

# DEMOCRATIZING THE RULE OF LAW

Hon. Deno G. Himonas\* & Tyler J. Hubbard\*\*

*Year in and year out, Americans face a mountain of unmet civil legal needs. To combat this access-to-justice crisis, the Utah court system has introduced a number of changes. These changes cover the spectrum, from common improvements like making standardized forms available online, to pioneering advancements, such as introducing a legal regulatory sandbox. In this Article, we explore many of the reforms that the Utah courts have embraced, their underlying rationales, and the pushback the reforms have faced.*

INTRODUCTION.....	262
I. CLOSING THE ACCESS-TO-JUSTICE GAP IN UTAH .....	263
A. Incremental Improvements .....	264
1. Form reform .....	264
2. Online Court Assistance Program (OCAP).....	266
3. Utah Courts Self-Help Center .....	267
B. Breakthrough Change .....	268
1. Licensed Paralegal Practitioners program.....	269
2. Online Dispute Resolution (ODR) .....	271
3. Regulatory reform .....	273
II. ADDRESSING PUSHBACK .....	278
A. Online Dispute Resolution.....	278
B. Regulatory Reform and the Licensed Paralegal Practitioners Program.....	279
CONCLUSION .....	282

---

\* Justice Constandinos (Deno) Himonas serves on the Utah Supreme Court. He is the Chair of the Utah Task Force on Licensed Paralegal Practitioners, the Chair of the Task Force on Online Dispute Resolution, and a Co-Chair of the Task Force on Regulatory Reform. Before his appointment to the Utah Supreme Court, Justice Himonas served as a Utah State District Court Judge for over a decade. Justice Himonas has also served as an Adjunct Professor of Law at the S.J. Quinney College of Law at the University of Utah and is a Life Fellow of the American Bar Foundation. He is a past Chair of the Litigation Section of the Utah Bar, and a recipient of its Judicial Excellence Award.

\*\* Tyler Hubbard received his J.D. from the S.J. Quinney College of Law at the University of Utah in 2019, Highest Honors, Order of the Coif. He was the Executive Text Editor of the Utah Law Review. He currently serves as a law clerk to Justice Himonas.

## INTRODUCTION

A recurrent refrain in our public discourse these days is the “rule of law,” the reassuring concept that the law is neutral and applies equally to all. Be that as it may, the rule of law offers little succor to those who are unable to access or afford our civil legal system. And as things presently stand in the United States, that group includes all but the very wealthiest of individuals and moneyed interests. The rest of us do not have the ability to adequately understand our civil legal issues, to access our civil legal system, or both.

Study after study has documented the disparity in access to and the affordability of civil justice in the United States. Although this problem is not unique to the United States, it is particularly acute here: the World Justice Project ranked the U.S. as tied for 99th out of 126 countries in terms of access to and affordability of civil justice.<sup>1</sup> That is why American academics and nonprofit groups have increasingly focused on access to justice. For example, the American Academy of Arts and Sciences recently dedicated an entire issue of its journal, *Daedalus*, to exploring the “national crisis in civil legal services facing poor and low-income Americans.”<sup>2</sup> And the Pew Charitable Trusts just released the results of a wide-ranging study that cut “across all income levels” and found that “[a]bout 1 in 3 U.S. households faced housing, family, or debt issues that could result in an interaction with the civil legal system in 2018.”<sup>3</sup> Yet at least “80 percent of people living below the poverty line and a majority of middle-income Americans receive no meaningful assistance when facing” these issues.<sup>4</sup>

The empirical and academic work in this space evinces several certainties. Each year, millions of Americans are confronted with civil legal issues. Some face a dilemma: either bring or defend a legal action with the aid of a lawyer and expect to pay more in legal fees than the value of the dispute, or go it alone. Those Americans are fortunate; they have a choice. Others do not. Many Americans lack the means to afford a lawyer and face the overwhelming prospect of going it alone, with little or no understanding of what they are up against.<sup>5</sup>

---

1. UTAH WORK GRP. ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION 1 (2019), <https://perma.cc/HJP8-AQ5M>.

2. See generally *Access to Justice*, DAEDALUS, Winter 2019.

3. Erika Rickard, *Many U.S. Families Faced Civil Legal Issues in 2018*, PEW CHARITABLE TR. (Nov. 19, 2019), <https://perma.cc/R3LS-BRDH>.

4. Andrew M. Perlman, *The Public’s Unmet Need for Legal Services & What Law Schools Can Do About It*, DAEDALUS, Winter 2019, at 75, 75.

5. AM. BAR ASS’N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 8 (2016), <https://perma.cc/C3QL-AV8Q> (“[L]egal services are growing more expensive, time-consuming, and complex, making them increasingly out of reach for most Americans. Many who need legal advice cannot afford to hire a lawyer and are forced to either represent themselves or avoid accessing the legal system altogether.”). This all assumes that those Americans confronting legal issues understand in the first instance that the issue has a justiciable element, which is often not the case. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 30 (2017),

The Utah judiciary has sought to level the playing field for those who have no access to justice. This Article frames the Utah judiciary's efforts to transform the civil legal system to combat these inequalities or, put differently, to democratize the rule of law by making an understanding of the law and access to our civil legal system more widely affordable and available. It closes by responding to criticism of these reform efforts.

### I. CLOSING THE ACCESS-TO-JUSTICE GAP IN UTAH

Closing the access-to-justice gap requires both incremental improvement and breakthrough change.<sup>6</sup> Indeed, “long-term success” in our legal system “depends on the ability to do two seemingly contradictory things at the same time: improve existing processes and products (continuous, incremental change) and invent totally new, better processes and products (discontinuous, breakthrough change).”<sup>7</sup> For years we in the legal profession in the United States have been making incremental improvements—tinkering around the edges—but fear, inertia, and captive or insider sub-regulators (*i.e.*, state bar associations)<sup>8</sup> have often stymied breakthrough change.<sup>9</sup> As discussed below, we need both

---

<https://perma.cc/HR5S-W6NV>.

6. Cf. GEORGETOWN LAW CTR. ON ETHICS & THE LEGAL PROFESSION, 2020 REPORT ON THE STATE OF THE LEGAL MARKET 2-3 (2020).

7. *See id.* at 2.

8. A sub-regulator becomes captive when it “ends up advancing the political or commercial concerns of the very people . . . it is supposed to be regulating” instead of the public interest. *Regulatory Capture—Definition and Meaning*, MARKET BUS. NEWS, <https://perma.cc/W2WC-78DD>. So, for example, if a state bar association advances the political or commercial concerns of lawyers—instead of the public interest—it would be a captive sub-regulator.

