



Narrowing the “Justice Gap”: Roles for Nonlawyer Practitioners

COMMITTEE ON PROFESSIONAL RESPONSIBILITY

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**“Not everything that is faced can be changed,
but nothing can be changed until it is faced.”
– James Baldwin**

I. Introduction

Each year more than 2.3 million low-income New Yorkers face the complexities of the State’s civil justice system without access to even minimal professional assistance.¹ As a result, they often forfeit essential rights involving basic necessities of life – in stark contrast to the outcomes obtained by litigants who can afford to hire a lawyer or the small minority who receive pro bono assistance. This “justice gap” is a fundamental, long-term crisis in our legal system. It demands attention and action by the Bar.

Under the auspices of the Unified New York Court System, a Task Force to Expand Access to Civil Legal Services in New York (“the New York Task Force”) has sought to develop responses to this crisis. In a November 2012 report to Chief Judge Jonathan Lippman, the New York Task Force recommended the establishment of a pilot project “that would test models of practice in which nonlawyers are entrusted to provide legal assistance, outside the courtroom, to individuals who are otherwise unrepresented.” The report stated:

In the Task Force’s view, particularly given the level of nonlawyer assistance that is already being provided with limited or no oversight and regulation, further development of the role of nonlawyer advocates can be an important element in helping to address the substantial access-to-justice gap in the State. Based on its own consideration of these matters, ***the Task Force recommends the implementation of a pilot program to permit appropriately trained nonlawyer advocates to provide out-of-court assistance in a discrete substantive area.*** Given the extent to which nonlawyer advocates and entities – such as housing counselors in the foreclosure area and credit counselors in the consumer credit area – are already providing help to low-income New Yorkers, the Task Force recommends that the pilot program be in an area such as housing assistance, consumer credit or, possibly, foreclosure.²

The report recommended further that the Chief Judge appoint an advisory committee to develop the pilot program and propose ways to expand the role of nonlawyers in the civil justice system.³

The Committee applauds this initiative. Indeed, expanding the role of nonlawyers has been a subject of discussion by the New York City Bar Association, and particularly by the Committee on Professional Responsibility, for almost two decades. In 1995, this Committee issued a report that endorsed the concept of increased reliance on nonlawyer assistance. In

¹ Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, Nov. 2010 (“2010 Task Force Report”), at 1, available at <http://www.nycourts.gov/ip/access-civil-legal-services/>.

² Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, Nov. 2012 (“2012 Task Force Report”), at 39 (emphasis added), available at <http://www.nycourts.gov/ip/access-civil-legal-services/>.

³ *Id.* at 39.

Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment, the Committee considered analogous developments in professions such as medicine and accounting and took note of evolving roles for nonlawyers in legal services programs and other legal settings. The Committee concluded by giving “preliminary endorsement to a deregulated licensing approach that permits greater nonlawyer practice in specified areas but establishes minimal requirements in order to protect the public while simultaneously increasing the availability of low-cost, accessible legal services to all.”⁴

In revisiting the subject now, the Committee notes significant developments that have occurred since 1995. Medicine and other professions have continued to innovate by expanding the areas in which practitioners with lesser qualifications may provide specified services, at rates lower than those traditionally charged by more highly qualified practitioners. Moreover, even within the field of law, nonlawyers increasingly perform some of the services traditionally provided exclusively by lawyers. Nonlawyers already provide advice and even advocacy in certain judicial and administrative settings, in New York and other U.S. jurisdictions. Notable examples also have developed in England, Wales, and Canada, where nonlawyers now perform important roles both inside and outside the courtroom. The need to consider and adapt these experiences to appropriate situations in New York has never been more pressing, as low-income New Yorkers’ access to essential legal services has only worsened over the years.

In light of these developments, the Committee today takes a fresh look at the possibility of expanding further the role of nonlawyers in limited respects. Whether the Committee’s recommendations require amendments of current rules or statutes (such as the prohibition of the unauthorized practice of law) will depend on the specific nature and extent of any proposals that may be adopted. The line between providing information or administrative assistance on the one hand, and legal advice or advocacy on the other, may not always be clear, but the Committee sees an urgent need to examine the issue in various settings and to develop frameworks that would substantially increase the assistance available to unrepresented New Yorkers, at a cost they can afford. The Committee offers its recommendations provisionally, with the understanding that they may be reconsidered by the organized bar (including this Committee), the judiciary, and other interested parties in view of the results of the New York Task Force’s pilot project, which will soon be launched.

In particular, the Committee offers these recommendations:

1. Recognize a role for “courtroom aides” in judicial and administrative hearings. This proposal would allow a nonlawyer in the role of “courtroom aide” to assist litigants in proceedings before selected courts and

⁴ *Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment*, 50 The Record 190, 209 (Jan. 1995). Similar conclusions were reached by an American Bar Association commission in a lengthy study published the same year. See ABA Comm’n on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations* (Aug. 1995) (“ABA Nonlawyer Study”), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity.authcheckdam.pdf. More recently, the New York City Bar Association has called for “greater access to justice in civil cases for New Yorkers of low and moderate means,” in a wide-ranging report issued in connection with New York’s 2013 mayoral election. *Policy Recommendations for New York City’s Next Mayor* at 39 (May 2013), available at <http://www.nycbar.org/images/stories/pdfs/mayoralreport04302013.pdf>.

agencies, subject to varying degrees of regulation and oversight. In some settings, friends or relatives should be allowed to provide moral support and other assistance without formal training or regulation, subject to approval and oversight by the presiding judge or administrator, as long as the nonlawyer does so without financial compensation. The Committee also suggests considering whether, in a more limited range of cases, it may be appropriate for nonlawyers to render assistance for a fee, subject to formal regulation regarding matters such as qualifications, mandatory disclosures, fee arrangements, and standards of conduct, in addition to on-the-scene supervision by the adjudicator. Nonlawyers already perform roles equivalent to that of a courtroom aide, in varying forms and on a paid or unpaid basis, in certain federal and state agency proceedings, in New York's Family Court, and in courts in England and Wales. This approach is a humane and modest step forward that should be extended beyond its current narrow applications. Nonlawyers serving this function are not expected to match the skill level of a lawyer, but can facilitate communication between the litigant and the tribunal, offer legitimate arguments that might otherwise be overlooked, and provide emotional support to litigants who may be thoroughly bewildered by judicial or administrative procedures.

2. Recognize a role for “legal technicians” outside judicial and administrative hearings. This concept has already been adopted by the Supreme Court of Washington State. Trained and licensed nonlawyers would be allowed to provide for a fee certain specified services – e.g., explaining procedures, gathering facts and documents, and assisting in the completion of court forms – but would not be allowed to participate in court hearings. In New York and elsewhere, such services (and more) already are provided in specialized settings by nonlawyers with varying levels of expertise. Creation of a regulatory regime that places undue burdens on those activities should be avoided. Nevertheless, the Committee sees value in establishing a legal framework that would attract more people to the field while ensuring the quality of the services provided. In some respects, this proposal also may require changes in existing law.

3. Study additional roles for nonlawyers. Given the profound severity of the justice gap, the Committee also recommends the study of broader roles for nonlawyers beyond the two modest proposals noted above. Further expansion of nonlawyers' roles rests on two basic premises: First, without additional reforms, the justice gap will continue to exist for millions of New Yorkers. Second, a number of currently unfulfilled tasks can be performed by someone without special training, or with a level of training below that of an attorney, subject to varying degrees of regulation and oversight. The study of broader roles for nonlawyers should focus on increasing consumer choice while providing appropriate safeguards against consumer confusion (including, for example, mandatory disclosures regarding the limitations of nonlawyer services). The Committee sees an urgent need to examine greater possibilities for providing nonlawyer assistance in selected settings. At this time, however, the Committee has decided not to adopt particular additional proposals.

The Committee makes these recommendations with the recognition that prior proposals to expand the role of nonlawyers have faced a range of objections. Some have asserted that nonlawyers will charge at least as much as lawyers, lack competence to handle legal matters, necessitate the creation of regulatory regimes that are doomed to fail, and more. This is a long-standing debate. Almost half a century ago, Justice William O. Douglas warned against labeling services as “legal” and reserving them for lawyers in situations where nonlawyers may be able to function just as capably:

The so-called “legal” problem of the poor is often an unidentified strand in a complex of social, economic, psychological, and psychiatric problems. Identification of the “legal” problem at times is for the expert. But even a “lay” person can often perform that function and mark the path that leads to the school board, the school principal, the welfare agency, the Veterans Administration, the police review board, or the urban renewal agency.⁵

More than four decades later, the Supreme Court observed that nonlawyers such as social workers may adequately protect the interests of unrepresented litigants in at least some civil proceedings that are simple enough to render the assistance of an attorney unnecessary.⁶ The Court’s observation stands in tension with the traditional view that legal tasks are inherently too complicated for performance by nonlawyers, and by implication supports expanding the role of nonlawyer advocates in appropriate cases.⁷

The New York Task Force’s pilot project provides a timely and important opportunity to study broader roles for nonlawyers in real-world circumstances, to test legitimate concerns that may be raised, and, if necessary, to consider a change of course or provide additional protections. The Committee looks forward to reviewing the results of the pilot project. At the same time, the Committee believes that it should move forward with its own recommendations in view of the growing severity of the justice gap and the need to promote a broad-based discussion of solutions within New York’s organized bar.

