

NEW ROLES FOR NON-LAWYERS TO INCREASE ACCESS TO JUSTICE

*Richard Zorza & David Udell**

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* Richard Zorza is Coordinator Emeritus of the Self-Represented Litigation Network, www.srln.org (last visited Apr. 17, 2014). David Udell is Executive Director of the National Center for Access to Justice at Cardozo Law School, <http://ncforaj.org> (last visited Apr. 17, 2014). The views expressed herein are the authors' own. The authors wish to thank the following people for their assistance: Guy Dempsey, Thea Jennings, Paula Littlewood, and Steve Crossland. Of course, the opinions expressed are those of the authors, and all errors are theirs alone.

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INTRODUCTION

In the spring of 2013, New York Court of Appeals Chief Judge Jonathan Lippman observed in a speech delivered at the White House, “Sometimes an expert non-lawyer is better than a lawyer non-expert.”¹ Indeed, one of the most intriguing developments in response to the crisis of access to justice in our state courts has been the increasing interest at high levels of the legal system in considering new roles for non-lawyer legal practitioners to provide a range of civil legal services.

In a culmination of steps occurring over a number of years, on March 11, 2014 Chief Judge Lippman called for a study of the appropriateness and scope of the current rules governing unauthorized practice of law:

Building on the use of non-lawyers who do not, in a real sense, practice law, we must look at our legal regulatory framework, first, to see if our unauthorized practice of law rules should be modified in view of the crisis in civil legal services and the changing nature of legal assistance needs in society; and, second, to identify if, short of full admission to the bar, there are additional skill sets, separate in concept from our incubator projects, that can be licensed to provide low-bono or less costly services to help those in need of legal assistance. The high cost of legal services is a real barrier to a growing part of our population gaining access to justice. If lay persons with training in discrete subject areas can dispense legal information or assistance expertly and more cheaply, we should be

1. Richard Zorza, *Some Thoughts on Non-Lawyer Practice Issues After the Fordham Symposium*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Nov. 2, 2013), <http://accesstojustice.net/2013/11/02/some-thoughts-on-non-lawyer-practice-issues-after-the-fordham-symposium>; see also Richard Zorza, *What a Day at the White House!*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Apr. 17, 2013) [hereinafter Zorza, *What a Day at the White House!*], <http://accesstojustice.net/2013/04/17/what-a-day-at-the-white-house> (recapping the White House Forum on Increasing Access to Justice at which Chief Judge Jonathan Lippman spoke).

exploring how best to accomplish that, without diminishing the great legal profession in our state.²

In February 2014, Chief Judge Lippman announced the planned launch of two pilot projects in New York to test involvement of non-lawyers in roles responsive to the crisis.³ One of these pilots involves non-lawyer “navigators” who will provide a variety of forms of assistance to unrepresented parties in certain housing courts and civil courts within the state, including answering judges’ questions about the facts of cases.⁴ The other involves new roles for non-lawyer professionals to provide informational assistance to seniors, including those who are homebound.⁵ The New York City Bar Association’s

2. Jonathan Lippman, Chief Judge, N.Y. Court of Appeals, Address at the New York University School of Law Justice William A. Brennan Lecture on State Courts and Social Justice (Mar. 11, 2014), *available at* <http://richardzorza.files.wordpress.com/2014/03/brennan-send-out.pdf>.