9. Members of the legal profession recognized the disparity in access to justice as far back as 1938, when the “the Dean of Yale Law School[] bemoaned the failure of lawyers to ‘meet the social needs which justify the existence of his profession’ and urged the organized bar to ‘meet the issue of maldistribution of legal service.’” Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 64 (2016) (citing Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1275 (1938)). And so began this “tinkering around the edges”—which includes a potpourri of access-to-justice efforts that cannot all be listed here. Some jurisdictions have experimented with ethical rules to increase attorneys’ pro bono legal service. *Pro Bono Reporting*, AM. B. ASS’N, <https://perma.cc/F8GY-4G8S> (last updated Mar. 19, 2020). Florida was the first state to *mandate* pro bono reporting, which has “brought about significant increases in participation, the number of volunteer hours and monetary contributions.” *Id.* Some jurisdictions, including Arizona and California, have for many years allowed nonlawyers to become certified to prepare legal documents for people. *What Is a Legal Document Assistant?*, CAL. ASS’N OF LEGAL DOCUMENT ASSISTANTS, <https://perma.cc/2NQ7-NMXD>; *Legal Document Preparer Program*, AZCOURTS.GOV, <https://perma.cc/6XWL-N6MG>. And New York has a Navigator Program, in which nonlawyers known as ‘navigators’ provide “to unrepresented litigants the services of information, moral support, and accompaniment to negotiations with the other side’s attorneys and into courtrooms.” REBECCA L. SANDEFUR & THOMAS M. CLARKE, AM. BAR FOUND., ROLES BEYOND LAWYERS 4 (2016),

types of progress to democratize the rule of law. Erika Rickard, Project Director for Civil Legal System Modernization at the Pew Charitable Trusts, put it this way: “The broad impact of civil legal problems confirmed by [a Pew] survey suggests that the nation needs new solutions to the problems frequently encountered by U.S. households.”<sup>10</sup> And the Conference of Chief Justices (CCJ) agrees: “[T]raditional solutions to reducing the access to justice gap, such as increased funding for civil legal aid, more pro bono work, or court assistance programs have had some success, but are not likely to resolve the gap, which is only increasing in severity.”<sup>11</sup> Indeed, the CCJ recently adopted a resolution encouraging “regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public.”<sup>12</sup> This Part discusses both the incremental improvements and breakthrough changes that the Utah judiciary has made and is making in trying to close the access-to-justice gap.

#### A. Incremental Improvements

For decades the United States has sought to bridge the access-to-justice gap through incremental improvement, such as volunteerism (*i.e.*, pro bono work) and legal aid.<sup>13</sup> This Subpart documents some of the efforts that have been made in Utah—other than pro bono work and legal aid—to improve access to justice little by little: form reform, the Online Court Assistance Program (OCAP), and the Utah Courts Self-Help Center. These efforts are important to improving access to justice and must continue.

##### 1. Form reform

In 2016, the Utah Judicial Council created “a Forms Committee to examine the multitude of forms used in the courts.”<sup>14</sup> Although this effort might seem

---

<https://perma.cc/JMS2-MBE3>. All of these efforts are incremental, however, because neither document preparers nor the New York Navigators “are licensed to give legal advice.” Stephen R. Crossland & Paula C. Littlewood, *Washington’s Limited License Legal Technician Rule and Pathway to Expanded Access for Consumers*, 122 DICK. L. REV. 859, 862 (2018).

10. Rickard, *supra* note 3.

11. Conference of Chief Justices, Resolution 2, Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services (Feb. 5, 2020), <https://perma.cc/7Q5N-9YKD>.

12. *Id.*

13. See *id.*; Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, DAEDALUS, Winter 2019, at 177, 178 (“In the last century, legal professions, governments, and charitable providers have taken small, partial steps to provide access to legal processes and legal advice to people who could not otherwise afford them. By doing so, they have inched closer to the ideals of universal justice.”).

14. Catherine J. Dupont, *Licensed Paralegal Practitioners*, UTAH B.J., May-June 2018, at 16, 18; UTAH CODE JUD. ADMIN. r. 3-117 (establishing the committee on court forms).

insignificant at first glance, it is an incremental advance that greatly narrows the access-to-justice gap. That is because “[o]ne of the most basic needs of [unrepresented] litigants is access to the forms that they need to carry their legal dispute from conception to resolution in the courts.”<sup>15</sup> Unrepresented litigants need help to convey legally relevant facts; forms are designed to draw out details that an authority has predetermined are “necessary to achieve a particular objective.”<sup>16</sup> Indeed, “[s]trong qualitative evidence shows that forms help litigants to prepare legally sufficient paperwork.”<sup>17</sup>

Despite the importance of standardized forms, they are often neglected. Although most states make at least some standardized state forms available, the forms may be difficult to obtain.<sup>18</sup> The forms can also be riddled with legalese and laden with complex instructions, making them confusing and difficult to fill out correctly.<sup>19</sup> Perhaps worst of all, standardized forms can be “just plain wrong,” based on outdated statutes or other law.<sup>20</sup>

To rid the court system of erroneous and non-user-friendly forms, the Court Forms Committee in Utah has been charged with “the herculean task of updating court forms, creating new forms, and deleting obsolete forms.”<sup>21</sup> Importantly, the Committee is also working to put the forms in plain language.<sup>22</sup>

The Utah State Courts website currently offers about 150 updated and approved forms.<sup>23</sup> The Court Forms Committee is just getting started and still

---

15. Mark G. Harmon et al., *Remaking the Public Law Library into a Twenty-First Century Legal Resource Center*, 110 L. LIBR. J. 115, 129 (2018).

16. SELF-REPRESENTED LITIG. NETWORK, DESIGN THINKING & AGILE DEVELOPMENT 5 (2017), <https://perma.cc/7JU2-DUJ7>; SUPREME COURT TASK FORCE TO EXAMINE LIMITED LEGAL LICENSING, REPORT AND RECOMMENDATIONS 19 (2015), <https://perma.cc/HXQ2-FS4W> [hereinafter TASK FORCE REPORT].

17. SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED 44 (2008), <https://perma.cc/7JU2-DUJ7>.

18. Harmon et al., *supra* note 15, at 129 (discussing a 2012 survey that found “that forty-eight states and the District of Columbia have standardized state forms available”).

19. *See, e.g.*, Deno Himonas, *Utah’s Online Dispute Resolution Program*, 122 DICK. L. REV. 875, 877 (2018); Harmon, *supra* note 15, at 143. Recently, a ‘Plain Language Movement’ has taken hold in the United States. Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 1065, 1069 (2013). The movement recognizes that forms—if they are written in plain language—can be instrumental in access to justice, allowing litigants to provide “clear and relevant information” to the court. *Id.* at 1072-73.

20. Himonas, *supra* note 19, at 877, 880.

21. Dupont, *supra* note 14, at 18.

22. For example, the Summons form reads “Deadline!” before telling the defendants that they must answer the summons within twenty-one days; directs the defendant to read and answer the relevant complaint or petition; and tells defendants that they can go to the court’s Finding Legal Help webpage for help. *Summons*, UTAH COURTS, <https://perma.cc/6PJL-94TS>. It does all of this in English and Spanish, and also notes that there are simplified Chinese and Vietnamese versions available online. *Id.*

23. *See* Comm. on Court Forms, Meeting Minutes (Apr. 13, 2020),

has hundreds of forms left to review.<sup>24</sup> Further, the Committee will create new forms for the many areas of law that have not traditionally had forms.<sup>25</sup> Thus litigants will have access to hundreds of forms—and by that, access to justice—that they previously did not have.

## 2. Online Court Assistance Program (OCAP)

Utah launched the Online Court Assistance Program (OCAP) around two decades ago. OCAP is software that increases access to legal services by helping “court users who do not have an attorney to prepare court documents.”<sup>26</sup> It does so by conducting an interactive online interview and producing a downloadable document to file with the court.<sup>27</sup>

OCAP is a simple but powerful tool that is operationally similar to common online resources like TurboTax. After logging in, users choose the type of interview they want. There are forty-nine interviews to choose from in five broad legal areas: family law, garnishment, protective orders, landlord and tenant, and small claims.<sup>28</sup> The interviews cover sophisticated matters within those areas. For instance, in an answer to a petition for divorce, the user can use OCAP to make a counterclaim against the petitioner.