II. The Justice Gap

A. The Need Is Extreme

For the past three years, the New York Task Force has issued annual reports that studied low-income New Yorkers’ access to legal assistance in civil cases. Each year the Task Force has found a continuing and growing crisis. Without legal assistance, millions of people in our State

⁵ *Hackin v. Arizona*, 389 U.S. 143, 148 (1967) (dissenting opinion, Douglas, J.).

⁶ *Turner v. Rogers*, 131 S. Ct. 2507, 2519-20 (2011). The Court in *Turner* rejected a broad due process right to counsel in certain civil contempt proceedings. In doing so, it cited *Vitek v. Jones*, 445 U.S. 480, 499-500 (1980) (Powell, J., concurring), which pointed out that a mental health professional rather than an attorney could provide necessary assistance to an inmate threatened with involuntary transfer to a state mental hospital.

⁷ For a discussion of *Turner*’s potential implications (after oral argument but before decision), see <http://www.concurringopinions.com/?s=tribe+rogers>.

face “losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened.”⁸

In 2010, the Task Force reported that more than 2.3 million New Yorkers lacked legal assistance in potentially life-altering civil cases. Unassisted litigants included:

- 99% of tenants in eviction cases in New York City and 98% of tenants in New York State;
- 99% of borrowers in consumer credit cases in New York City (nearly a quarter million of which are filed annually);
- 97% of parents in child support proceedings in New York City and 95% of parents in New York State;
- 44% of homeowners in foreclosure cases in New York State.⁹

These four categories alone – landlord-tenant, consumer credit, family law, and foreclosure actions – represent 70% of the caseload pending on New York State dockets.¹⁰

In 2011, the Task Force found that the crisis was continuing throughout the State:

This year, the Task Force has concluded that the key findings of the Task Force’s legal needs study have not changed. Indeed, the continuing high rates of poverty in New York State validate those findings. . . . [D]ata indicates that 1.2 million low-income New Yorkers had three or more legal problems over the course of the year and thereby experienced the most pressing need for civil legal help. . . . [In such cases,] at best, 20 percent of the need for civil legal services is being met.¹¹

In 2012, the Task Force reaffirmed its previous findings in light of more recent data, noting again that no more than 20% “of the legal needs of low-income New Yorkers involving the essentials of life are being met.”¹²

The Task Force’s findings are supported by a wealth of data from a variety of sources. For example, in testimony presented to the Task Force in 2010, the Legal Aid Society stated that, because of a lack of resources, it was “able to help only one out of every nine New Yorkers who seek [the Society’s] help with civil legal problems.”¹³ Among many other examples of the problem, the Society noted that since the economic downturn began in 2008, it had seen “a 40% increase in requests for health law assistance and help obtaining Medicaid, Medicare, and other health care coverage,” and “a stunning 800% increase in requests for foreclosure defense

⁸ 2010 Task Force Report, at 7.

⁹ *Id.* at 1, 16.

¹⁰ *Id.* at 16.

¹¹ Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, Nov. 2011 (“2011 Task Force Report”), at 15 (capitalization omitted), available at <http://www.nycourts.gov/ip/access-civil-legal-services/>.

¹² 2012 Task Force Report, at 14.

¹³ Testimony of the Legal Aid Society on the Impact of the Unmet Civil Legal Services Needs Throughout the State, First Dep’t Hearing, Sept. 28, 2010, at 3, available at <http://www.legal-aid.org/media/139139/testimony092810clshearing.pdf>.

assistance.”¹⁴

Similarly, the Legal Services Corporation examined data from across the country in 2009 and found that at least 50% of eligible individuals seeking assistance from the Corporation’s recipient programs were turned away each year because the programs lacked sufficient resources.¹⁵ Data compiled by the Corporation’s New York State recipient programs (outside New York City) showed that this national problem was mirrored locally. In 2009 alone, for example, the New York programs were forced to turn away approximately 100,000 people seeking help.¹⁶

These problems are long-standing and structural. They cannot be attributed solely to the recent recession, nor can they be expected to disappear as the economy recovers. Studies have shown a consistently wide justice gap for at least the past quarter century. In the late 1980’s, for example, data indicated that 70-80% of low-income Americans were unable to obtain necessary legal assistance, and 86% or more of low-income New Yorkers had unmet legal needs.¹⁷ Those numbers have persisted, or even worsened, over the last 25 years. Effective action is long overdue.

B. Current Efforts By the Legal Profession Are Valuable and Deserve Support, But Much More Is Needed

New York’s courts, lawyers, and law schools are making substantial efforts to narrow the justice gap. Those efforts are laudable, but the Committee recognizes – along with the New York Task Force and other observers – that much more must be done. We briefly note some of the legal profession’s current efforts here.

1. Pro bono efforts by the private bar

Pro bono work performed by experienced lawyers is critically important and, in many cases, literally life-saving. The Committee applauds that work and those who perform it. In its 2012 Report, the Task Force recommended measures to increase pro bono work and monetary contributions by New York lawyers, including a biennial pro bono reporting requirement for the private bar.¹⁸

In addition, under a recently adopted rule, New York bar applicants must now complete 50 hours of pro bono service.¹⁹ The new rule will likely increase the amount of service provided

¹⁴ *Id.*

¹⁵ Legal Services Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans* 2-3 (Sept. 2009), available at <http://www.lsc.gov/media/reports/>.

¹⁶ Empire Justice Center, *Turned Away: A Snapshot of New York’s Justice Gap*, available at <http://www.empirejustice.org/policy-advocacy/legislative-updates/turned-away-a-snapshot-of.html>.

¹⁷ See data cited in *ABA Nonlawyer Study* at 77 & Appendix E (“Legal Needs Studies from 1985-1995”) at E-2.

¹⁸ *2012 Task Force Report*, at 32.

¹⁹ Advisory Committee on New York State Pro Bono Bar Admission Requirements, *Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments* (Sept. 2012), at 1, available at <http://www.nycourts.gov/attorneys/probono/>.

by law students and recent law graduates who are not yet admitted to the bar. Nevertheless, any foreseeable increase in pro bono work – by bar applicants or by experienced lawyers – is unlikely to close the justice gap.

2. The civil legal aid bar

The civil legal aid bar provides crucial assistance to individuals both in and out of court. The bar's efforts also have a salutary impact on the culture of our courts and the legal profession generally. A network of civil legal aid programs receives funds appropriated by Congress and distributed by the Legal Services Corporation, as well as funds from state, local, and private sources. Programs in New York include the Legal Aid Society and Legal Services for New York City, among many others.

As noted above, however, civil legal aid programs can reach only a minority of those who urgently need their services. Our nation's failure to commit adequate financial and other resources reflects a lack of political will but may also stem from a basic limitation of our legal system. Although the right to counsel in criminal cases has been recognized broadly under federal and state constitutions, no corresponding right has been recognized in civil cases, even though many civil matters – landlord-tenant, foreclosure, debt collection, and other cases – may entail life-changing consequences comparable to the effects of criminal proceedings.²⁰ Indeed, even in the criminal context, the right to counsel often is ineffective due to a lack of resources. Our society has not yet made the necessary commitments to provide appropriate legal assistance in either civil or criminal cases.²¹

3. Court facilities

Courthouse personnel and facilities provide important assistance to unrepresented litigants. Clerks' offices, court forms on websites, and courthouse help desks furnish basic information, but they cannot provide individualized advice, much less in-court representation. The limitations are evident. Many litigants, for example, may be unable to read and understand even simplified court forms, and the utility of standardized forms often diminishes in the later phases of litigation, when an advocate's skills and judgment typically are most useful.

In addition, judges themselves have sought to provide greater assistance to unrepresented individuals in their courtrooms. In recent years, New York has become a national leader in encouraging judges to take a more active role in ensuring that pro se litigants have a basic understanding of the proceedings and are treated fairly at hearings. But here, too, the limitations are evident. Judges cannot abandon their neutrality in an effort to mitigate the often gross disparities in knowledge and expertise between unrepresented individuals and their represented opponents. The disparities can be narrowed substantially only if pro se litigants have access to someone who can take their side and legitimately promote their interests.

²⁰ See, e.g., *Turner v. Rogers*, *supra* (rejecting a constitutional right to counsel in certain civil contempt proceedings).

²¹ See generally D. Cantrell, *The Obligation of Legal Aid Lawyers To Champion Practice by Nonlawyers*, 73 Fordham L. Rev. 883 (2004) (noting that the legal services bar has called for abolition of "unauthorized practice of law" restrictions).

4. Law school developments

In a step that may expand access to lower-cost legal services, Arizona recently adopted a rule that allows law students to take the bar examination before completing three full years of law school.²² Prof. Samuel Estreicher of New York University Law School, a leading advocate of this approach, argues that it will “reduce the cost of legal education for many and enable them to pursue lower-paying careers in the public service, if they are so inclined or situated.”²³

In addition, law schools in New York and elsewhere have begun “incubator” programs to help recent law graduates establish small firm practices aimed at responding to the justice gap. Indeed, some schools are creating their own law firms for such purposes.²⁴ Yet even if these efforts take root and flourish, the new firms will reach only a small number of unrepresented individuals in the foreseeable future.

5. Unbundled legal services

New York’s Rules of Professional Conduct permit the “unbundling” of legal services – that is, arrangements in which a lawyer performs some, but not all, of the work involved in traditional full-service representation, while clients undertake the remaining work themselves.²⁵ Among other things, this approach encourages attorneys to perform discrete tasks at lower cost, without the need to commit to comprehensive or long-term representation.

