations. 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 a consulted lawyer about the latter’s client will typically take all steps necessary to prevent an attorney-client relationship with that client. If the consultant succeeds in that goal, commentators point out that she may, nonetheless, assume duties that are not terribly 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 consulted lawyer is an agent of his client, the principal. As an agent, he owes fiduciary duties to the principal,

---

90 See Formal Op. 98-411, supra note 87; Moss & Bridge, supra note 85, at 688.
91 Moss & Bridge, supra note 85, at 692.
92 Id.
93 Id.
94 Id. See also Moore, supra note 85, at 790-91; Formal Op. 98-411, supra note 87.
95 See text accompanying notes 73–78 supra.
96 See Moore, supra note 85, at 790–91; Rovner, supra note 85, at 1136-39.
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. The Restatement also provides, however, that the subagent owes some fiduciary duties to the principal, 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. The duty of loyalty in turn implicates conflict of interest concerns.

The MCLA attorney advising the CBO staffer through the LACI program might qualify as a subagent under this paradigm. If so, it may not matter that the preceding analysis has assured the MCLA lawyer that she has no attorney-client relationship with the ultimate agency constituent benefitting from the advice—the “client.” The most serious concern for MCLA under this arrangement is conflicts, as we saw above, and the subagent status implicates 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, because of the lack of notice to and consent, express or implied, of the principal. Therefore, the concern that the LACI arrangement would inherently commit the MCLA lawyers to some duties to the clients aided by the CBO staffers appears to be unwarranted.

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.

One writer, relying on the Restatement’s comment, adds this additional texture 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.”

---

98 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.
99 See Moore, supra note 85, at 790.
100 Id.
101 Restatement (Third) of Agency, supra note 97, at § 1.01.
The CBO staffer does not fit this definition in any meaningful way. The lack of a retainer is not dispositive, but the lack of control is critical. 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 end of next week, when the application opportunity closes, 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. Broker-advisors can be agents, and courts have imposed fiduciary duties upon them. 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. 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. Not surprisingly perhaps, no authority has found such a staffer to be an agent with fiduciary duties (although, in fairness, none has concluded that the staffer is not an agent; the question simply does not arise).

Furthermore, even if the staffers 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.” 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.

---

103 Agency is not dependent on the payment of fee, or on an express written agreement. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).
104 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 The question posed here does not appear to have been identified in the literature before now. At times, community-based staffers may be seen as agents of their organizations, as employees sometimes become. See, e.g., Mazen v. Seidel, 940 P.2d 923, 924–25 (Ariz. 1997). In the adoption environment, “it is not clear whether the social workers are the agents for the babies or the parents . . . .” Erwin A. Blackstone et al., Market Segmentation in Child Adoption, 28 INT’L REV. L. & ECON. 220, 224 (2008).
No subagency relationship arises. In addition, given that the lawyer owes her 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.\(^{110}\)

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 nonlawyer most likely has established an attorney-client relationship with that nonlawyer.\(^{111}\) 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.

A CBO participating in LACI requires professional assistance in order to accomplish its mission—to ensure that its staffers understand sufficiently the legal issues that the CBO’s clients encounter. MCLA is a law firm that has the capacity to provide that professional guidance. The resulting interaction evidences all of the elements of Section 14 of the Restatement of the Law Governing Lawyers,\(^{112}\) if the training and guidance provided by MCLA to the CBO constitutes “legal services.” 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.\(^{113}\)

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 to the CBO and its staffers. The CBO constituents rely on that legal information and guidance. Those factors serve as the central guideposts for establishing an attorney-client relationship.\(^{114}\) Indeed, if a nonlawyer, or a company owned by a nonlawyer, offered to sell such legal guidance to a CBO, the odds seem good that bar regulators would


\(^{111}\) See Lanctot, *Cyberspace*, supra note 75, at 179.

\(^{112}\) See RESTATEMENT, supra note 57, at § 14.

\(^{113}\) 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 Lanctot, *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).