3. See JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2014: VISION AND ACTION IN OUR MODERN COURTS 7–9 (2014), *available at* <https://www.nycourts.gov/ctapps/soj2014.pdf>. The speech followed action by the Chief Judge in appointing the Committee on Non-lawyers and the Justice Gap to develop pilot projects. See Press Release, N.Y. State Unified Court Sys., Chief Judge Names Members of Committee Charged with Examining How Non-Lawyer Advocates Can Help Narrow New York’s Justice Gap (May 28, 2013), *available at* https://www.nycourts.gov/press/PDFs/PR13_07.pdf. The creation of the Committee itself followed issuance of a report by the Task Force to Expand Access to Civil Legal Services in New York, recommending that the Chief Judge establish a committee for this purpose. See TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N. Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK app. 17, at 1087 (2012), *available at* <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS2012-APPENDICES.pdf> (describing current independent non-lawyer practice); Gillian K. Hadfield, Summary of Testimony Before the Task Force to Expand Access to Civil Legal Services in New York (October 1, 2012), *available at* <http://richardzorza.files.wordpress.com/2012/10/hadfield-testimony-october-2012-final-2.pdf> (urging expanded roles for non-lawyers in response to justice gap). See *generally* TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N. Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2013), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf. As noted above, the authors of this Article are members of the Committee on Lawyers and the Justice Gap. One of the authors, David Udell, was also a member of the New York City Bar Association’s Committee on Professional Responsibility from 2010 to 2013, during which time he chaired a subcommittee that was the primary author of the Committee’s 2013 report, *Narrowing The “Justice Gap”: Roles for Nonlawyer Practitioners*. See COMM. ON PROF’L RESPONSIBILITY, N.Y.C. BAR ASS’N, NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS (2013), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>. While both authors have learned from their colleagues on the respective committees, the opinions expressed herein are theirs alone and not the views or directions of the committees on which they serve or have served.

4. See LIPPMAN, *supra* note 3, at 8.

5. See *id.* at 9.

Committee on Professional Responsibility has issued two reports—the first in 1995⁶ and a second in 2012⁷—calling on New York to consider authorizing new models for non-lawyers in helping to respond to the justice gap.

But, while these are cutting-edge developments, they are not the only initiatives to test the potential benefits of expanded roles for non-lawyers in access to justice. In a different approach, the Washington State Supreme Court in 2012 authorized the creation of a new class of “limited licensed legal technicians” to provide legal assistance and information to unrepresented persons,⁸ and the Limited License Legal Technician Board⁹ has now established the regulatory structure,¹⁰ with initial licenses expected in spring 2015.¹¹ The approach and analysis are comprehensive.¹² In California, the state bar is holding public hearings on whether to move forward with

6. See COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR ASS'N, PROHIBITIONS ON NONLAWYER PRACTICE: AN OVERVIEW AND PRELIMINARY ASSESSMENT (1995), available at <http://www2.nycbar.org/pdf/report/uploads/95033-ProhibitionsonNon-LawyerPractice.pdf>.

7. See COMM. ON PROF'L RESPONSIBILITY, *supra* note 3.

8. Order, *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005 (June 14, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>; see also Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75 (2013) (discussing the rule in detail); Rita L. Bender & Paul A. Bastine, *Legal Technicians: Myths and Facts*, WASH. STATE BAR NEWS, June 2008, at 23, available at http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/NWLawyer/~/_media/Files/News_Events/Publications/Bar%20News/2008%20Full%20Issues/200807JulyBarNews.ashx (discussing the policy issues).

9. See *Limited License Legal Technician Board*, WASH. STATE BAR ASS'N, <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Legal-Technician-Board> (last visited Apr. 14, 2014).

10. See WASH. REV. CODE ANN. Admission to Practice R. 28 (West 2003).

11. *Limited License Legal Technician Board*, *supra* note 9.

12. See *LLLT Board Meeting Minutes and Materials*, WASH. ST. B. ASS'N, <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Legal-Technician-Board/LLLT-Board-Meeting-Minutes-and-Materials> (last visited Apr. 14, 2014).

new roles for non-lawyers.¹³ In Massachusetts, the state Access to Justice Commission prioritized the issue for action.¹⁴

More is happening at the national level. The American Bar Association (ABA) Task Force on the Future of Legal Education's final report supported the involvement of law schools in the creation of innovative frameworks for authorizing the provision of legal services by new categories of practitioners. The Task Force explained:

[T]he services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, *and licensing persons other than holders of a J.D. to deliver limited legal services*. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.¹⁵

Similarly, at a White House function in the spring of 2013, the then-President of the ABA, Laurel Bellows, offered tentative general

13. See Laura Ernde, *Panel Gives Nod to Limited License Idea*, CAL. B.J. (July 2013), <http://www.calbarjournal.com/July2013/TopHeadlines/TH5.aspx>. The issue will next be addressed as part of the mission of a state bar special committee to “[s]tudy [c]reative [s]olutions to [a]chieve [t]rue [c]ivil [j]ustice in California.” Memorandum from Luis Rodriguez, President, State Bar of Cal., to the Bd. Comm. on Operations and the Bd. of Trs. (Nov. 13, 2013), *available at* <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000011532.pdf>.