The “unbundling” concept has been endorsed by the American Bar Association as well. An ABA study recognized the concept as a method of providing low-cost services almost 20 years ago.²⁶ In February 2013, the ABA resolved to “encourage practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.”²⁷ The ABA’s accompanying report explains:

Research clearly indicates that a growing number of people are foregoing the assistance of lawyers when confronted with a civil legal issue and are addressing their matters through self-representation. In many instances, people are turning to self-help alternatives, such as document preparation services available over the

²² Order amending Ariz. Sup. Ct. Rule 34 (Dec. 10, 2012), available at <http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf/>.

²³ S. Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 Legis. & Pub. Policy 599, 611 (2012); see also D. Rodriguez & S. Estreicher, “Make Law Schools Earn a Third Year,” *New York Times*, Jan. 18, 2013, at A27 (New York ed.), available at <http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html>.

²⁴ See, e.g., E. Bronner, “To Place Graduates, Law Schools Are Opening Firms,” *New York Times*, March 14, 2013, at A14 (New York ed.), available at http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?hpw&_r=0.

²⁵ Rule 1.2(c) of the New York Rules of Professional Conduct provides: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.”

²⁶ See ABA *Nonlawyer Study* at 85-88.

²⁷ See ABA Resolution, adopted Feb. 11, 2013, available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_108.authcheckdam.docx.

Internet.

Lawyers who provide some of their services in a limited scope manner facilitate greater access to competent legal services. Limited scope representation has taken on several names, including “discrete task representation,” “limited assistance representation,” and “unbundled legal services.”

To be clear, limited scope representation is used in pro bono and legal aid settings, but is not limited to free legal services. Lawyers who unbundle their services in the marketplace are able to serve a broader range of clients because the cost per case is more affordable.²⁸

Like some other innovations, “unbundling” may allow lawyers to provide services at more affordable costs. The Committee believes, however, that adequate responses to the justice gap must include innovations that significantly expand the services provided by nonlawyers.

III. Nonlawyers Can Play a Potentially Crucial Role in Responding to the Justice Gap

A. Legal Scholars Have Shown That New Models of Representation Are Necessary and Practical

This Committee’s 1995 report recognized that nonlawyer services offer potentially significant benefits for unrepresented persons. In the intervening years, other voices have likewise called for serious consideration of new models of representation. The calls have come from many sectors of the profession, including scholars whose work has done much to promote recent court initiatives. We highlight some of that work here.

One of the leading voices for reform is Gillian K. Hadfield, professor of law and economics at the University of Southern California. In testimony prominently featured in the New York Task Force’s 2012 Report, she argued forcefully for expanding the role of nonlawyers as a means to address the justice gap, pointing to the medical profession as a useful analogy:

Does a full fledged MD have to deliver every service needed to address every medical issue you face in order to receive quality care? No. Medical care is a team sport, provided by a wide variety of medical professionals: nurses, radiologic technologists, pharmacists, nurse practitioners, physical therapists, chiropractors, registered massage therapists, certified nurse midwives, certified registered nurse anesthetists, etc. Many of these providers are licensed and authorized to provide services directly to those with medical problems. They are not limited to working under the direct supervision of MDs. Thank goodness. Because if they were, we’d be paying MD rates for every sore throat and backache.²⁹

Prof. Hadfield also noted that the role of nonlawyers has dramatically expanded in countries with legal systems closely related to ours: “The United Kingdom, for example, has a

²⁸ *Id.*, Report at 1.

²⁹ 2012 Task Force Report, at 38.

long history of allowing a wide variety of differently trained individuals and organizations to provide legal assistance. And fortunately some very fine legal scholars have studied how well this works. Their key finding: it works very well. . . .”³⁰

Likewise, Prof. Laurel Rigertas at Northern Illinois University Law School cites the medical profession as a model and calls for a similar “stratification” of legal roles:

[S]tratification would involve the training, education and licensure of professionals – other than lawyers – to provide some legal services. For example, a one-year program that focused on housing law could lead to a limited license as a housing advocate. This might be an effective way for the private marketplace to provide affordable legal services in areas of high consumer demand while protecting consumers from incompetent services.³¹

Prof. Renee Knake at Michigan State University Law School has offered additional arguments for new models of representation, with an emphasis on possible market solutions.³² Although corporate ownership of legal practices remains prohibited in the United States, Prof. Knake suggests that allowing such ownership could channel substantial economic resources into serving the unmet needs of a large portion of the population, particularly through retail outlets. She notes, for example, that Wal-Mart aims to serve an estimated 30 million households that never or rarely use bank accounts – the very same households that could benefit from, but are least likely to have access to, affordable legal representation.³³

Other scholars emphasize that although specific arrangements may vary, broadening the role of nonlawyers is inevitable and necessary. Prof. Herbert Kritzer at the University of Minnesota Law School argues that expanding the role of “those who do not possess the full credentials of a legal professional has the potential of greatly widening access to legal services.”³⁴ Initially, he suggests, this will occur as a broader array of standardized services are “offered through firms headed by lawyers but with services actually provided by specialized nonlawyers” at lower cost. At later stages, “[a]s the standardized services become increasingly accepted, legal services firms would not necessarily require the employment of any lawyers.”³⁵

B. Nonlawyers May Be Capable of Performing Certain Legal Tasks in Appropriate Circumstances

Much of the scholarly work described above rests on a basic observation: some of the tasks involved in assisting low-income individuals are relatively simple and, in appropriate circumstances, could be performed effectively by nonlawyers with some degree of training, or

³⁰ *Id.* at 39.

³¹ L. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, ABA J. of Prof. Lawyer 79, 106 (2012).

³² R. Knake, *Democratizing the Delivery of Legal Services*, 73 Ohio St. L.J. 1 (2012).

³³ *Id.* at 7.

³⁴ H. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 Law & Society Rev. 713, 743 (1999), available at <http://users.polisci.wisc.edu/kritzer/research/legalprof/postprof.htm>.

³⁵ *Id.*; see also Cantrell, *supra* note 21, at 886-88.

even by untrained but intelligent laypersons. This observation applies in a variety of contexts, including litigation. As Prof. Deborah Rhode of Stanford Law School has pointed out, nonlawyers can play increased roles as courts continue to streamline proceedings in the types of cases that most frequently involve pro se litigants.³⁶

New York is a leader in the effort to simplify such proceedings. For example, the New York State Courts Access to Justice Program has developed technologies called “Advocate Document Assembly Programs” for collecting court forms and providing “advocates with a much faster method of interviewing a litigant and producing court papers.” The expectation is that “a trained advocate will assist the litigant through the process and will be available to ensure that a prima facie pleading is produced and terms and concepts are explained.”³⁷

More exploration is needed to determine which tasks of potential benefit to unrepresented individuals could be performed effectively by nonlawyers, which types of cases would be appropriate for such services, and what forms of training, regulation, or other forms of oversight would be needed. Consider, for example, the tasks that might be helpful to persons in debt collection or eviction proceedings:

- explain how representation by an attorney differs from assistance by a nonlawyer, and how both differ from proceeding pro se;
- explain the complaint and other legal filings;
- explain court procedures and what the litigant is required to do next;
- assemble necessary facts and documents;
- help the litigant obtain, complete, and file required court forms;
- help organize statements, questions, and documents the litigant wants to present in court;
- advise the litigant with regard to preserving documents, communicating by certified or registered mail, making notes of relevant phone calls or other communications, etc.;
- advise the litigant with regard to appropriate dress and comportment in court;
- remind the litigant of court dates, and accompany him or her to the courthouse to provide moral and emotional support.

³⁶ D. Rhode, *Whatever Happened to Access to Justice?*, 42 Loy. L.A. L. Rev. 869, 885-86 (2009), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2670&context=llr..>

³⁷ New York State Courts Access to Justice Program, 2012 Report, at 34, available at http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2012report.pdf.

We consider now some examples of how these and similar tasks are already being performed by nonlawyers in certain judicial and administrative settings.

IV. Nonlawyers Already Provide Legal Services in Limited Circumstances

In evaluating models for expanding the role of nonlawyers, it is useful to consider the range of services that nonlawyers already are authorized to perform in various circumstances. Such services fall into three broad categories:

- providing legal information outside court or agency proceedings;
- providing moral support inside court or agency hearing rooms; and
- providing legal advice (not just information) and actual representation in some court and agency proceedings.

Nonlawyers also operate in a variety of employment capacities, including:

- as an employee of a nonprofit social services agency or legal services organization, which does not charge a fee and provides attorney supervision;
- as an employee of a law firm, which charges a fee and provides attorney supervision;
- as an employee of a nonlawyer firm, which charges a fee and does not provide attorney supervision;
- as an independent service provider, who may or may not charge a fee and does not work under attorney supervision.

A. Court Proceedings

1. Landlord-tenant

Each year millions of New Yorkers are involved in landlord-tenant proceedings. In New York City, cases are heard in the Housing Part of Civil Court; in 99% of those cases, the tenants lack counsel.³⁸ Elsewhere in the State, cases are heard in civil courts, town and village courts, county courts, and district courts; in 98% of those cases, the tenants lack counsel.³⁹

Some limited sources of nonlawyer assistance are available in landlord-tenant cases:

- ***Housing Court help desks.*** Housing Court Answers, a nonprofit organization, operates help desks within New York City's Housing Court.

³⁸ 2010 Task Force Report, at 1.