To illustrate how OCAP works, imagine a user who is filing for a divorce. To do so, they would create an OCAP account, log in, and select the ‘Divorce–Petitioner’ interview.<sup>29</sup> The user would then complete the interview by typing in or selecting their answers to the questions.<sup>30</sup> When the interview is over, the software generates a PDF document, which the user can then file with the court.

In fiscal year 2019, OCAP generated 7,376 forms that were used to initiate cases in Utah.<sup>31</sup> Nearly half—41 percent—of all divorce and annulment filings and 19 percent of custody and support and paternity filings were made using OCAP.<sup>32</sup> OCAP has thus increased access to the legal system in Utah by allowing self-represented litigants, attorneys, and LPPs to prepare and file documents with

---

<https://perma.cc/668E-MWBT> (listing the approved forms); *Approved Forms*, UTAH COURTS, <https://perma.cc/XFP4-UJTB> (listing categories of approved forms and providing links to the forms).

24. Email from Brent Johnson, Gen. Counsel, Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Feb. 13, 2020, 14:49 MST) (on file with author).

25. *Id.*

26. UTAH CODE § 78A-2-501 (2019); *Online Court Assistance Program*, UTAH COURTS, <https://perma.cc/J27B-ZDMR>.

27. See TASK FORCE REPORT, *supra* note 16.

28. *Online Court Assistance Program*, *supra* note 26.

29. *Id.*

30. *Id.*

31. Email from Clayson Quigley, Court Serv. Dir., Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Jan. 21, 2020, 10:13 MST) (on file with author).

32. *Id.*

the court.

### 3. Utah Courts Self-Help Center

Self-help centers are essential to access to justice because “[a]ccess to justice requires the ability to find the law.”<sup>33</sup> Self-help centers facilitate just that by providing attorneys and resources to the public.<sup>34</sup>

The Utah Courts Self-Help Center currently has six attorneys who help unrepresented litigants with their cases in any way possible, short of giving legal advice.<sup>35</sup> These attorneys accept “the self-represented as equal to licensed attorneys” and serve them accordingly.<sup>36</sup> They “answer questions about the law, court process and options; provide court forms and instructions and help completing forms; provide information about [one’s] case; provide information about mediation services, legal advice and representation through pro bono and low cost legal services, legal aid programs and lawyer referral services; [and] provide information about resources provided by law libraries.”<sup>37</sup> And unlike some self-help centers, the Utah Courts Self-Help Center is not limited to a specific area of law (*e.g.*, family law). Instead, it can help with any case type at any procedural level—even state administrative processes.<sup>38</sup>

The Self-Help Center can assist any Utah resident; it currently receives about 21,000 contacts per year.<sup>39</sup> The Center allows a person to call, text, or email to receive help,<sup>40</sup> so that services are available to rural residents, or those in prison or jail.<sup>41</sup> And because the Self-Help Center can help people throughout the state with all manner of legal problems, it has a unique perspective on legal needs in the state. The Self-Help Center shares that perspective with various court committees, the executive branch, and legal aid organizations to help them

---

33. Harmon et al., *supra* note 15, at 137.

34. *Id.* at 127-28.

35. Interview with Nathanael Player, Dir., Self-Help Ctr., Utah State Courts, in Salt Lake City, Utah (Jan. 17, 2020).

36. Harmon et al., *supra* note 15, at 136.

37. *Self-Help Center*, UTAH COURTS, <https://perma.cc/7MGT-T4GA>; *see also* UTAH CODE § 9-7-313 (2012).

38. Interview with Nathanael Player, *supra* note 35.

39. The Self-Help Center received 21,495 contacts in 2019, averaging 109.11 contacts per service day. Email from Nathanael Player, Dir., Self-Help Ctr., Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Jan. 22, 2020, 11:13 MST) (on file with author). A ‘contact’ is “an interaction with a patron” such as “one phone call, one email or one text exchange over the course of the day.” Email from Nathanael Player, Dir., Self-Help Ctr., Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Feb. 18, 2020, 08:16 MST) (on file with author).

40. *Self-Help Center*, *supra* note 37.

41. There are no legal libraries in Utah prisons, but prisoners can contact the Self-Help Center, making it a crucial resource to Utah’s inmates—the people who arguably need access to the law the most. Interview with Nathanael Player, *supra* note 35.

improve their processes in ways that increase access to justice.

Besides helping people through call, text, and email, the Self-Help Center also curates extensive online resource pages that give users easily understandable information on certain legal topics, forms, and directions about finding legal help.<sup>42</sup> For example, the ‘Eviction’ page gives general information about the eviction process, diagramming it with a flowchart.<sup>43</sup> The page lets the reader know—using large, bold font—that it is illegal to evict a tenant without a court order.<sup>44</sup> The page also spells out eviction procedures and court proceedings.<sup>45</sup> At the bottom, the page steers readers toward other resources such as the Mobile Home Park Helpline and information about homeless shelters.<sup>46</sup>

The Utah Courts Self-Help Center has helped carry the access-to-justice baton since 2007.<sup>47</sup> Every day it carries that baton a step further through meaningful contact with those in need of legal help, the resources on its website, and its statewide perspective on legal issues.

## B. Breakthrough Change

Incremental improvements are critical to access to justice. But these improvements have only slowed the rate at which the access-to-justice gap has grown. Empirical results conclusively demonstrate that we can neither volunteer ourselves across the gap nor rely on public services.<sup>48</sup> And that is why, besides continuing to improve aspects of the legal system bit by bit, we need breakthrough change—change that includes institutional modifications and market-driven solutions—to bridge the access-to-justice gap.<sup>49</sup> In Utah, recent breakthrough changes include creating Licensed Legal Practitioners, enabling online dispute resolution (ODR) systems, and launching regulatory reforms.

---

42. *Self-Help Resources/Self-Represented Parties*, UTAH COURTS, <https://perma.cc/4KWC-R4DE>.

43. *Eviction*, UTAH COURTS, <https://perma.cc/QA9X-L3JU>.

44. *Id.*

45. *Id.*

46. *Id.*

47. Daniel J. Hall & Lee Suskin, *Responding to the Crisis—Reengineering Court Governance and Structure*, 47 *NEW ENG. L. REV.* 505, 524 (2013).

48. Data from a 2014 study show that “annually ‘U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with legal needs.’” AM. BAR ASS’N, *REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14* (2016) (citation omitted), <https://perma.cc/JGF3-J9EM>.

49. “Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction.” *See* NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 257 (2019).