\(^{114}\) See text accompanying notes 73–79 supra.
prohibit the transaction.\textsuperscript{115} Second, the Model Rules presume that the services provided by an attorney to a client involve representation.\textsuperscript{116} 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.\textsuperscript{117}

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 effectively is practicing law.\textsuperscript{118} 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 at all while doing so.\textsuperscript{119}

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,\textsuperscript{120} in order to justify nonlawyer participation in the activity as well as nonlawyer ownership in firms that provide the service.\textsuperscript{121} While some observers find the arguments not all that persuasive,\textsuperscript{122} no authority has challenged the compliance consulting industry for unauthorized practice,\textsuperscript{123} and nonlawyer consultants engage in compliance work

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} See Alexis Anderson, “Custom and Practice” Unmasked: The Legal History of Massachusetts’ Experience with the Unauthorized Practice of Law, 94 MASS. LAW REV. 124 (2013) (describing the limits on nonlawyer real estate closing firms).
\item \textsuperscript{116} Tanina Rostain, The Emergence of “Law Consultants,” 75 FORDHAM L. REV. 1397, 1410 n.66 (2006) (citing MODEL RULES, supra note 54, at Preamble, r. 1.2).
\item \textsuperscript{117} See ABA Comm. on Ethics and 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 and 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.”).
\item \textsuperscript{119} See Lanctot, 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.
\item \textsuperscript{120} See Ray Worthy Campbell, Rethinking Regulation and Innovation in the U.S. Legal Services Market, 9 N.Y.U. J.L. & BUS. 1, 43 (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 116, at 1398-99.
\item \textsuperscript{121} DeStefano, supra note 120, at 2989-90; Rostain, supra note 116, at 1409.
\item \textsuperscript{122} See Rostain, supra note 116, at 1407 (noting that the activity of compliance consulting often includes all of the elements of providing tailored legal advice to a client).
\item \textsuperscript{123} 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 text accompanying note 159 infra.
\end{itemize}
\end{footnotesize}
regularly.\textsuperscript{124} 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.\textsuperscript{125}

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.\textsuperscript{126} That admixture of inputs serves to support the consultant’s claims that it 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 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 that between a law firm and its client for legal services, not law-related services.

While it would be a burden for MCLA to treat all of the beneficiaries who receive guidance from the CBO staffers as clients, it is less of a complication for the LACI project 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.\textsuperscript{127} 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,\textsuperscript{128} 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.\textsuperscript{129} There are settings where that obligation will be constraining for MCLA. Imagine, for instance, a senior community center participating in LACI, with MCLA lawyers training its social workers and geriatric specialists about how to guide its guests about the legal issues they confront. The senior center under LACI becomes a client of MCLA, entered into its database for purposes of conflict checking. If an individual prospective client seeks the help of MCLA for a matter in which that senior center is a possible defendant, or in some other way an adverse party, MCLA will 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

\begin{footnotes}
\item[124] Id.; Remus, supra note 120, at 1271.
\item[125] See MODEL RULES, supra note 54, at r. 5.7; Boston Bar Association Ethics Opinion 1999-B: Law-Related Services (1999) (describing the implementation of Rule 5.7). For a description of that strategy, see DeStefano, supra note 120, at 2993; Remus, supra note 120, at 1261; Rostain, supra note 116, at 1410–11.
\item[126] See DeStefano, supra note 120.
\item[127] See MODEL RULES, supra note 54, at r. 1.13(a), (g).
\item[128] See text accompanying notes 54–62 supra.
\item[129] See MODEL RULES, supra note 54, at r. 1.7, 1.9.
\end{footnotes}
as well.\textsuperscript{130} 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 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.\textsuperscript{131} Implemented with care, it is ethically proper.\textsuperscript{132} 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.

\textbf{B. THE UNAUTHORIZED PRACTICE OF LAW QUESTION}

\textsuperscript{130} \textsc{Model Rules, supra} note 54, at 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. 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.

\textsuperscript{131} See, \textit{e.g.}, \textsc{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 contrary Op. 93-372); Richard W. Painter, \textit{Advance Waiver of Conflicts}, 13 \textsc{Geo. J. Legal Ethics} 289 (2000).

\textsuperscript{132} Formal Op. 05-436, \textsc{supra} note 131.
The issue of unauthorized practice of law (UPL) is much-discussed\textsuperscript{133} and profoundly unsatisfying.\textsuperscript{134} The UPL doctrine does, however, possess enough 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.\textsuperscript{135}

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.\textsuperscript{136} Some early attempts to define the practice of law demonstrated 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.”\textsuperscript{137} Slightly better are more recent formulations that connect the advice or advocacy to particularized legal questions faced by a specific person or entity.\textsuperscript{138} 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.”\textsuperscript{139} Professor Catherine Lanctot calls this “the hallmark of the practice of law.”\textsuperscript{140} It is

\textsuperscript{133} 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.

\textsuperscript{134} 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 Improving Access to Justice, 9 HARV. L. & POL’Y REV. 553, 563 (2015) (discussing the lack of clarity in UPL doctrine).


\textsuperscript{136} 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).