³⁹ *Id.*

The desks are staffed by nonlawyers who provide information about the Court's proceedings, explaining, for example, the roles of various court personnel and identifying possible sources of additional assistance.

- ***Court-sponsored courses.*** Some courts offer courses to the public, taught by nonlawyer staff, regarding basic matters such as defenses to non-payment proceedings and nuisance holdovers, proceedings to obtain repairs, and information about public benefits and housing rights.
- ***Student volunteers.*** Law students and undergraduates from participating schools can volunteer to assist pro se tenants and landlords in nonpayment proceedings through the New York City Civil Court's Resolution Assistance Program (RAP). RAP assistants provide support in hallway negotiations concerning parties' claims or defenses, encourage parties to discuss settlement with the court where appropriate, and provide information regarding sources of legal and other assistance. RAP assistants may not provide legal advice or participate in actual negotiations or settlement conferences. RAP assistants must attend a brief training course and commit to providing a minimum of six hours of service per year.⁴⁰
- ***Guardians ad litem ("GAL's").*** Nonlawyer volunteers may advocate on behalf of mentally or physically impaired litigants facing eviction through the New York City Civil Court's Housing Court Guardian Ad Litem Program. GAL's make court appearances, negotiate settlements between tenants and landlords, obtain help for litigants from social services agencies, and provide other assistance. GAL's do not have the legal authority to manage personal affairs. Candidates must submit background information, provide professional references, and complete a training course. Once accepted, they are placed on a list of available GAL's circulated to the court's supervising judges for appointment in individual cases. Volunteers commit to serving a minimum of three appointments over the course of one year.⁴¹ In some instances, GAL's receive compensation by the Human Resources Administration.⁴²

2. Foreclosure

In residential foreclosure actions, over 75% of the defendants in New York City and over 66% in New York State are unrepresented.⁴³ By contrast, the plaintiffs in such actions are typically sophisticated lenders with highly experienced counsel. Many proceedings are

⁴⁰ New York City Housing Court, Prospective RAP Assistants, available at http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml.

⁴¹ Guardian Ad Litem Program – NYC Civil Court, Housing Part, available at <http://www.nycourts.gov/ip/nya2j/diverseneeds/GAL.shtml>.

⁴² See 2012 Task Force Report, Appendix 17, at 19-20.

⁴³ 2011 Report of the Chief Administrator of the Courts, at 5, available at <http://www.nycourts.gov/publications/pdfs/ForeclosuresReportNov2011.pdf>.

complicated and involve numerous potential defenses and counterclaims, which unrepresented litigants often lack the ability to understand, much less assert. In addition, settlement conferences are mandatory and often involve a lengthy process of four to eight sessions.

Sources of nonlawyer assistance in such cases include:

- ***Nonprofit counseling agencies.*** The U.S. Department of Housing and Urban Development certifies nonprofit counseling agencies to provide borrowers with specialized assistance in foreclosure cases. Among other things, nonlawyer counselors working for certified agencies explain the settlement process, help assemble documents, seek accommodations such as extensions of time and loan modifications, prepare loan modification papers, and arrange short sales. They are not authorized to provide legal or tax advice, and do not appear in court. The program is funded with assistance from the Office of the New York Attorney General.
- ***Nonprofit legal services agencies.*** Free assistance is also available from nonlawyers at legal services organizations, operating under attorney supervision. The nonlawyers cannot provide legal advice but can explain the foreclosure process and help prepare loan modification applications or a pro se answer.
- ***For-profit counseling businesses.*** Companies operating for profit may offer similar assistance – particularly loan modification services – for a fee, but are prohibited from collecting fees in advance

3. Consumer credit

In 2009, over 240,000 debt collection cases were filed in New York City Civil Court.⁴⁴ In 99% of those cases, the debtors were unrepresented, while 100% of creditors had legal counsel.⁴⁵ Indeed, creditors typically are represented by a cadre of highly experienced law firms.⁴⁶ The disparity in expertise is reflected by a striking imbalance in outcomes. It has been found that 80% of these cases result in default judgments.⁴⁷

When default judgments are entered, creditors' submissions are often legally inadequate but go unopposed because debtors lack the basic knowledge to evaluate and challenge them.⁴⁸ In

⁴⁴ 2010 Task Force Report, at 16.

⁴⁵ *Id.* at 1, 16.

⁴⁶ See Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor*, at 1 (Oct. 2007) (cited hereafter as *Debt Weight*), available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf.

⁴⁷ *Id.* at 1, 9.

⁴⁸ *Id.* at 9-10; see also *Pavlov v. Debt Resolvers USA, Inc.*, 28 Misc. 3d 1061, 1076, 907 N.Y.S.2d 798, 810 (N.Y. Civ. Ct., Richmond Cty. 2010) (the “vast majority” of consumer debt cases in New York City Civil Court result in default judgments against defendants; only about 30% of defendants appear and answer, and the “vast majority” of those are unrepresented).

other cases, pro se debtors appear but fail to recognize and assert valid defenses.⁴⁹ In many such cases, debtors may forego legal representation because the cost of hiring a lawyer exceeds the amount in issue. Yet an adverse judgment can have devastating effects on a low-income debtor. The judgment creditor can garnish wages and freeze bank accounts, crippling the debtor's ability to pay for basic needs such as food, rent, utilities, and medical care. The resulting negative credit record may impair the debtor's long-term ability to find work and housing.

New York expressly bars nonlawyers from providing certain types of services to debtors except on a pro bono basis. In particular, for-profit businesses are prohibited from offering "budget planning services," which involve the distribution of a debtor's funds to creditors.⁵⁰ The prohibition stems from the long history of fraud and abuse associated with businesses that purport to provide debt negotiation and credit counseling.⁵¹ A report issued recently by the New York City Bar Association's Civil Court Committee and Consumer Affairs Committee formally opposed a proposal to relax New York's prohibition.⁵² The report supports a broad ban on "any debt relief service – whether debt settlement, debt negotiation (otherwise known as debt management), or credit counseling – for a fee that is more than nominal."⁵³

Debtors may still obtain limited assistance from nonlawyers, particularly from these sources:

- ***Law school and college students, acting under attorney supervision.*** Debtors may obtain free legal information and advice from the Civil Legal Advice and Resource Office ("CLARO"), which operates under the auspices of the New York State Unified Court System's Access to Justice Program. CLARO runs court-based, walk-in clinics in all five boroughs of New York City. The clinics are staffed by law school and college students who are supervised by volunteer attorneys. CLARO typically deals with non-bankruptcy cases involving credit card debt, medical debt, student loans, car loans, and utilities. Staffers explain the court process, educate debtors on what to expect at their court hearings, and help draft court filings such as answers and motions to open default judgments. They do not represent debtors in court.
- ***Civil Court clerks.*** New York City Civil Court clerks may help debtors answer a complaint by assisting them in completing a pre-printed form (the "Consumer Credit Transaction Answer in Person"), which provides a list of defenses. The clerk fills out the form based on information

⁴⁹ *Debt Weight* at 1.

⁵⁰ N.Y. Gen. Bus. Law § 455.

⁵¹ See, e.g., New York City Bar Ass'n, *Profiteering from Financial Distress: An Examination of the Debt Settlement Industry* (May 2012), available at <http://www2.nycbar.org/pdf/report/uploads/DebtSettlementWhitePaperCivilCtConsumerAffairsReportFINAL5.11.12.pdf>

⁵² New York City Bar Ass'n, *Report on Legislation by the Civil Court Committee and Consumer Affairs Committee*, available at <http://www2.nycbar.org/pdf/report/uploads/BudgetplanningConsumerCivilCtReportFINAL6.17.11.pdf>.

⁵³ *Id.* at 4.

provided by the debtor, sends the answer to the plaintiff, and advises the debtor of the hearing date. In addition, the Court's website provides litigants with information regarding defenses and counterclaims, definitions, and explanations of procedure.⁵⁴

4. Family courts

New York's Family Court and State Supreme Court address a wide spectrum of family law matters, including divorce, child and spousal support, child custody, abuse and neglect charges, termination of parental rights, guardianship, placement, and delinquency. At least 80% of family law cases involve one or more pro se parties. In many cases, a pro se party faces a represented opponent.⁵⁵

Sources of nonlawyer assistance include:

- **Family Court clerks.** Court clerks help pro se litigants fill out paperwork, such as the petition necessary to obtain an order of protection.
- **Court-appointed special advocates/assistants (CASAs).** CASAs are appointed by Family Court judges to serve as advocates for abused, neglected, or at-risk children.⁵⁶ All CASAs receive at least 30 hours of training, take an oath to uphold the best interests of the children, and are sworn in by the Family Court. They function as "friends of the court," attending all court hearings and certain other proceedings, monitoring court orders, and reporting directly to the court. CASAs are supervised by the CASA program's directors or volunteer coordinators, and attorney supervision is not required.
- **Friends and relatives.** New York's Family Court Act provides that "[u]nless the court shall find it undesirable," a petitioner may bring a non-witness friend, relative, counselor, or social worker to the courtroom. Such a person has no right to participate in the proceedings, but the court may call him or her as a witness.⁵⁷

5. Tribal courts

Some Native American tribal courts allow nonlawyer advocates, called "lay counselors," to perform all of the functions of a professional attorney in both civil and criminal proceedings. In the tribal courts of the Ute Indian Tribe, for example, any party in any proceeding may choose to be represented by a lay counselor instead of a professional attorney.⁵⁸

⁵⁴ See, e.g., <http://www.courts.state.ny.us/COURTS/nyc/civil/procedural.shtml>.