14. See MASS. ACCESS TO JUSTICE COMM'N, STATEMENT OF STRATEGIES, OBJECTIVES AND GOALS FOR 2013, at 15 (2013), *available at* <http://www.massaccessjustice.org> (follow “comprehensive statement” hyperlink under “Strategies, Objectives and Goals for 2013”) (“Lay Advocacy Study Group will review increasing access to justice roles of non-lawyers, including licensure in several states.”).

15. TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 3 (2014) (emphasis added), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf. The report was presented to the ABA House of Delegates on February 10, 2014. See *Legal Education Task Force Presents Final Report to the House*, A.B.A. (Feb. 11, 2014), http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/legal_education_task.html.

support for discussion of the concept (although this did not constitute formal support by the ABA).¹⁶

The new interest in reform follows earlier writing in the legal academy, including assertions that the traditional blanket prohibitions on unauthorized practice of law are unsustainable,¹⁷ and a conference at Fordham University School of Law in the fall of 2013 in which a public panel was devoted to expert presentations on the potential roles for non-lawyers in response to the justice gap.¹⁸

The current debate about the role of non-lawyers has been prompted by the access to justice crisis in our courts, and by the fact that the numerous current reform initiatives, each individually important, have not solved the problem.¹⁹ These initiatives include the following: campaigns for increased legal aid funding,²⁰ efforts to expand the roles of judges to encourage judge-initiated actions to ensure that all are heard in the courtroom²¹ (endorsed by the

16. See Zorza, *What a Day at the White House!*, *supra* note 1 (reporting that Ms. Bellows “respond[ed] positively in terms of her belief that there are many non-legal skills that can help clients, and that there have to be solutions to cost and access issues”).

17. See Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners*, in MIDDLE INCOME ACCESS TO JUSTICE 145 (Michael J. Trebilcock et al. eds., 2012), available at <http://www.nesl.edu/Opportunities&Challenges-EnglerArticle.pdf>; Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC’Y REV. 713, 743 (1999); Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, J. PROF. LAW., 2012, at 79, 106. For earlier bar association documents promoting the approach, albeit without result, see COMM’N ON NONLAWYER PRACTICE, AM. BAR ASS’N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (1995), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity.authcheckdam.pdf; COMM. ON PROF’L RESPONSIBILITY, *supra* note 6.

18. See *Until Civil Gideon: Expanding Access to Justice*, CITY SQUARE BY FORDHAM URB. L.J., <http://urbanlawjournal.com/until-civil-gideon> (last visited Apr. 14, 2014).

19. For a review of the interrelated approaches to solving the access to justice crisis, see generally Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156 (2011).

20. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. For relatively recent funding data, see ABA, RESOURCES FOR CIVIL LEGAL AID, 2011 DATA COLLECTION (2011), available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccessjusticechairs/lsc_slaid_atj_funding_data.authcheckdam.pdf.

21. See Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, JUDGES’ J., Fall 2011, at 16.

Conference of Chief Justices),²² approval of new roles for court staff in providing information to litigants,²³ proliferation of new court forms intended to increase access for litigants,²⁴ proliferation of new rules allowing lawyers to perform discrete task representation,²⁵ research on public attitudes on civil legal aid and access to justice,²⁶ development of triage models to maximize efficiency of courts and legal aid programs in assisting litigants,²⁷ introduction of a law student pro bono service bar admission requirement in New York,²⁸ pilot projects to test models for assuring assignment of lawyers to otherwise unrepresented litigants (also known, not necessarily correctly, as “civil *Gideon*”),²⁹ the development of law school

22. See CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM’RS, RESOLUTION 2: IN SUPPORT OF EXPANDING RULE 2.2 OF THE ABA MODEL CODE OF JUDICIAL CONDUCT TO REFERENCE CASES INVOLVING SELF-REPRESENTING LITIGANTS (2012) [hereinafter IN SUPPORT OF EXPANDING RULE 2.2], available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252012-Support-Expanding-Rule-ABA-Model-Code-Judicial-Conduct-Self-Representing-Litigants.ashx>.