### 1. Licensed Paralegal Practitioners program

Utah recently created the Licensed Paralegal Practitioner (LPP) program, under which nonlawyers may engage in some activities traditionally reserved for lawyers without violating the prohibition against the unauthorized practice of law.<sup>50</sup> The LPP program is designed to be a “market-based solution” for access to justice.<sup>51</sup> The idea is that this new profession will increase the supply of certain legal services, which will in turn make those services more affordable. The medical profession took a similar route many years ago with “the advent of the nurse practitioner, physician assistants, and other qualified and regulated medical providers.”<sup>52</sup>

LPPs increase the supply of legal services by engaging in the “limited practice of law” in their specialty area.<sup>53</sup> Right now there are three specialty areas: certain family law matters, evictions, and debt collection in small claims cases.<sup>54</sup> Because “[t]here are many areas of practice in which specialized paraprofessional providers could give better service than . . . generalist graduates of law schools,”<sup>55</sup> going forward, Utah should consider expanding the areas of law in which LPPs can practice. For example, in Ontario, Canada, paralegals can independently offer services for some minor criminal offenses.<sup>56</sup>

Within each specialty area, LPPs can do certain tasks for their clients. Those include interviewing clients; completing forms approved by the Judicial Council; advising clients which forms to use and how to fill them out; obtaining, explaining, and filing any documents needed to support the forms; reviewing the

---

50. “Model rules and most statutes today preclude persons not licensed by a state from practicing law in that state.” Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 130 (2000) (internal citation omitted). See also UTAH ADMIN. CODE r. 14-802(a) (“[O]nly persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.”). In creating the LPP profession, Utah followed in the regulatory footsteps of Washington State, which was the first state to authorize an “independently licensed legal paraprofessional in the United States.” Crossland & Littlewood, *supra* note 9, at 862. In Washington, those paraprofessionals are known as Limited License Legal Technicians (LLLTs), and may give limited legal advice in certain practice areas. *Id.*

51. Dupont, *supra* note 14, at 16.

52. Crossland & Littlewood, *supra* note 9, at 862.

53. UTAH ADMIN. CODE r. 14-802.

54. UTAH ADMIN. CODE r. 14-802(c).

55. Gordon, *supra* note 13, at 186.

56. DAVID J. MORRIS, ONTARIO MINISTRY OF THE ATTORNEY GEN., REPORT OF APPOINTEE’S FIVE-YEAR REVIEW OF PARALEGAL REGULATION IN ONTARIO 2-3, 11 (2012), <https://perma.cc/7NS9-MX9J>; Lisa Trabucco, *Lawyers’ Monopoly? Think Again: The Reality of Non-Lawyer Legal Service Provision in Canada*, 96 CAN. B. REV. 460, 469 (2018) (“In Ontario, licensed paralegals may provide legal services with respect to . . . provincial court matters for provincial offences and summary conviction offences under the *Criminal Code* . . . .”); see also Law Society Act, R.S.O. 1990, c L.8, By-laws 4, 4.1 (Can.) (authorizing qualified licensees to provide certain legal services in accordance with the act).

documents of another party and explaining them; advocating for a client in mediated negotiations; communicating with another party about the relevant form; and explaining a court order that affects the client's rights and obligations.<sup>57</sup>

To become an LPP, one must meet certain requirements.<sup>58</sup> Some of those requirements are educational: LPPs must have (1) graduated from law school, (2) graduated with an associate or bachelor's degree in paralegal studies, or (3) graduated with a bachelor's degree in any field plus completed a paralegal certificate or fifteen credit hours of paralegal studies.<sup>59</sup> If the applicant has not graduated from law school, they must also meet experiential requirements (1,500 hours of substantive law-related experience within the last three years, including a certain number of hours in the area of law in which the applicant wants to be licensed); must have a credential as a paralegal; and must complete specialized courses about ethics and about each specialty area in which the applicant wants to be licensed.<sup>60</sup> All applicants must also pass an ethics examination and an examination for the practice area in which they will be licensed and prove their good moral character.<sup>61</sup>

In October 2019, the first four LPPs in Utah were sworn in.<sup>62</sup> It is anticipated that the program will grow slowly over the next few years and then exponentially over the next decade.<sup>63</sup> And although Utah does not yet have data about the LPP program (*e.g.*, consumer satisfaction, legal outcomes), Professor Anna Carpenter of the University of Utah and Dr. Alyx Mark of Wesleyan University will study the program in the coming months and years.<sup>64</sup>

To help the LPP program grow at a faster pace, Utah should consider allowing LPPs to represent clients in court to some extent—something they cannot currently do—and easing the experiential requirement. Utah should also strongly consider broadening the educational requirement. Educational reform may play a role in that expansion, given that state educational institutions have started creating legal education programs apart from full-blown Juris Doctorate programs. For instance, the S.J. Quinney College of Law at the University of Utah launched a Master of Legal Studies degree program in the fall of 2018, and

57. UTAH ADMIN. CODE r. 14-802(c)(1)(A) to -(c)(1)(L).

58. UTAH ADMIN. CODE r. 15-703.

59. UTAH ADMIN. CODE r. 15-703(a)(4).

60. UTAH ADMIN. CODE r. 15-703(a)(5).

61. UTAH ADMIN. CODE r. 15-703(a)(6) and (a)(7).

62. Licensed Paralegal Practitioner Steering Comm., Meeting Minutes 1-2 (Oct. 17, 2019), <https://perma.cc/U82M-3XK2>.

63. Email from Scotti Hill, Associate Gen. Counsel and LPP Admin., Utah State Bar, to Justice Deno Himonas, Utah Supreme Court (Jan. 14, 2020, 11:34 MST) (on file with author).

64. Licensed Paralegal Practitioner Steering Comm., Meeting Minutes 3 (Oct. 17, 2019), <https://perma.cc/49K7-NWG2>; Alyx Mark, WESLEYAN UNIV., <https://perma.cc/PRS6-G4JT>.

the University of Arizona offers a Bachelor of Arts in law.<sup>65</sup> Arizona may eventually allow those who want to become limited licensed legal practitioners to use that degree to help them qualify.<sup>66</sup> Utah should consider doing the same.

## 2. Online Dispute Resolution (ODR)

The internet has long allowed “people to shop, socialize, and pay bills from any location at any time of day or night.”<sup>67</sup> But the internet can also be used “to improve access to justice.”<sup>68</sup> Indeed, every smartphone and computer “should be a point of access to justice—the multidoor courthouse of tomorrow.”<sup>69</sup> With that goal in mind, the State of Utah in 2018 began to pilot online dispute resolution (ODR) in small claims cases at a few state courts.<sup>70</sup>

ODR is a communication platform that allows parties to communicate in an attempt to settle their dispute without any intervention from the court.<sup>71</sup> Utah was “the first U.S. state to deploy an ODR system capable of handling an entire dispute, as opposed to a discrete part of a dispute such as mandatory mediation.”<sup>72</sup> Some people call ODR “pajama court,”<sup>73</sup> since users can use it at home in pajamas at 3:00 a.m. Although this example is somewhat absurd, it illustrates an important point. By participating in ODR, litigants need not come to the courthouse to participate in their cases; nor do they have to participate during typical business hours. Thus people who cannot come to the courthouse—because of disability, needing to be at work, or having to take care of children—can litigate their cases from home and avoid a default judgment.

---

65. Alexis Blue, *Nation’s First B.A. in Law Now a Model*, UNIV. ARIZ. (July 11, 2017), <https://perma.cc/8AWU-M292>; *University of Utah S.J. Quinney College of Law Launches New Master of Legal Studies Degree Program*, UNIV. UTAH S.J. QUINNEY C.L. (Jan. 22, 2018), <https://perma.cc/8BFH-U982>; *Bachelor of Arts: Law*, UNIV. ARIZ., <https://perma.cc/FRM3-Y6TP>.

66. ARIZ. CODE OF JUD. ADMIN. § 7-210 (proposed Mar. 12, 2020), <https://perma.cc/UT5U-WNKJ> (allowing a “four-year Bachelor of Arts degree in Law” that includes certain coursework to fulfill the educational requirement to become a Limited License Legal Practitioner).

67. PEW CHARITABLE TR., *ONLINE DISPUTE RESOLUTION OFFERS A NEW WAY TO ACCESS LOCAL COURTS* (2019), <https://perma.cc/2YPM-GL5M>.