⁵⁵ See 2012 Task Force Report, Appendix 17, at 21.

⁵⁶ See <http://www.courts.state.ny.us/ip/casa/publications/Chapter1-TheCASAProgramInNYS.pdf>.

⁵⁷ N.Y. Family Court Act § 838.

⁵⁸ Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation § 1-5-1 *et seq.*, available at <http://www.narf.org/nill/Codes/uteucode/utebodytt1.htm>.

The Tribe's Law and Order Code effectively places lay counselors on the same footing as professional attorneys, although no special training or certification appears to be required for lay counselors. When acting as representatives, lay counselors:

- bear “the same ethical obligations of honesty and confidentiality” as professional attorneys;
- are subject to the same attorney-client privilege, which attaches “in appropriate circumstances”;
- are “deemed officers of the Court” and governed by the same disciplinary rules as professional attorneys, including “the requirements and suggested behavior of the Code of Professional Responsibility as adopted by the American Bar Association”;
- like professional attorneys, may be required to represent “without compensation or without full compensation” persons who are deemed by a Tribal Court judge to have “a particularly urgent need for such representation but are personally unable to afford to pay for such legal help.”⁵⁹

Similar provisions can be found in other Native American tribal codes. Some codes, however, require that lay counselors pass a “bar examination” (administered by a tribal executive board) or a “certified paralegal training program.”⁶⁰

B. Administrative Proceedings

Some federal and New York State agencies allow nonlawyers to represent clients in administrative proceedings, and in some cases allow the nonlawyers to charge fees. In federal Social Security proceedings, for example, nonlawyers may be compensated from a claimant's award of retroactive benefits; and in immigration cases, firms employing nonlawyers may charge a nominal fee for their services. Nonlawyers may also appear in state unemployment and workers' compensation proceedings. The federal and state agencies impose various regulatory requirements on nonlawyers who practice before them. Often these include minimum requirements of education, training, and experience; a showing of good moral character; insurance or bonding requirements; disciplinary procedures; and fee limitations.

1. Social Security benefits

⁵⁹ *Id.* §§ 1-5-1, 1-5-6; *see also id.* § 1-5-7 (identical oath prescribed for attorneys and lay counselors upon admission).

⁶⁰ *See, e.g.,* Assiniboine & Sioux Tribes Fort Peck Tribal Code § 501(b) (bar examination), available at <http://www.indianlaw.mt.gov/fortpeck/codes/default.mcp>; Winnebago Tribal Code §§ 1-402, 1-403 (certified paralegal training program), available at http://www.winnebago-tribe.com/images/tribal_court/2012%20WTN%20TRIBAL%20CODE.pdf.

The Social Security Administration allows nonlawyers to represent claimants seeking Social Security disability insurance benefits. A relative, friend, or “other spokesman” may serve in that capacity,⁶¹ provided that he or she “is generally known to have a good character and reputation,” is “capable of giving valuable help” in connection with the claim, and is not disqualified or legally prohibited from doing so.⁶²

Additional requirements apply to nonlawyer representatives who seek compensation for their services. In such cases, the nonlawyer must (1) have a bachelor’s degree from an accredited institution, or at least four years of relevant professional experience and either a high school diploma or GED certificate; (2) pass a written examination regarding relevant Social Security Act provisions and recent court decisions; (3) maintain professional liability insurance of at least \$500,000; (4) pass a criminal background check; and (5) meet continuing education requirements.⁶³ If the claimant is successful, the agency is authorized to withhold up to 25% of the past-due benefits awarded or \$4,000 (whichever is less) as payment for the nonlawyer’s services, subject to certain other requirements.⁶⁴

2. Immigration

Immigration decisions are made in the first instance by the U.S. Citizenship and Immigration Services (“USCIS”), which reviews applications for visas, green cards, and asylum. The application process requires knowledge of immigration law and procedures (which are complex and subject to frequent change), factual development, and pursuit of a Freedom of Information Act request to discover the applicant’s history of interaction with the government. Initial decisions are based on written submissions and in some cases an interview.

Applicants denied relief at the USCIS level may be subject to deportation or removal. The next stage involves Immigration Court proceedings conducted by the Department of Justice’s Executive Office for Immigration Review. Matters may also reach that level if a noncitizen is arrested and detained upon discovery of unlawful status. Immigration Court decisions are subject to review by the Board of Immigration Appeals, and its decisions in turn are subject to review by the U.S. Court of Appeals.

Many individuals lack representation in Immigration Court proceedings. One recent study showed that 67% of detained individuals were unrepresented in New York removal proceedings. Moreover, even where individuals are represented, the quality of representation is often considered inadequate by the presiding judges.⁶⁵

Nonlawyers may play limited but important roles in immigration cases:

⁶¹ 45 C.F.R. § 205.10(a)(3)(iii).

⁶² 20 C.F.R. § 404.1705.

⁶³ 76 Fed. Reg. 45184, 45186-89 (July 28, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-28/pdf/2011-19026.pdf>.

⁶⁴ 42 U.S.C. § 406.

⁶⁵ See “Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings,” 33 Cardozo L. Rev. 357, 367-68 (2011), available at <http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf>.

- ***Accredited representatives of recognized nonprofit organizations.***
“Accredited representatives” of a “recognized” nonprofit organization may participate in Immigration Court proceedings to the same extent as attorneys. However, the organization may charge only a “nominal” fee for its services, and must demonstrate that its “knowledge, information and experience” are adequate to provide appropriate representation. There is no requirement that the organization employ a supervisory attorney, although many authorized organizations with adequate funding do. Examples of such organizations in New York City include Catholic Charities, CUNY Citizenship NOW, and Sanctuaries for Families.⁶⁶
- ***“Other qualified representatives,” including “reputable individuals.”***
Federal regulations also permit other categories of nonlawyers to provide representation in immigration cases. These include law graduates who are not yet admitted to the bar and law students, under specified conditions. Another category consists of “reputable individuals” who are “of good moral character”; appear on an “individual case basis” at the noncitizen’s request; receive no compensation; and have a pre-existing relationship with the noncitizen (for example, as a relative or friend), although the last requirement may be waived “where adequate representation” is otherwise unavailable.⁶⁷

The Committee notes that, in contrast to these legitimate representatives, so-called “notarios” and “travel agents/translators” in minority communities often victimize immigrants through the unauthorized practice of law and other forms of misconduct. The unauthorized services include, for example, the selection, preparation, and submission of USCIS forms. In many cases, the nonlawyers charge more than immigration lawyers for similar services. Although efforts to eliminate the abuses have been made, more needs to be done.⁶⁸

3. Unemployment insurance benefits

New York State’s Unemployment Insurance Appeals Board allows nonlawyers to serve as “registered representatives” of claimants seeking unemployment insurance benefits. At Board hearings, registered representatives are authorized to present a claimant’s case, introduce

⁶⁶ The Department of Justice lists recognized organizations and accredited representatives at <http://www.justice.gov/eoir/statspub/raroster.htm>.

⁶⁷ See 8 C.F.R. § 292.1.

⁶⁸ See, e.g., Cantrell, *supra* note 21, at 893. In an effort to protect immigrants in this context, New York City’s Local Law 31 attempts to regulate – but does not license or certify – nonlawyers who provide “immigration assistance services” for profit. See N.Y.C. Admin. Code §§ 20-770 to 20-780. Whether the regulation is effective in preventing fraud or ensuring adequate representation is open to question. See generally C. Shannon, “To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers,” 33 Cardozo L. Rev. 437, 457-65 (2011).

documentary evidence, cross-examine opposing parties and their witnesses, and give a closing summation.⁶⁹

To qualify as a registered representative, a nonlawyer must (1) have a high school diploma or its equivalent; (2) have at least 16 hours of work experience or have taken courses in specified areas (administrative law and procedure, labor law, unemployment insurance, or civil practice and procedure); and (3) be of good moral character. In addition, the applicant “may” have to pass an examination, and “should have some experience with hearings and a working knowledge” of Article 18 of New York’s Labor Law and the Board’s rules and recent decisions.⁷⁰ As part of the application process, a nonlawyer must submit a detailed resume and five references, must indicate whether he or she intends to engage full-time in representing claimants for a fee, must be interviewed by the Board, and upon certification must obtain a surety bond of \$500.⁷¹

The Board maintains a list of registered representatives and their contact information, which is supplied to claimants and available online. Registered representatives may charge a fee only if their client has won an award. Payments are limited to \$75 per hour for nonlawyers (\$100 per hour for lawyers). The representative must present a detailed certification of the services performed. The Board then approves a fee based on the total benefit to the claimant, the time spent on the representation, the legal and factual complexities of the case, and any other factors the Board deems relevant.⁷²

4. Workers’ compensation benefits

The New York State Workers’ Compensation Board authorizes nonlawyers to practice before the Board, subject to a licensing requirement.⁷³ To qualify for a license, an applicant must be at least 18 years old and a U.S. citizen or lawful permanent resident, have a high school diploma or its equivalent, reside or have a regular place of business in New York State, be of good moral character, and have “competent knowledge of the law and regulations relating to workers’ compensation matters and the necessary qualifications to render service to his or her client.”⁷⁴ The nonlawyer must also pass a written examination, submit to possible “oral review at the Board’s discretion,” and participate in an orientation program covering Board procedures and the legal and ethical responsibilities of practitioners.⁷⁵

⁶⁹ Fact Sheet, New York State Unemployment Insurance Appeal Board, available at <http://www.labor.ny.gov/sites/ui-appeal/pdf/RegisteredRepresentativeFactSheet.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See 12 N.Y. Comp. Codes Rules & Regs. § 460.6; Unemployment Insurance Appeals Board, Attorney and Registered Representative Fee Schedule, available at <http://www.labor.ny.gov/sites/ui-appeal/pdf/Attorney-and-Registered-Representative-Fee-Schedule.pdf>.