23. See CTR. ON COURT ACCESS TO JUSTICE FOR ALL, NAT’L CTR. FOR STATE COURTS, ACCESS BRIEF: SELF-HELP SERVICES 1–3 (2012), available at <http://cdm16501.contentdm.oclc.org/utills/getfile/collection/accessfair/id/263/filefil/264.pdf>.

24. See generally CTR. ON COURT ACCESS TO JUSTICE FOR ALL, NAT’L CTR. FOR STATE COURTS, ACCESS BRIEF: FORMS AND DOCUMENT ASSEMBLY (2013) <http://ncsc.contentdm.oclc.org/utills/getfile/collection/accessfair/id/264/filename/265.pdf>.

25. See *Court Rules*, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last visited Apr. 14, 2014) (providing the status of court rules governing discrete task representation).

26. See PUB. WELFARE FOUND., A NEW “COMMUNICATIONS HUB” FOR CIVIL LEGAL AID (2013), available at http://www.publicwelfare.org/Libraries/PDF_Docs/CLA_Communications_Hub_Description.sflb.ashx. For a response to the Executive Summary of the research that has launched the Hub, see Richard Zorza, *Very Important Communications Research Released*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Nov. 21, 2013), <http://accesstojustice.net/2013/11/21/very-important-communications-research-released>.

27. See, e.g., TOM CLARKE ET AL., TRIAGE PROTOCOLS FOR LITIGANT PORTALS: A COORDINATED STRATEGY BETWEEN COURTS AND SERVICE PROVIDERS (2013), available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/2045> (proposing model protocols for the litigant, courts, and legal aid.); see also Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859 (2013).

28. See *Archive for the ‘Law Student Pro Bono’ Category*, NAT’L CENTER FOR ACCESS TO JUST., <http://ncforaj.org/category/law-student-pro-bono/> (last visited Apr. 14, 2014).

29. For recent news on the rapidly developing field of law student pro bono work, see NAT’L COALITION FOR CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org> (last visited Apr. 14, 2014).

“incubator” programs to aid new law graduates as they build small firm practices,³⁰ and court simplification initiatives.³¹

While progress is being made on each of these fronts, solving the fundamental problem will require more.³² In particular, few ideas have been suggested that respond to the legal needs of middle-income individuals. But even if the focus of the inquiry is on the poor, more is still needed. It is an inescapable fact that the legal services made available by the private bar are beyond the financial reach of the poor, working poor, and middle class,³³ and that the level of need far outstrips the resources available, notwithstanding the vital efforts to fund civil legal aid for the poor, to expand pro bono services offered by the private bar and law schools, and to accomplish other systemic reforms.³⁴

Only recently has the interest in expanding authority to offer legal assistance emerged in a significant way. For decades, the trend in the United States went in the opposite direction by reserving the right to provide legal services exclusively to traditional legal professionals—i.e., lawyers.³⁵ This structure of regulatory prohibition—that lawyers may practice law, and everyone else may not, except in some instances when supervised by a lawyer—has been increasingly challenged.³⁶

But, beyond the overwhelming need³⁷ and the limited reach of current initiatives, other factors are also driving the conversation, including the opportunities created by new technologies for delivering information and services in new ways,³⁸ the expansion of accepted

30. See Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 848–49 n.10 (2013).

31. See generally *id.*

32. See Hadfield, *supra* note 3, at 3 (showing how, at least in New York, pro bono may only be filling ten percent of the legal need, and arguing that it is not realistic to claim that it can fill the gap).

33. CTR. ON COURT ACCESS TO JUSTICE FOR ALL, ACCESS BRIEF: ACCESS TO JUSTICE COMMISSIONS (2013), available at <http://nscs.contentdm.oclc.org/utis/getfile/collection/accessfair/id/271>.

34. See Hadfield, *supra* note 3, at 1.

35. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2582–85, 2583 n.6 (1999).