\textsuperscript{137} ABA 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, 46 (1981) [hereinafter Rhode, Policing the Professional Monopoly].

\textsuperscript{138} 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).


\textsuperscript{140} Lanctot, Cyberspace, supra note 75, at 182.
apparently settled today (but was not always so) that providing legal information is acceptable, as long as that provision does not turn into legal advice. It is the particularized, client-centered interaction that qualifies the conduct as practicing law, and that distinguishes “legal information” from “legal advice.” Because “the boundaries between legal information and legal advice can be hazy,” context will matter 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. 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. 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. The absence of the supervision and oversight by a lawyer means that the assistant has practiced law without a license. In the LACI setting, the level of oversight provided by the MCLA lawyers would not satisfy that standard.

Nonlawyers may also practice law without attorney supervision in many administrative contexts. Most state and federal agencies authorize nonlawyers to accompany and assist

---


145 Longobardi, supra note 143.


147 Id.

148 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).

149 Tremblay, supra note 146, at 668-69.


151 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, 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).
litigants appearing in adjudicative proceedings before the agencies. Those same nonlawyers may, consequently, advise the litigants about the proceedings and their rights—the activity otherwise deemed to be unauthorized practice. 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 nonlawyers experts from appearing and advocating for parents in federally-mandated special education appeal hearings. Other state and federal agencies limit practice by nonlawyers.

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. The assistance to the staffers provided by MCLA, both generally and in specific instances, therefore 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.

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 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.

152 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).


155 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. 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.

156 See text accompanying notes 169–79 infra.

157 MODEL RULES, supra note 54, at r. 5.5, Cmt. [3].
This comment implies a reality that is well-accepted (if fairly ignored): 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.”

For example, a tax accountant must apply state and federal tax law in her practice, and a lawyer may properly assist the accountant in performing that role. 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. The Comment to Rule 5.5 includes social workers as another example, implicitly recognizing that many community-based social workers must understand how legal systems and government agencies function in order effectively to advise and advocate for their clients.

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 systems, court processes, privileges, and the like in order to ensure that the social workers advise and support their clients most effectively. 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. A LACI-type

---

159 Rhode, Policing the Professional Monopoly, supra note 137, at 82 & n.326.
162 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. & POL’Y 183, 187 n.12 (2004) (noting “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) (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.”).
164 An Alabama ethics opinion has indicated 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.”
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) 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.

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, and the well-recognized understanding that almost all UPL challenges are market- and competition-driven. But an 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 the CBO staffers for available subsidized and pro bono


See Cotton, supra note 52 (describing the LEST project).

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).

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.

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).

See McMorrow, supra note 4, at 697; Rhode, Policing the Professional Monopoly, supra note 137.
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 selected identified settings, almost always administrative in nature. The most apt
examples would be claims under the Social Security Act for benefits, including disability
benefits, and public welfare matters, including TANF and SNAP (food stamp) benefits. 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. To the extent that the surrogacy project limits the CBO staffers’ assistance to those
areas of law and regulation that the MCLA lawyers are certain 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 here, this surrogacy project is hardly innovative, and adds little to the ATJ mission. And,
relatedly, the impetus for a surrogacy project like LACI is the stark need for clients to have
guidance on the areas that will now have been excluded, 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.  

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. 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, and refer the clients to the most user-friendly and appropriate technology to
guide the clients in a more interactive fashion.

170 See text accompanying notes 149–53 supra.
171 See Swank, supra note 151.
173 See text accompanying note 152 supra.
176 See Lanctot, Scriveners, supra note 141, at 849–50.
177 See Greiner et al., supra note 8, at 1130-35 (evaluating pro se assistance devices and systems).

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. 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’s collaboratively walking the client though an interactive on-line program made available to 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 on-line resource about how to respond to eviction court papers. 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.

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 on-line services require, or the ability to process online information without assistance.

**Screening and Triage Opportunities:** A limited LACI project would likely use the resources of the CBO staffers to aid existing legal services providers to refine their intake choices, by performing screening and making tailored referrals. Some existing access-to-justice projects have implemented this component. No authority has claimed that the process of screening and referral to legal service providers qualifies as the practice of law, and observers have recognized this as a proper role for nonlawyers. But the limitations of this service will be 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. That is, indeed, the rationale for exploration of surrogacy projects like the robust version of LACI.