⁷³ New York State Workers’ Compensation Board, Licensed Representative Regulations § 302-1.1, available at <http://www.wcb.ny.gov/content/main/wclaws/30213.jsp#sec1b>.

⁷⁴ *Id.* § 302-1.2.

⁷⁵ *Id.* §§ 302-1.4, 302-1.7. Law graduates who are not yet admitted to the bar and law students may also practice before the Board, under a separate set of conditions. *Id.* §§ 302-1.1, 302-1.6.

The regulations specify representatives' duties to their clients and the Board. Among other things, representatives are expected to have full knowledge of their client's case, prepare diligently for handling all matters relating to the case, ascertain and fully disclose to the client the relevant facts and questions of law, fairly advise the client as to the merits of the case, disclose to the client in writing any potential conflicts of interest, transfer or accept transfer of a case only with approval by the Board, and withdraw from representing a client only after giving five days' written notice to the client (which must also be filed with the Board).⁷⁶

The regulations also require representatives to conduct themselves as lawyers would in a court; maintain a register of their cases for Board inspection; display their licenses; and appear only in connection with cases in which they have been directly retained. Representatives may receive fees only if authorized by the Board or by a referee, and are strictly prohibited from receiving any other compensation for their services.⁷⁷

V. Roles for Nonlawyers Are Already Being Expanded

In recent years, several jurisdictions have extended the activities of nonlawyers substantially beyond the limited practices described above. We describe some of those developments here: the "McKenzie Friend" and "lay advocate" concepts in England and Wales; Washington State's authorization of "Limited License Legal Technicians"; and the "independent paralegal" model, variations of which have been adopted in California, Arizona, and Canada.

A. Nonlawyer Advisers in England and Wales

In England and Wales, nonlawyers are allowed to render legal advice to a far greater extent than nonlawyers in the United States. As a general matter, those other countries do not limit to attorneys what we would consider the "practice of law." Instead, they reserve for attorneys the right to provide particular services including the right to conduct litigation, appear before certain courts, prepare various types of contracts, engage in specific probate and notarial activities, and administer oaths. On the other hand, nonlawyers are permitted to write wills, consult on employment disputes, and manage personal injury and other types of claims out of court – all without licensing or regulation. Nonlawyers can also provide immigration advice, although that activity is subject to regulation.⁷⁸

Given this scheme, numerous "advice agencies" offer nonlawyer counseling and other services on a broad range of issues. For example, the Citizens' Advice Bureau announces on its website that it operates in 3,500 locations and provides free advice to more than two million people a year on "any issue," including debt, employment, housing, immigration, "plus everything in between."⁷⁹ The advice bureaus direct clients who need more specialized legal advice to trained lawyers, while nonlawyers handle more routine matters.

⁷⁶ *Id.* § 302-2.1.

⁷⁷ *Id.* §§ 302-2.2, 302-2.4.

⁷⁸ See generally Legal Services Institute, *The Regulation of Legal Services: Reserved Legal Activities – History and Rationale* (Aug. 2010), available at http://www.legalservicesinstitute.org.uk/LSI/LSI_Papers/Discussion_Papers/Reserved_Legal_Activities_History_and_Rationale/.

⁷⁹ See http://www.citizensadvice.org.uk/index/aboutus/factsheets/cab_key_facts.htm.

1. “McKenzie Friends”

In England and Wales, lay persons known as “McKenzie Friends” may appear alongside litigants in some court proceedings.⁸⁰ Anyone can serve as a Friend, including a family member, neighbor, trained volunteer affiliated with an organization, or someone who regularly serves as a Friend.⁸¹ With disclosure to the court, the Friend can be paid.

The role of McKenzie Friend was established by the courts and is regulated under a court-issued “Practice Guidance.”⁸² Although litigants have a general right to “reasonable assistance,” courts have the discretion to decide in a particular case that “the interests of justice and fairness” do not require assistance by a McKenzie Friend.⁸³ If assistance is allowed, the Friend is authorized to “provide moral support” to the litigant, “take notes,” “help with case papers,” and “quietly give advice on any aspect of the conduct of the case.”⁸⁴ The Friend may not, however “(i) act as the litigants’ agent in relation to the proceedings; (ii) manage litigants’ cases outside court, for example by signing court documents; or (iii) address the court, make oral submissions or examine witnesses.”⁸⁵ The emphasis, thus, is on “quiet” advice.

In exceptional circumstances, a court may allow a Friend to take on the additional role of “lay advocate” (described further below), who may then cross-examine witnesses and present oral argument.

Courts “ordinarily” allow the participation of a Friend,⁸⁶ but may decline to do so if participation “might undermine or has undermined the efficient administration of justice.”⁸⁷ The “Practice Guidance” offers the following examples of circumstances in which a Friend may be denied permission to participate:

- the assistance is being provided for an improper purpose;

⁸⁰ The name “McKenzie Friend” derives from an English divorce case, *McKenzie v. McKenzie*, [1971] P33, [1970] 3 All ER 1034, [1970] 3 WLR 472, in which a lawyer who was qualified to practice in Australia but not in England sought to accompany the husband and offer assistance at trial. The trial court denied permission, but the appellate court, citing precedent going back to 1831, ruled that the lawyer should have been allowed to sit with the husband, take notes, and pass questions to the husband for cross-examination, but not advocate directly to the court.

⁸¹ See, e.g., Cantrell, *supra* note 21, at 888-91. U.K. social service and advocacy groups (such as “Families Need Fathers,” www.fnf.org.uk) often provide lists of “trained” McKenzie Friends.

⁸² *Practice Guidance: McKenzie Friends (Civil and Family Courts)*, issued July 12, 2010 (“Practice Guidance”), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf>.

⁸³ *Id.* at 1; see also *Regina v. Leicester City Justices et al., ex parte Barrow et al.*, 2 QB 260, [1991] 3 WLR 368.

⁸⁴ *Practice Guidance*, at 1.

⁸⁵ *Id.*

⁸⁶ *Id.*; see also *In the Matter of the Children of Mr. O’Connell, Mr. Whelan and Mr. Watson*, [2005] EWCA Civ. 759, [2005] 3 WLR 1191, [2005] 2 FLR 967.

⁸⁷ *Practice Guidance*, at 3.

- the assistance is unreasonable in nature or degree;
- the Friend is subject to a civil proceedings order or a civil restraint order;
- the Friend is using the litigant as a “puppet”;
- the Friend is directly or indirectly conducting the litigation;
- the court is not satisfied that the Friend fully understands the duty of confidentiality.⁸⁸

A report by the Civil Justice Council of England and Wales states that “the general view from judges and staff was that on balance it was better to have McKenzie Friends than not.”⁸⁹ The Council recommended that courts encourage the use of McKenzie Friends.⁹⁰ It also stated that courts should allow non-paid Friends to speak in some circumstances, but should be “very resistant” to allowing paid Friends to do so.⁹¹ The Council proposed a code of conduct that guides Friends to be honest, avoid disruption, follow the court’s directives, disclose to the court any payments for the Friend’s assistance, and reveal to the court and the litigant if the Friend serves that function regularly. The Council also stated that the Friend should “normally decline” to participate in a case if the Friend has “a financial interest in the outcome of the case.”⁹²

2. “Lay advocates”

As noted above, courts in England and Wales may permit a McKenzie Friend to take on the additional role of oral advocate for an otherwise unrepresented litigant, with authority to examine witnesses and present argument. In such cases, the Friend becomes a “lay advocate.”

Courts rarely grant permission to serve as a lay advocate. They are particularly reluctant to grant permission to individuals who charge a fee for their services, or serve repeatedly as lay advocates.⁹³ Circumstances that have been held to justify lay advocacy include: the lay advocate is a close relative of the litigant; the litigant cannot afford a lawyer and has health problems that preclude self-representation; or the litigant is relatively inarticulate and prompting

⁸⁸ *Id.*

⁸⁹ “Access to Justice for Litigants in Person (or self-represented litigants),” Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice by the Civil Justice Council (Nov. 2011), at 53, available at <http://www.judiciary.gov.uk/NR/rdonlyres/16D9B96A-5610-4677-8AA3-9B1BB05A2F18/0/CivilJusticeCouncilReportonAccesstoJusticeforLitigantsinPersonorselfrepresentedlit.p df>.

⁹⁰ *Id.* at 53-54.

⁹¹ *Id.* at 54.

⁹² *Id.* at 91-92.

⁹³ *See D v. S (Rights of Audience)* [1997] Fam Law 403, available at <http://www.bailii.org/ew/cases/EWCA/Civ/1996/1341.html>; *Noueiri v Paragon Finance Plc (No. 2)* [2001] EWCA Civ. 1402, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2001/1402.html>.

by a non-speaking adviser may unnecessarily prolong the proceedings.⁹⁴ The “Practice Guidance” observes:

[A] person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.⁹⁵

Finally, representation by lay advocates in specific types of proceedings may be authorized by legislation. For example, a Scottish statute allows lay advocacy in cases involving repossession of homes in Scotland.⁹⁶

B. “Limited License Legal Technicians”

In July 2012, the Supreme Court of Washington adopted a “Limited Practice Rule for Limited License Legal Technicians.”⁹⁷ The Rule establishes a regime under which legal technicians will be licensed to provide services in specific practice areas, to be defined by further regulation. If a client’s legal problem does not fall within an authorized practice area, the legal technician must decline the engagement and advise the client to seek the assistance of a lawyer. The Rule does not allow legal technicians to represent clients in court proceedings or out-of-court negotiations.