68. Utah Supreme Court Standing Order No. 13 (effective Sept. 19, 2018).

69. Colin Rule, *Using Online Dispute Resolution to Expand Access to Justice*, OKLA. B.J., <https://perma.cc/4T5Z-PCUT>.

70. *Online Dispute Resolution (ODR) Pilot Project*, UTAH COURTS, <https://perma.cc/Z9YB-8M7S>.

71. Himonas, *supra* note 19, at 882.

72. *Id.* at abstract, 880 (“We’re going to be, I believe, the first in the country to launch this soup-to-nuts approach.”). As of July 2019, at least twelve states were using some form of ODR. NAT’L CONSUMER LAW CTR., *CONSUMER PROTECTION AND COURT-SPONSORED ONLINE DISPUTE RESOLUTION IN COLLECTION LAWSUITS 1* (2019), <https://perma.cc/ENG7-VPHE>.

73. Zack Quaintance, *SXSW 2019: Utah, ‘Pajama Court’ and Resolving Cases Online*, GOV’T. TECH. (Mar. 11, 2019), <https://perma.cc/FF38-BGJE>.

Here is how ODR works. A plaintiff files a small claims case and registers for the ODR system.<sup>74</sup> The defendant is then served with a copy of the ODR summons and the claim.<sup>75</sup> Having been served, the defendant has fourteen days to register for an ODR account.<sup>76</sup> After the defendant has answered, the parties must participate in ODR, absent an exemption.<sup>77</sup> In ODR, a trained ODR facilitator “guide[s] the parties” and “assist[s] them in reaching a settlement.”<sup>78</sup> As they work toward that goal, the parties can communicate online—“asynchronously or in real time”<sup>79</sup>—with the facilitator and each other and can upload documents to become part of their files.<sup>80</sup> If the parties settle the claim, the facilitator prepares an online settlement agreement, which the parties then execute. If the parties cannot reach a settlement, the facilitator terminates the ODR process, notifies the court to set a trial date, and creates a trial preparation document (which whittles down the issues for trial).<sup>81</sup> The judge and the parties can then choose to have a live hearing or to have the trial electronically.<sup>82</sup>

Preliminary data show that ODR expedites access to justice. Before ODR, it took an average of 144 days for small claims cases in the pilot courts to be disposed. Cases that went through ODR, however, had an average time of disposition of just 84 days.<sup>83</sup> The overall default rate also fell roughly 4 percent, from about 71% to about 67%.<sup>84</sup> But this overall number understates the reduction in informed defaults—those cases in which a party has touched the court system, gained some insight into their matter, and then elected not to proceed. Three percent of the defaults are of this variety—in other words, defaults in name only.<sup>85</sup> And the settlement rate of the cases increased about four percent while the trial rate has decreased in the neighborhood of one percent.<sup>86</sup>

---

74. Standing Order No. 13, *supra* note 68 (effective Sept. 19, 2018).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Himonas, *supra* note 19, at 880.

80. *Id.* at 881.

81. Standing Order No. 13, *supra* note 68; Himonas, *supra* note 19, at 894.

82. Himonas, *supra* note 19, at 894.

83. Email from Paula Hannaford, Dir., Ctr. for Jury Studies, Nat’l Ctr. for State Courts, to Justice Deno Himonas, Utah Supreme Court (Oct. 21, 2019, 10:40 MST) (on file with author).

84. Email from Jeff Hastings, Mgmt. Analyst, Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (May 14, 2020, 12:38 MST) (on file with author).

85. *Id.* Hannaford notes that her own research, in contrast, indicates that the overall rate rose by 1 percent and that the rate of default after the party touched the system fell by over 4 percent. Overall, there is about a 3 percent difference between the data. This difference is likely explained by Hannaford’s more limited data set, which does not include a full year’s worth of data. Telephone Interview with Paula Hannaford, Dir., Ctr. for Jury Studies, Nat’l Ctr. for State Courts (May 26, 2020).

86. Hastings, *supra* note 84.

The mean number of hearings per case has dropped from 2.66 to 1.5.<sup>87</sup> These results, while not yet fully validated, are extremely promising, and indicate that online platforms can do much to democratize the rule of law.

### 3. Regulatory reform

Utah also seeks to narrow the access-to-justice gap through regulatory reform. To that end, the Utah Supreme Court has authorized the creation of a legal regulatory sandbox—overseen by a regulator—in which legal entities can experiment with consumer-focused innovations.<sup>88</sup> Those innovations will undoubtedly advance access to justice in countless ways. This Subpart details how regulatory reform was launched in Utah and how it is intended to work.

Regulatory reform kicked off in 2018 when the Utah Supreme Court, at the request of the Utah Bar, authorized a work group to study how to optimize the regulatory structure for legal services in Utah and to make recommendations accordingly.<sup>89</sup> The next year, the work group issued a report,<sup>90</sup> which the Utah Supreme Court adopted,<sup>91</sup> proposing a path to regulatory reform. The Court has charged a task force with carving that path, which will be done in two somewhat overlapping tracks.

One track will explore increasing access to justice by revising certain rules of professional conduct. Specifically, it will explore loosening “[r]estrictions on lawyer advertising, fee sharing, and ownership of and investment in law firms by non-lawyers.”<sup>92</sup> The goal is for new rules surrounding these activities to balance the risk of harm to clients from these activities with their benefits to clients and to lawyers, rather than broadly prohibiting them.<sup>93</sup>

Much progress has already been made toward this goal. For example, the Utah Supreme Court recently proposed repealing rule 5.4 of the Utah Rules of Professional Conduct—the rule that prohibits lawyers from sharing legal fees with a nonlawyer, from forming a partnership with a nonlawyer, and from practicing law for an entity that is owned or managed by nonlawyers—and replacing it with rules 5.4A and 5.4B.<sup>94</sup> Proposed rule 5.4A is similar to rule 5.4, with the main difference being that proposed rule 5.4A allows lawyers to share

---

87. Hannaford, *supra* note 83.

88. Utah Supreme Court Standing Order No. 14 (effective Sept. 9, 2019).

89. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 1-2.

90. *Id.* at 2.

91. Standing Order No. 14, *supra* note 88 (“The Task Force shall pursue and implement the recommendations set forth in the Narrowing the Access-to-Justice Gap by Reimagining Regulation report of the Utah Work Group on Regulatory Reform.”).

92. *Id.* at 12.

93. *Id.* at 13-15.

94. *Utah Court Rules—Published for Comment*, UTAH COURTS (Apr. 24, 2020), <https://perma.cc/7BPD-ZAJT>.

legal fees with nonlawyers if they provide notice to the client.<sup>95</sup> Proposed rule 5.4B, on the other hand, differs greatly from rule 5.4. It allows a lawyer to “practice law with nonlawyers, or in an organization” owned or managed by a nonlawyer as long as the lawyer (1) gives notice to the client and (2) is permitted to do so by Utah Supreme Court Standing Order No. 15, which is explained below.<sup>96</sup> This change would allow the legal profession to “leverage the skills, capital, and innovations that . . . come from partnering with other industries like finance, technology, [and /] or retail.”<sup>97</sup>

Working in conjunction with these rule changes, the second track of regulatory reform, which will be divided in two phases, will focus on solving the access-to-justice problem through innovation and evidence-based regulation.<sup>98</sup> As detailed in proposed Standing Order No. 15, which the Utah Supreme Court recently released for public comment, the Utah Supreme Court plans on moving toward this goal in Phase 1 by (1) establishing an Office of Legal Services Innovation (Innovation Office), (2) creating a “pilot legal regulatory sandbox,” and (3) allowing legal services providers to innovate within the sandbox.<sup>99</sup> The Innovation Office will oversee the sandbox, taking an “objectives-based and risk-based approach to regulation.”<sup>100</sup> The sandbox will be a place in which entities will be able—with the Innovation Office’s permission—to try out “new consumer-centered innovations” that are perhaps “illegal (or unethical) under current regulations.”<sup>101</sup> In other words, if approved to do so by the Innovation Office, “traditional providers using novel approaches and means” and “nontraditional providers” will be able “offer nontraditional legal services to the public.”<sup>102</sup>