---

178 See Lancot, Scriveners, supra note 140, at 849–50.
179 Id. at 841–49 (discussing assistance with Bankruptcy Court forms).
180 See In re Moffett, 263 B.R. 805, 815 (Bankr. W.D. Ky. 2001) (“This Court has no problem with [the nonlawyer] using a computer program, but she is only permitted to receive information from potential debtors on official bankruptcy forms.”).
182 See, e.g., Bertelli, supra note 163, at 22 (describing the Women’s Re-Entry Resource Network (WRRN) in Cleveland); Cotton supra note 52.
183 See, e.g., Cotton supra note 52.
184 See Keith, supra note 172, at 96 (“the system is currently drinking from a fire hose”).
185 That reality serves to undermine the mission of the Baltimore program, LEST, described by Michelle Cotton. See Cotton, supra note 52. The justification for the LEST program was ultimately to make referrals to legal aid and pro bono lawyers. Id. at 191. But the very need for the LEST program was the absence of available lawyers to serve those in need.
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.

V. IMAGINING A MORE ROBUST SURROGACY PROTOCOL

This Article will now imagine a regime where a more robust LACI arrangement would be acceptable. It examines the risks, benefits, and safeguards that such an arrangement would entail. This review concludes that a more just system would permit a surrogacy project that used existing CBO resources more directly, but acknowledges 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 begins to sketch out some systemic safeguards that might minimize, but not eliminate, those risks.

A. ASSESSMENT OF RISKS

A robust surrogacy project will use nonlawyer CBO staffers to advise clients about 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. 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. In addition to competence worries, nonlawyers do not assure the clients the ethical commitments that lawyers provide, and no licensing agency oversees their behavior to assure such commitments. Then, 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.

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. In that comparative setting, it is straightforward (if sometimes}

---

186 See Cantrell, supra note 36.
187 This is an obvious and well-established rationale for UPL protections. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.1.2, at 832 (1986). See also George J. Annas, Ethics Committees: From Ethics Comfort to Ethical Cover, HASTINGS CENTER REP., May-June 1991, at 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.”).
188 See Denckla, supra note 2, at 2593 (summarizing the argument).
189 Longobardi, supra note 143, at 2049.
190 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 187, at §15.1.2, pp. 828-34.
191 See, e.g., RHODE, supra note 22.

misleading\textsuperscript{192} to conclude that the client would be much better with a lawyer providing assistance instead of the less-trained, less-monitored nonlawyer. But that comparison is inapt—almost 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 guidance from an experienced participant in the systems that matter to the client is better, all things considered, than no guidance at all.\textsuperscript{193}

The point might be asserted even more strongly. Given the nature of the “sharp legal things”\textsuperscript{194} into which low- and moderate-income clients so often bump, and the lived experiences of the clients and their struggles, some assert that social workers and CBO staffers are better qualified than lawyers to offer guidance,\textsuperscript{195} or at least the kind of advice 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,\textsuperscript{196} 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.\textsuperscript{197}

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,\textsuperscript{198} 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 on-line 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 restrictions have as their goal to protect the interests of those clients, in a benevolent

\textsuperscript{192}See text accompanying notes 194–96 infra.


\textsuperscript{194}Wexler, \textit{supra} note 13, at 1053.

\textsuperscript{195}See Cantrell, \textit{supra} note 36, at 885 (reporting on some limited empirical studies).

\textsuperscript{196}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 text accompanying note 177–80 supra. 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).

\textsuperscript{197}Cantrell, \textit{supra} note 36, at 886–87 (summarizing the findings in HERBERT M. KRITZER, \textit{LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK} (1998)).

\textsuperscript{198}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 on-line 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).
paternalistic fashion,\textsuperscript{199} 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 the 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,\textsuperscript{200} 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.\textsuperscript{201} Some states have developed such protocols in recent years.\textsuperscript{202}

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 paralegal authorized to provide certain services, but the odds are not many of them would, or could given the demands on their time, proceed in that fashion. If LACI were to work effectively, it needs 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.

\textsuperscript{199} See WOLFRAM, supra note 187, at § 15.1.2, p. 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.

\textsuperscript{200} 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.’”).

\textsuperscript{201} 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, e.g., Kritzer, supra note 172, at 921; Rhode, Policing the Professional Monopoly, supra note 137, 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).


\textit{Forthcoming, Georgetown Journal of Legal Ethics (2018)}
This 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 stage regulatory agency that enforces UPL violations and the state attorney disciplinary authorities for an express, structured program by which employees and volunteers of community-based service providers may 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. 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 responsible 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, as the CBO knows, encounter common legal issues on a regular basis.

**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

---


204 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.

205 See text accompanying notes 118–24 supra (discussing the prospect that a CBO might not necessarily qualify as a client).