In authorized practice areas, legal technicians will be allowed to undertake the following tasks:

- obtain relevant information and explain its relevance to the client;
- inform the client of applicable procedures, including deadlines, documents that must be filed, and the anticipated course of legal proceedings;
- inform the client of applicable procedures for proper service of process and the filing of legal documents;
- provide the client with certain approved materials that contain relevant information about legal requirements, case law relevant to the client’s claim, and venue and jurisdictional requirements;

⁹⁴ *Practice Guidance* at 4.

⁹⁵ *Practice Guidance*, at 3; *see also* *Portelli v. Goh* [2002] NSWSC 997.

⁹⁶ *See* “Home Owner & Debtor Protection Act of 2010 – Guidance on Lay Representation,” available at <http://www.scotland.gov.uk/Publications/2010/08/03135201/0>.

⁹⁷ Wash. Sup. Ct. Admission to Practice Rule (“Wash. APR”) 28, available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>. *See generally* B. Holland, “The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice,” 82 Miss. L.J. 75 (2013), available at <http://mississippilawjournal.org/2013/02/the-washington-state-limited-license-legal-technician-practice-rule-a-national-first-in-access-to-justice/>.

- review documents or exhibits that the client has received from the opposing side, and explain them to the client;
- select and complete forms that have been approved by certain specified authorities, and advise the client of their significance;
- perform legal research and draft “legal letters” and other documents (beyond the forms noted immediately above), if the work is reviewed and approved by a Washington lawyer;
- advise the client as to other documents that may be necessary to the case (such as exhibits, witness declarations, or party declarations) and explain how they may affect the case;
- assist the client in obtaining necessary documents such as birth, marriage, or death certificates.⁹⁸

The Rule holds legal technicians to the standard of care of a Washington lawyer, and extends to legal technicians the attorney-client privilege and the fiduciary duties of a lawyer. The Rule also specifies essential terms of the legal technician’s contract with a client. Before any services are performed for a fee, both parties must sign a written contract that includes these provisions:

- an explanation of the services to be performed, including a conspicuous statement that the legal technician may not represent the client in court, “formal administrative adjudicative proceedings,”⁹⁹ or any other formal dispute resolution process, and may not negotiate the client's legal rights or responsibilities;
- an identification of all fees and costs to be charged to the client;
- a conspicuous statement on the first page that the legal technician is not a lawyer and may only perform limited legal services;
- a statement that upon the client's request the legal technician will deliver to the client any documents submitted by the client to the legal technician;
- a statement describing the legal technician’s duty to protect the confidentiality of information provided by the client and the legal technician’s work product;

⁹⁸ Wash. APR 28(F).

⁹⁹ The Rule incorporates certain exceptions provided by Washington’s definition of the “practice of law.” One of those exceptions allows acting as a “lay representative authorized by administrative agencies or tribunals.” See Wash. Sup. Ct. Gen. Rule 24(b)(3), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr24.

- a conspicuous statement that the client has the right to rescind the contract at any time and receive a full refund of unearned fees; and
- any other conditions required by rules or regulations to be issued later.¹⁰⁰

The Rule imposes certain additional requirements, including:

- completion of an ABA-approved paralegal training program;
- two or three years' work experience as a paralegal under the supervision of a lawyer;
- admission requirements, including an examination and proof of good moral character;
- maintenance of a principal place of business with a physical street address; and
- ongoing requirements for maintenance of legal technician status, including continuing education requirements, payment of an annual fee, and annual "proof of fiscal responsibility."

The Rule establishes a Limited License Legal Technicians Board, which is tasked with developing more detailed regulations and administering the program on a day-to-day basis. The Board's responsibilities include recommending to the Washington Supreme Court specific areas in which legal technicians will be authorized to practice; specifying more detailed licensing requirements; developing rules of professional conduct and procedures for disciplinary actions; processing applications; and administering required examinations.¹⁰¹ In light of the multiplicity of open issues that the Board must address, the program is not expected to begin operation until 2014.¹⁰²

C. "Independent Paralegals"

Another expansion of nonlawyer roles has taken place under the rubric of "independent paralegals." This type of practitioner has some legal training and provides service for a fee directly to clients without attorney supervision, rather than to clients of a lawyer who employs or retains the paralegal and remains responsible for his or her work.¹⁰³

¹⁰⁰ Wash. APR 28(G)(3).

¹⁰¹ Wash. APR 28(C).

¹⁰² Washington State Bar Ass'n, *Limited License Legal Technician Board* (Feb. 2013)

http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees_Boards_Panels/LLLT%20Board/Meeting%20Materials/20130221%20Meeting%20Materials.ashx.

¹⁰³ Confusingly, the term "independent paralegal" also may be used to refer to nonlawyers who provide services for a fee in certain administrative proceedings (described in Section IV.B above).

In addition to the term “independent paralegal,” various other titles may be used to describe providers of such services. For example, California and Arizona have authorized nonlawyers to provide certain types of services as “legal document preparers” and “legal document assistants,” respectively. The scope of services is essentially the same for both: assisting clients with the preparation of legal documents without attorney supervision. Under Arizona’s rules, “legal document preparers” must meet initial and continuing educational requirements, pass an examination, and abide by a code of conduct; the rules explicitly prohibit the provision of legal advice, opinions, or recommendations.¹⁰⁴ Similarly, California prohibits “legal document assistants” from providing legal advice or explanation.¹⁰⁵ (Whether such prohibitions are violated by internet and in-person businesses that sell document assembly and related services is the subject of ongoing debate and, in some instances, legal action.¹⁰⁶)

Similar developments have taken place outside the United States. In 2007, for example, Ontario’s regulatory body for the legal profession, the Law Society of Upper Canada, allowed “licensed paralegals” to begin providing fee-based legal services to clients in minor civil and criminal matters. The regulatory framework established there resembles in some respects Washington State’s more recent legal technicians rule, discussed above. Ontario, however, has gone further: licensed paralegals may provide certain types of litigation advice, prepare court filings, and negotiate for clients with respect to small claims court cases, traffic offenses, landlord-tenant disputes, administrative matters, and minor criminal offenses. In a five-year review of Ontario’s program, the Law Society reported that “regulation of paralegals has been successful.” The Law Society concluded that “[c]onsumer protection has been balanced with maintaining access to justice and the public has thereby been protected.”¹⁰⁷

VI. Overview of New York’s Prohibition of the Unauthorized Practice of Law

In New York and many other jurisdictions, nonlawyers are prohibited from engaging in the practice of law or from holding themselves out as able to practice law.¹⁰⁸ The prohibition has salutary goals that include preventing fraudulent impersonations and incompetent services by nonlawyers who lack the necessary qualifications and skill. The prohibition is relevant to a consideration of new models for nonlawyer services.

We briefly review New York’s law here. The extent to which changes in the law may be needed depends on the particular proposal in question. The Committee invites discussion of the models as general concepts and looks forward to building a consensus for particularized versions of those models. As that occurs, the Committee will be able to address whether changes in the law are necessary to accommodate the specific proposals under consideration.

¹⁰⁴ Ariz. Sup. Ct. Rule 31; Ariz. Code of Judicial Administration § 7-208, available at <http://www.azcourts.gov/cld/LegalDocumentPreparers.aspx>.

¹⁰⁵ Cal. Bus. & Prof. Code § 6400.

¹⁰⁶ See, e.g., *ABA Nonlawyer Study* at 36-39, 46-48, 59-60.

¹⁰⁷ The Law Society of Upper Canada, *Report to the Attorney General of Ontario* (June 2012), at 3, available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147488010>.

¹⁰⁸ For a history and survey of state laws prohibiting the unauthorized practice of law, see *ABA Nonlawyer Study* at 1, 13-32, 60-72; see also Cantrell, *supra* note 21, at 892-94 (questioning whether UPL prohibitions are effective tools for protecting consumers).

New York’s Judiciary Law broadly prohibits nonlawyers from engaging in the practice of law. Although “the “practice of law” is a malleable term, the statute generally bars unlicensed individuals from providing legal advice, holding oneself out as a lawyer, and preparing certain legal documents. Judiciary Law § 478 declares:

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath.

Because § 478 refers to proceedings in a “court of record,” it does not prohibit various nonlawyer services described above in connection with administrative proceedings.¹⁰⁹

In addition, Judiciary Law § 484 designates specific activities that constitute the unauthorized practice of law:

No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents’ estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted.

Similarly, courts have defined the unauthorized practice of law as including “rendering legal advice,” “appearing in court and holding oneself out to be a lawyer,” and preparing legal documents for a lay person.¹¹⁰ In addition, Rule 5.5(b) of the New York Rules of Professional

¹⁰⁹ See, e.g., *Matter of Bd. of Educ. of Union-Endicott Cent. School Dist. v. New York State Pub. Employment Relations Bd.*, 233 A.D.2d 602, 649 N.Y.S.2d 523 (3d Dep’t 1996). The statute also provides exceptions for law students, law graduates who have not yet been admitted to the bar, and “officers of societies for the prevention of cruelty to animals,” under specified conditions.