To try out these innovations in the sandbox, providers must notify the Innovation Office and provide it with information about the innovation.<sup>103</sup> The

95. UTAH RULES OF PROF’L CONDUCT r. 5.4A (proposed), <https://perma.cc/3PGT-KDMP>.

96. UTAH RULES OF PROF’L CONDUCT r. 5.4B (proposed), <https://perma.cc/XYU7-2EQZ>.

97. Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1, 68. Justice Neil Gorsuch has advocated for courts to take a fresh look at the rules of professional conduct in this sphere: “It seems well past time to reconsider our sweeping unauthorized practice of law prohibitions. The fact is, nonlawyers already perform—and have long performed—many kinds of work traditionally and simultaneously performed by lawyers.” GORSUCH, *supra* note 49, at 257.

98. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 11-12.

99. *Utah Court Rules—Published for Comment*, UTAH COURTS (Apr. 24, 2020), <https://perma.cc/Q4NH-RU6U>; Utah Supreme Court Standing Order No. 15, at 2-3 (proposed), <https://perma.cc/N56N-PBJL>.

100. Standing Order No. 15, *supra* note 99, at 4.

101. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 18.

102. Standing Order No. 15, *supra* note 99, at 4.

103. *Id.* at 8; UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, PROPOSED REGULATORY SCOPE FOR TASK FORCE ON REGULATORY REFORM AND SANDBOX 1, <https://perma.cc/6U6E-NFUZ> (2019).

Innovation Office will then decide whether to allow the innovation, and, if so, what requirements the provider must meet (*e.g.*, reporting or risk mitigation requirements).<sup>104</sup> Potential providers will need to notify the Innovation Office in at least three general situations. First, traditional law firms and lawyers will need to notify the Innovation Office if they want to “partner[] with a nonlawyer-owned entity to offer legal services as contemplated by Rule 5.4B.”<sup>105</sup> Second, entities that are at least partially owned by nonlawyers must notify the Innovation Office if they want to “offer[] legal practice options . . . not authorized” under current rules.<sup>106</sup> Third, entities that are at least partially owned by nonlawyers must notify the Innovation Office if they want to “practic[e] law through technology platforms, or lawyer or nonlawyer staff, or through an acquired law firm.”<sup>107</sup>

Here are some illustrations of what innovations in the regulatory sandbox might look like:

- A law firm wants to partner with a nonlawyer-owned entity.<sup>108</sup> It creates a new, co-owned entity that operates a kiosk in a box store and offers legal services through that kiosk.
- A social worker works with the elderly. The elderly face not only “social work issues” such as “loneliness, fear, anxiety, illness, mental impairment and disability claims, and health care financing” but also “legal issues such as financial planning, wills, guardians, and advance directives.”<sup>109</sup> The social worker is authorized to help with at least some of these legal issues, depending on the Innovation Office’s evaluation of risk and benefit.
- A smartphone app “permits social workers who serve the home-bound elderly to conduct ‘legal health checks’ to identify their clients’ potential legal problems.”<sup>110</sup> By answering the app’s questions, a social worker can “determine whether a client has a landlord-tenant, health care, or consumer-debt problem, or is a victim of financial exploitation or physical abuse.”<sup>111</sup> Once the social worker identifies one of these issues using the app, he or she can then point the client toward helpful legal

---

104. Standing Order No. 15, *supra* note 99, at 10.

105. *Id.* at 7-8.

106. *Id.*

107. *Id.*

108. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, PROPOSED REGULATORY SCOPE FOR TASK FORCE ON REGULATORY REFORM AND SANDBOX 2 (2019), <https://perma.cc/A9JY-TF6M>.

109. Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL’Y 131, 141-42 (2001).

110. Tanina Rostain, *Techno-Optimism & Access to the Legal System*, DAEDALUS, Winter 2019, at 93, 95.

111. *Id.*

resources.

- A small law firm that serves “ordinary individuals and small businesses” wants to spend less time running the business—*i.e.*, “finding clients, managing administrative tasks, and collecting payment.”<sup>112</sup> So it partners with “a large-scale business” that “build[s] a service platform, research[es] the market, figure[s] out pricing, handle[s] billing, manage[s] customer complaints, optimize[s] the use of nonlawyer staff, and arrange[s] financing.”<sup>113</sup> The law firm’s attorneys are thus left to do what they do best—give legal advice—while the cost of that advice for their clients decreases.<sup>114</sup>
- A law firm buys a business that offers helpful technology or services. For example, DWF Law—Britain’s largest publicly traded law firm—recently bought Mindcrest, a company that offers affordable document review and legal process outsourcing.<sup>115</sup> Alternatively, attorneys launch a start-up with computer programmers and work with them to develop and offer a cornucopia of tech products that offer legal advice (*e.g.*, estate planning, e-discovery).
- A nonprofit legal service entity “offers an online tool providing guidance, form completion, and legal advice on eviction defense via its website.”<sup>116</sup> The entity “also uses its non-licensed eviction defense experts to provide legal assistance, including advice, to supplement the online tool.”<sup>117</sup>

Although the innovative services offered in these examples would be unethical under current regulations, potential providers could request permission to test them in the sandbox.<sup>118</sup> And the Innovation Office—not some blunt rule of professional conduct—will determine whether the service is worth trying in the sandbox.

Once the Innovation Office admits a legal entity into the sandbox to experiment with an innovation, the sandbox will then act as a highly monitored

---

112. Gillian K. Hadfield, *More Markets, More Justice*, DAEDALUS, Winter 2019, at 37, 45-46.

113. *Id.*

114. *Id.*

115. Alan Freeman, *A World of Opportunity*, NAT’L MAG. (Feb. 18, 2020), <https://perma.cc/7P4Q-6Q7Y>.

116. Memorandum from Joanna Mendoza to the State Bar of Cal. Task Force on Access Through Innovation of Legal Serv. 3 (Jan. 31, 2020) (on file with author).

117. *Id.*

118. Many of these arrangements would be unethical because Rule 5.4 of the Utah Rules of Professional Conduct forbids a lawyer to “share legal fees with a nonlawyer” and to “form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” UTAH RULES OF PROF’L CONDUCT r. 5.4. Others would be unethical because “only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.” UTAH ADMIN. CODE r. 14-802(a).

environment in which the innovation can be piloted and evaluated.<sup>119</sup> The task force has indicated that in evaluating the legal services provided by sandbox participants, the Innovation Office will focus on three possible harms to consumers: (1) “[r]eceiving inaccurate or inappropriate legal services,” (2) “[f]ailing to exercise legal rights through ignorance or bad advice,” and (3) “[p]urchasing unnecessary or inappropriate legal services.”<sup>120</sup> By evaluating these harms, the Innovation Office will be able to protect consumers while fostering the type of innovation we need to increase access to justice. Figure 1 illustrates how the sandbox will operate in Phase 1.