206 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 99-104 (2015).
safe harbor applicable to a LACI-type program would need to ensure that the health center does not add any further charges as a result of the guidance offered on legal matters. While the LACI-type program ought to apply only to low- and moderate-income clients, if a safe harbor applies to it, 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 \textit{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 freely to 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 did not include housing, family, and debt collection, all areas traditionally deemed the practice of law and the source of serious need for representation in most courts hearing those matters. Employment law is a plausible candidate as well. The possibility of bankruptcy 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.

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, 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 at the same time 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

\footnotesize

207 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 6 (Brennan Ctr. for Justice at NYU Sch. of Law, Working Paper, 2009) (reporting the data); Jon D. Levy, \textit{The World Is Round: Why We Must Assure Equal Access to Civil Justice}, 62 ME. L. REV. 561, 574 (2010) (discussing the studies).


210 For an in-depth discussion of efforts to assist unrepresented bankruptcy debtors, see Lanctot, \textit{Scriveners}, supra note 141, at 841–49.

211 See text accompanying notes 190–96 supra.
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,\textsuperscript{212} and the surrogacy initiative, much like ski slopes, kayak rentals, sporting events, and the like,\textsuperscript{213} could not function without the clients acknowledging and accepting the risks.\textsuperscript{214} As with most waivers used in the business world, claims based on intentional misconduct would survive.\textsuperscript{215}

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.\textsuperscript{216} 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.\textsuperscript{217} MCLA must therefore provide competent training materials and instruction to the staffers, and provide capable follow-up advice to staffers when appropriate. If the waiver by the clients 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.

VI. 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

\textsuperscript{212} See Restatement (Third) of Torts § 2 (2010) (“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.”); Peter M. Kinkaid & William J. Stuntz, Note, Enforcing Waivers in Products Liability, 69 Va. L. Rev. 1111, 1112 (1983).

\textsuperscript{213} See, e.g., Sharon v. City of Newton, 769 N.E.2d 738, 745 (Mass. 2002) (signed release barred a claim for injuries to a high school cheerleader).

\textsuperscript{214} 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.

\textsuperscript{215} Releases that purport to cover intentional misconduct are often unenforceable as against public policy. See Restatement (Third) of Torts § 2, 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. Voyagaire Houseboats, Inc., 32 WM. MITCHELL L. REV. 1315 (2006).

\textsuperscript{216} See text accompanying notes 73–95 supra.

\textsuperscript{217} 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 & Wardell, 866 N.E.2d 1033 (N.Y. 2007) (law firm not liable for failure to address an issue because of limited retainer agreement); Lerner v. Laufer, 819 A.2d 471 (N.J. Super. A.D. 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 (2007).
in the values their supporters claim, now can bar leaders accept lawyering activity by unlicensed
nonlawyers on behalf of the most vulnerable of client populations?218

Critics of strict UPL limits argue that those policies recognize little more than guild
protectionism.219 Bar leaders disagree, but their arguments are, frankly, weaker than those of the
critics.220 The chief—and often the only—complainants about nonlawyers encroaching upon
lawyers’ terrain are lawyers, not consumers.221 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.222 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.223 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.224 A LACI exception appears to waive that protection

218 Protection of vulnerable client populations is a common justification for UPL restrictions. See Rhode, supra note
22, at 82–83.
219 Id., at 92; Denckla, supra note 2, at 2581.
(“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 187, at § 15.1.2, page 832; Barlow F.
Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good
justification, except perhaps for purely selfish reasons, for denying to the public the right to choose from whom it
will purchase legal services.”).
221 Rhode, Policing the Professional Monopoly, supra note 137, at 33-34; Rhode & Ricca, supra note 208, at 2591-
92.
222 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 Dym Cohen, Luz E. Herrera & William T. Tanner, Launching
the Los Angeles Incubator Consortium, 83 Umkc L. Rev. 861 (2015); 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.
Problem Solving, 45 Creighton L. Rev. 699, 740 (“law is becoming increasingly complex”).
224 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

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[.]” White critiques efforts to fit the legal representational needs of 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.” 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.

VI. CONCLUSION

A legal guidance program staffed primarily by nonlawyers, with licensed counsel remaining in the background in a purely supportive role, might past 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 of harm to the profession. The bar leadership ought to welcome that kind of innovation, as its benefits outweigh its costs by a considerable margin.

226 Id. (citing WOMEN, POVERTY, AND AIDS: SEX, DRUGS AND STRUCTURAL VIOLENCE (Paul Farmer et al., eds., 1996).