¹¹⁰ *El Gemayel v. Seaman*, 72 N.Y.2d 701, 706 (1988) (citing *Spivak v. Sachs*, 16 N.Y.2d 163, 168 (1965)); *In re Roel*, 3 N.Y.2d 224, 230 (1957). As of November 1, 2013, violation of Judiciary Law § 478 or § 484 will constitute a class E felony if a nonlawyer “(1) falsely holds himself or herself out as a person licensed to practice law in this state, a person otherwise permitted to practice law in this state, or a person who can provide services that only attorneys are authorized to provide; and (2) causes another

Conduct prohibits a lawyer from aiding a nonlawyer in the practice of law. Comment 2 notes that “[t]he definition of the ‘practice of law’ is established by law and varies from one jurisdiction to another.” It also notes that the Rule “does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”

VII. The Committee’s Recommendations

A. Recognize a Role for “Courtroom Aides” in Judicial and Administrative Hearings

As already discussed, nonlawyers are authorized to assist individuals in various federal and state administrative settings and certain court proceedings. (See Section IV above.) Similarly, courts in England and Wales allow “quiet” assistance by a McKenzie Friend, and sometimes allow the Friend to present evidence and argument as a lay advocate. (See Section V.A above.) In some circumstances, the nonlawyer is allowed to charge a fee.

The Committee endorses this concept, referred to here as the “courtroom aide” model, and recommends its application in appropriate forms to a broader range of forums. Assistance by a courtroom aide can be expected to facilitate proceedings in ways that benefit the litigant, the tribunal, and the justice system as a whole.¹¹¹ For individuals with educational, language, or cognitive limitations, the courtroom aide can be especially helpful, not only as a source of information and emotional and administrative support, but also as an advocate.¹¹²

In appropriate categories of cases, unpaid friends or relatives should be allowed to provide such assistance without elaborate regulation, but subject to approval and oversight by the presiding judge or administrator.

In addition, consideration should be given to whether, in a more limited range of cases, it may be appropriate for a nonlawyer to be compensated for work done in the role of a courtroom aide, recognizing that nonlawyers who are paid for their services should be subject to formal regulation regarding matters such as qualifications, mandatory disclosures, fee arrangements, and standards of conduct, in addition to on-the-scene supervision by the adjudicator.

We do not suggest an unthinking adoption of the courtroom aide model. It is particularly important to identify those judicial or administrative proceedings in which a role for a courtroom

person to suffer monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right to which he or she is entitled.” N.Y. Judiciary Law § 485-a.

¹¹¹ See, e.g., David Rubel, *Stem the Tide: A New Certification Program for Government Benefits Advocates as a Response to the Growing Crisis in Poor Communities* (Nov. 2007) (suggesting that certification of “government benefits advocates” would reduce the burden on the legal services bar by drawing more people into roles as advocates in social services agencies), available at <http://www.davidrubelconsultant.com/publications/1997%20govt%20advocates%20certification%20concept%20paper.pdf>.

¹¹² The Committee does not suggest that a courtroom aide’s assistance would be equivalent to that of lawyers, interpreters, or other professional participants in the proceedings, or that such assistance would relieve the court or agency of any of its responsibilities to the parties before it.

aide would provide the greatest benefits, and to provide standards under which the tribunal may decide that nonlawyer assistance is inappropriate.

Finally, our current proposal should not be viewed as attempting to modify any tribunal's existing regime for nonlawyer advocacy.

B. Recognize a Role for “Legal Technicians” Outside Judicial and Administrative Hearings

The Committee also recommends that New York adopt some form of Washington State's legal technician model for nonlawyer assistance, performed for compensation, outside of judicial and administrative hearings. (See Section V.B above.)

In making this recommendation, the Committee recognizes, as did Washington's Supreme Court, that properly trained nonlawyers are potentially capable of performing a range of law-related tasks responsive to the unmet needs of low-income people.

The Committee recognizes the need for regulation and oversight to ensure the quality of services provided by nonlawyers. In particular, the Committee endorses Washington State's set of mandatory disclosures to be embodied in a written contract between the legal technician and the client. The Committee is also mindful that excessive regulation may impose costs, burdens, and delays that will undercut the impact that such services may have in closing the justice gap. Achieving the proper balance between these two considerations is essential.

C. Consider Additional Roles for Nonlawyers

The Committee believes that the sheer size of the justice gap requires consideration of additional roles for nonlawyers. At best, the Committee's current proposals will narrow the gap incrementally; they cannot eliminate it completely. We therefore believe that it is important to consider additional steps, including limited authorizations of nonlawyers to render certain types of legal advice, conduct financial negotiations, and advocate in court beyond the parameters of the Committee's current proposals. Such steps would require careful analysis of the need for additional services and the concomitant need for additional safeguards and oversight. Without further study, the Committee cannot endorse such proposals at this time. Nevertheless, the Committee believes that further study by this Committee and by other committees of the New York City Bar is warranted.

D. Address Concerns

The Committee recognizes that concerns will be raised in response to its proposals. For example: Will nonlawyers be competent to perform the additional services? What kinds of regulatory regimes will be effective and practical? Will there be a market demand for the proposed services? And will expanding the role of nonlawyers promote a “two-tier” justice system? We offer some brief responses here. At the same time, we look forward to addressing the full range of concerns in greater detail as public debate continues.

Will nonlawyers be competent to handle the proposed services? The Committee acknowledges the need for detailed specifications of the additional tasks that nonlawyers may perform in particular settings, and the types of training and oversight necessary to ensure that those tasks are performed competently. At the same time, the Committee is reassured by the record of success achieved by many nonlawyers in guiding claimants through proceedings before federal and state agencies. In many respects, the tasks they fulfill are more complex and demanding than the tasks proposed in this report for courtroom aides in judicial or administrative proceedings, or for legal technicians outside such proceedings.

What kinds of regulatory regimes should be established? As discussed above, a number of federal and state agencies have already established formal regimes for the training, licensing, and supervision of nonlawyer advocates. The Committee does not propose altering any agency's existing rules and practices. A basic premise of the Committee's approach is that each tribunal should retain discretion to tailor its regulations in accordance with the special features of its caseload and jurisdiction. At the same time, the regimes already in place can inform the development of models for other judicial and administrative settings. Likewise, Washington State's legal technician regime can guide the development of models for nonlawyer services outside judicial and administrative hearings.¹¹³

The Committee does not recommend wholesale adoption of these or any other models. The appropriate type of regulation depends on the particular setting and the specified scope of the nonlawyer's activity. For example, where a courtroom aide is authorized to speak only when called upon by the court, the court retains direct control of the proceedings, reducing the need for independent oversight – although in some circumstances further regulation and even licensing will be appropriate, particularly if a nonlawyer advocate provides services for a fee. Similarly, the appropriate types of oversight in non-adjudicative contexts will depend on the breadth and complexity of the tasks to be performed. In any context, however, a balance must be struck between ensuring the quality of services and facilitating entry into the field.¹¹⁴

Will the new models be economically viable? The Washington Supreme Court specifically addressed this issue, observing that “[n]o one has a crystal ball,” and “[t]here is simply no way to know the answer to this question without trying it.” Some have questioned the existence of a significant consumer demand for nonlawyer services, arguing that if the demand existed, it would have been satisfied by now by the many recent law graduates who are currently unemployed. But an unmet demand for such services clearly does exist. It is often fulfilled – inadequately – by notarios and others who operate in the shadows of our legal system, without training or competency requirements. The legal technician model offers an opportunity to bring that activity out of the shadows and expose it to regulation. In any event, economic arguments against expanding nonlawyer services are hardly persuasive enough to preclude even modest experimentation. The limited proposals presented here deserve real-world tests.

¹¹³ Various other models have been suggested as well. For example, Prof. Rigertas has suggested a licensing scheme for “housing advocates,” who would provide legal advice in connection with real estate closings, landlord-tenant disputes, and foreclosures. Advocates would be required to complete courses in substantive law and professional responsibility, receive clinical training, and pass a qualifying examination. See Rigertas, *supra* note 31, at 98.

¹¹⁴ For a detailed discussion of analytical criteria relevant to determining the appropriate forms of regulation for different types of nonlawyer activities, see *ABA Nonlawyer Study* at 136-50.

Will the new roles promote a “two-tier” justice system? The Committee submits that we already confront a stark “two-tier” system, in which represented parties often face pro se litigants, with typically lopsided results. Expanding the scope of nonlawyer assistance will reduce rather than promote the extreme inequalities of the present system. The Committee strongly supports efforts to increase access to traditional legal counsel through pro bono work, legal aid services, and other programs. At the same time, such efforts alone cannot close the justice gap. Much more is needed.

VIII. Conclusion

The Committee has presented two proposals: (1) permit “courtroom aides” to participate in judicial and administrative hearings beyond those in which they are authorized to participate now; and (2) permit “legal technicians” to provide specified forms of assistance outside judicial and administrative hearings. The Committee believes that, with appropriate safeguards, adoption of these proposals will help to narrow the justice gap. The Committee also supports studying additional roles for nonlawyers. Every year millions of low-income New Yorkers face potentially life-changing events in our civil justice system without access to professional assistance. The New York bar can and should work creatively to address this crisis. The Committee joins the growing call for action and looks forward to participating in the search for solutions.

June, 2013

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