## Legal Innovation Sandbox

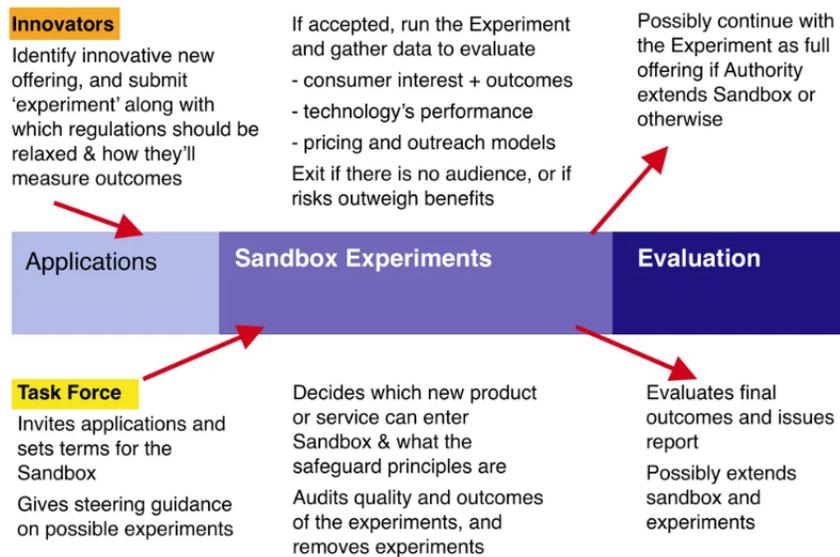


Figure 1: Process overview for Phase 1 regulatory sandbox.<sup>121</sup>

Once Phase 1 is completed, Phase 2 will likely see “some form of an independent, non-profit regulator [like the Utah Bar] with delegated regulatory authority over some or all legal services.”<sup>122</sup> But because what happens in Phase 2 depends so much upon the results of Phase 1, its form will be decided after Phase 1 is evaluated.<sup>123</sup>

119. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 18.

120. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, DATA COLLECTION REQUIREMENTS FOR SANDBOX PARTICIPANTS 1 (2019), <https://perma.cc/Q99N-VV2L>.

121. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION 21 (2019), <https://perma.cc/A9JY-TF6M>.

122. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 21.

123. *See id.*

This regulatory reform is a huge step in the right direction for access to justice. It harnesses experimentation and data to decide how to regulate the practice of law, instead of relying on the fear of unknown danger. It will allow for regulation that “fosters innovation and promotes other market forces so as to increase access to and affordability of legal services.”<sup>124</sup>

## II. ADDRESSING PUSHBACK

Some access-to-justice efforts are easily accepted but others receive pushback. The criticism, however, tends to rest on an understanding that is not data-driven. This Part first addresses the main resistance to ODR. It then discusses pushback to the LPP program and regulatory reform.

### A. Online Dispute Resolution

Critics have identified a few potential issues with ODR systems. Courts should consider and address these points to assuage any public concerns.

To begin with, the National Consumer Law Center (NCLC) points out that not everyone can access online resources.<sup>125</sup> This is undoubtedly true, and is why litigants can opt out of the Utah ODR system if they have a language barrier, disability, or lack access to the internet.<sup>126</sup>

Next, critics such as the NCLC worry that “[u]nsupervised chatroom spaces in ODR platforms” may lead to abusive practices by debt collection attorneys.<sup>127</sup> The NCLC also warns that there will be a “power imbalance” between consumers and experienced debt collection attorneys.<sup>128</sup> But Utah’s ODR system is built to monitor and thwart abusive practices. A court facilitator monitors interactions between the litigants and can intervene when necessary.<sup>129</sup>

Besides worrying about unsupervised ODR chatrooms, some critics also worry that the efficiencies of ODR “may come at the cost of procedural quality.”<sup>130</sup> Some critics, for example, worry that ODR will just be a pipeline for money lenders, such as payday loan companies, to collect on small claims.<sup>131</sup>

---

124. *Id.* at 1-2.

125. NAT’L CONSUMER LAW CTR., *supra* note 72, at 2.

126. NAT’L CTR. FOR STATE COURTS, UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT 10 (2017).

127. NAT’L CONSUMER LAW CTR., *supra* note 72, at 6.

128. *Id.* at 5-6.

129. *See* NAT’L CTR. FOR STATE COURTS, *supra* note 126, at 11. The ODR system will also help level the playing field between parties by giving plaintiffs and defendants relevant legal information so they can evaluate their claims and possible defenses. *See id.* at 9.

130. Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 634, 641 (2017).

131. This concern has been raised with one of the authors during his work on Utah’s

These are important concerns.

So far, the data show no signs that Utah's ODR system creates procedural defects or that it gives money lenders an advantage. In fact, the default rate in small claims has fallen in the ODR pilot courts, and there has been an uptick in settlement rates.<sup>132</sup> And there has been no increase—indeed, there has been a small decrease—in the number of debt collection cases filed in the primary pilot court.<sup>133</sup> Last, but perhaps most tellingly, virtually no one—plaintiff or defendant—has sought to opt out of the ODR system even though doing so is a relatively simple process. To date, plaintiffs and defendants have joined issue in nearly 1,400 cases and only twenty-three defendants and eleven plaintiffs have opted out.<sup>134</sup>

Besides knowing that there are no signs of procedural defects in Utah's ODR, citizens can take comfort in understanding that ODR is a pilot. And because it is a pilot, Utah collects data about the outcomes of cases that go through the ODR system and compares them with outcomes of cases that go through court. Utah also regularly collects feedback from ODR users and facilitators.<sup>135</sup> Armed with that information, the Utah court system can spot procedural defects and address them. Even if an unforeseen problem arises with ODR, Utah is equipped to detect it and fix it.

#### B. Regulatory Reform and the Licensed Paralegal Practitioners Program

Critics also find fault with regulatory reform and the LPP program. Two fears are prevalent here: the demise of lawyers and second-rate representation for clients.<sup>136</sup>

---

ODR system. Other scholars have similarly worried that ODR systems will become biased toward repeat players. *See, e.g.*, Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 722 (2017) (expressing concern that ODR could be “just another form of bureaucratic processing, the resolution of disagreements according to a set of tacit, often biased, intra-organizational, administrative norms (*e.g.*, seller is always correct), that are defined by repeat players who ‘capture’ the system and use it for their private ends”).

132. Hastings, *supra* note 84.

133. *Id.*

134. *Id.*

135. NAT'L CTR. FOR STATE COURTS, *supra* note 126, at 14.

136. Jane Kaplan, *Breaking Down the Barriers: Bringing Legal Technicians into Immigration Law*, 32 GEO. J. LEGAL ETHICS 703, 713 (2019) (“Lawyers (and scholars) who oppose the implementation of non-lawyer services often argue that such programs would take jobs away from lawyers. . . .”); Julian Aprile, *Limited License Legal Technicians: Non-Lawyers Get Access to the Legal Profession, but Clients Won't Get Access to Justice*, 40 SEATTLE U. L. REV. 217, 238 (2016) (arguing that limited license legal technicians do not “provide quality legal services because they have substantially less training than lawyers.”). Some resistance to the LPP program is more appropriately conceptualized as pettiness. One LPP has reported that, although most attorneys treat LPPs professionally and appropriately, one lawyer refused to speak with the LPP directly and communicated with her only through

Regulatory reform and the LPP program will not be the beginning of the end for lawyers. Similar legal market reforms enacted in England and Wales have not decreased the number of solicitors.<sup>137</sup> There, the Legal Services Act of 2007<sup>138</sup> reduced “the number of activities that only a lawyer may do” and authorized nonlawyer ownership of legal firms.<sup>139</sup> But this reform did not decrease the number of solicitors; the number of practicing solicitors grew from 112,063 in October 2007 (around the time the legal reform took place) to 149,005 in November 2019.<sup>140</sup> Perhaps that is because regulatory reform allows nonlawyers and innovative legal services to tap into a market that lawyers have not historically been able to reach.<sup>141</sup> In other words, nonlawyers generally do not take a slice of attorneys’ market pie; the pie itself gets bigger. Thus, more nonlawyers involved in legal services does not necessarily mean fewer lawyers. As has been pointed out elsewhere, “it is entirely reasonable for lawyers and non-lawyers to coexist in the legal market.”<sup>142</sup>

Neither will regulatory reform or the LPP program lead to second-class representation for clients. First, it is important to note that even if these reform efforts would result in second-rate representation for some, that may be better than the current state of affairs, which is no representation at all.<sup>143</sup> Second, evidence

---

the lawyer’s paralegal. Licensed Paralegal Practitioner Steering Committee, Meeting Minutes 1-2 (Feb. 18, 2020), <https://perma.cc/QD5E-UU4L>.

137. DAVID DIXON, THE LAW SOCIETY, ENTRY TO THE SOLICITOR’S PROFESSION 1980-2011 3 (2012), <https://perma.cc/HQZ4-49SZ>; *Population of Solicitors in England and Wales*, SOLICITORS REGULATION AUTH., <https://perma.cc/DJ2T-KWN7>. In England and Wales, practicing lawyers fall into two groups: solicitors and barristers. *Solicitor*, ENCYCLOPAEDIA BRITANNICA, <https://perma.cc/PM55-PB7L>. We focus on the number of solicitors rather than on the number of barristers here because solicitors “form the largest part of the legal profession and often have direct contact with their clients, providing legal advice and assistance on a range of matters.” Suzanne Rab, *Regulation of the Legal Profession in the UK (England and Wales): Overview*, Thomson Reuters Practical Law (database updated Jan. 2020), <https://uk.practicallaw.thomsonreuters.com/7-633-7078>.

138. Legal Services Act 2007, c.29 (Eng.), <https://perma.cc/7PLF-77A3>.

139. Thomas D. Morgan, *On the Declining Importance of Legal Institutions*, 2012 MICH. ST. L. REV. 255, 268 (2012).

140. Compare DIXON, *supra* note 137, at 3, with *Population of Solicitors in England and Wales*, *supra* note 137.

141. Notably, “[s]egments of the organized bar . . . have begun to perceive the inutility and bad public relations of resisting nonlawyer involvement in markets its monopoly does not serve.” Gordon, *supra* note 13, at 186.

142. Kaplan, *supra* note 136, at 713.

143. Rebecca L. Sandefur, *Access to What?*, DAEDALUS, Winter 2019, at 49, 49 (“Most of the civil justice problems that Americans experience receive no legal attention of any kind, ever. They never make it to court. They never receive consideration from any kind of legal professional such as a lawyer.”); Sandefur & Clarke, *supra* note 9, at 4-5 (discussing the Navigators Program and explaining that litigants assisted by nonlawyers were 56% more likely than unassisted litigants to say they were able to tell their side of the story in housing court, 87% more likely than unassisted tenants to have their defenses recognized and addressed by the court, and less likely to be evicted from their homes by a marshal).

indicates that there are legal tasks that nonlawyers can do as well as—if not better than—lawyers. For example, a study comparing the legal work of solicitors and nonlawyers in the United Kingdom found that lawyers and nonlawyers were equally likely to do competent legal work and that nonlawyers were 600% more likely to do legal work that peer reviewers rated as excellent quality.<sup>144</sup> In another U.K. study, specialist will-writers, who had no law degree, were more likely to draft a high-quality simple will than solicitors were.<sup>145</sup>

More important than data from studies in other jurisdictions is the fact that the Utah judiciary will evaluate regulatory reform using the regulatory sandbox and outside evaluators.<sup>146</sup> As mentioned above, Utah's Innovation Office will use data to evaluate whether consumers are harmed by sandbox participants' products and services.<sup>147</sup> If consumers are harmed, the Innovation Office will intervene. And if nonlawyers provide subpar services, the Innovation Office will prevent them from continuing.

The takeaway is that in assessing access-to-justice efforts, attorneys, bar associations, judges, and the public should look beyond critiques that are unsupported by data. The current data does not support these concerns. Rather than regulating based on fear, authorities should regulate based on data. Data is the clay with which regulators can work to create a system that affords justice to all. State courts and legislatures must strive toward that goal. They have long delegated day-to-day legal regulatory authority to other entities—*i.e.*, state bar associations.<sup>148</sup> But if those entities put the lawyers' interests ahead of the public's, then courts and legislatures must promptly reconsider that delegation of authority.<sup>149</sup>

---

144. Stanford Law School, *Will Changing Legal Services Regulation Increase Access to Justice?*, YOUTUBE, at 16:25 (Nov. 1, 2019), <https://perma.cc/NY7G-6DLH>.

145. LEGAL SERVICES CONSUMER PANEL, REGULATING WILL-WRITING 20-22 (2011), <https://perma.cc/2P6R-7YNG>.

146. The Conference of Chief Justices (CCJ) of the state supreme courts recently recognized that “experimentation with different approaches to regulatory innovation provides a measured approach to identify and analyze the best solutions to meeting the public’s growing legal needs.” See Conference of Chief Justices, *supra* note 11. Likewise, the ABA has “encourage[d] U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the public interest.” See ABA Comm’n on Ethics and Prof’l Responsibility, Revised Resolution 115 (2020), <https://perma.cc/3FAL-EUSR>.

147. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, *supra* note 120.

148. Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267, 276 (2017) (“State supreme courts control lawyer regulation to a lesser or greater extent in all fifty states. These courts typically have demanding caseloads, so they delegate their bar governance authority to other entities. Exactly which entities differs across jurisdictions. In some states, the supreme court has given all three responsibilities [admission, discipline, and the UPL] to one entity, often a state bar association. In other states, these regulatory duties are handled by different entities.”).

149. Bar associations have started to show their support for regulatory reform. The ABA recently adopted a resolution that “encourages U.S. jurisdictions to consider regulatory

## CONCLUSION

It is time for the rule of law to be equally accessible and affordable to all. The Utah judiciary has worked toward that goal through incremental improvements and breakthrough change. Using an empirical approach, it must continue to do so until the access-to-justice gap is eliminated. Only then will we truly have a system that puts the rule of law first. Only then will all citizens have the protection of their own laws.

---

innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public . . . .” ABA Comm’n, *supra* note 146. According to the president of the New York Bar Association, the resolution—which passed by a near-unanimous vote—“is not just the right thing to do, the moral thing to do for our clients, but for the profession it’s the right thing to do.” Brenda Sapino Jeffreys, *ABA Approves Innovation Resolution, With Revisions to Limit Regulatory Changes*, AM. LAWYER (2020), <https://perma.cc/C34W-W7Y6>. The resolution did not recommend any changes to the “ABA Model Rules of Professional Conduct, including Rule 5.4, as they related to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject.” *Id.* But that is because the ABA wants U.S. jurisdictions to experiment with their own changes to Rule 5.4 before it changes the *model* rules. Telephone Interview with Andrew M. Perlman, Dean, Suffolk Law Sch. (Feb. 19, 2020). Once the ABA has more information from these experiments, it can decide whether to change the model rules.