36. See *id.* at 2599 (concluding that unauthorized practice laws should be eased or undone to allow greater access to legal services); see also Hadfield, *supra* note 3, at 4 (asking rhetorically about the field of law, “[W]here are our nurse practitioners?”).

37. See LEGAL SERVS. CORP., *supra* note 20, at 1–2.

38. See generally Cristina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437 (2004).

roles for non-lawyers in performing at least some of the services once considered the exclusive province of lawyers,³⁹ and the rapid diversification of new classes of non-physician professionals in the medical community.⁴⁰

A recent Supreme Court decision is also accelerating the conversation. While declining in *Turner v. Rogers* to recognize a federal categorical right to counsel for people facing civil contempt charges and the prospect of imprisonment, the Supreme Court recognized that trial court judges may need to rely on social workers or other non-lawyer professionals to preserve due process and access to justice.⁴¹ *Turner* arose in the context of a child support civil contempt case, but its message of expanded reliance on non-lawyers extends to many categories of civil proceedings.⁴²

This Article suggests ways in which communities across the country can begin to develop responsible initiatives to authorize new roles for legal professionals to provide services to people who are otherwise unable to obtain assistance with civil legal problems. In Part I, we describe the status quo of non-lawyer practice—both on the ground and in the regulatory structure—and consider separately the roles of non-lawyers in nonprofit and for-profit settings and operating under attorney supervision and without attorney supervision. In Part II, we consider the challenges and opportunities for regulatory reform. In Part III, we suggest ways to develop new roles for non-lawyer legal professionals by relying on recently developed models that authorize court clerks to provide informational services to self-represented litigants. In Part IV, we analyze approaches to education and training that may be critical to assuring competence and quality. In Part V, we describe the broader market implications of expanding roles for non-lawyers.⁴³

39. See Rigertas, *supra* note 17, at 79.

40. See *id.*

41. “[T]his Court’s cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient.” *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011).

42. See *id.* at 2513.

43. This Article does not undertake to reconsider the constitutional validity or vulnerability of unauthorized practice laws, but recognizes that such a separate project would be worthwhile not only because the Supreme Court has now recognized in *Turner v. Rogers* that non-lawyers perform a potentially essential role in preserving due process and access to court in certain civil trial court proceedings, but also because these laws—however well intentioned when originally adopted—may in the modern era be prohibiting more speech than government interest can justify.

I. THE STATUS QUO AND OPTIONS FOR EXPANSION

We begin by considering the existing landscape in both legal and practical terms. In short, we detect significant disparities between the formal law prohibiting non-lawyer practice, the way it is perceived, and the reality on the ground. These differences may discourage the replication of existing *sub rosa* innovations and inhibit public discussion of the possible new roles for non-lawyer professionals.

In 2012, just over 250,000 paralegals and legal assistants worked in the United States, earning a median income of \$46,990 a year, or \$22.59 an hour.⁴⁴ This was approximately one-third of the number of attorneys, 728,200, whose median income was \$113,530 per year.⁴⁵ The number of paralegals and legal assistants was expected to grow by seventeen percent by the year 2022,⁴⁶ while the number of attorneys was expected to grow by ten percent by the year 2022.⁴⁷

In fact, the current landscape is complex, with non-lawyers occupying diverse roles in existing delivery systems. For ease of understanding, this Article describes roles of non-lawyers in nonprofit settings before turning to roles of non-lawyers in for-profit settings. Traditionally, non-lawyers work under the supervision of attorneys, but non-lawyers in the modern era increasingly adopt a variety of roles without attorney supervision.⁴⁸ Non-lawyers also perform a broad range of tasks, described below.

44. *Occupational Outlook Handbook: Paralegals and Legal Assistants—Summary*, BUREAU LAB. STAT. (Jan. 8, 2014), <http://www.bls.gov/ooh/Legal/Paralegals-and-legal-assistants.htm>. It is not clear if any of these paralegals are independent or unsupervised, but seventy-two percent are described as working in “legal services,” which seems to mean they are supervised by lawyers. See *Occupational Outlook Handbook: Paralegals and Legal Assistants—Work Environment*, BUREAU LAB. STAT. (Jan. 8, 2014), <http://www.bls.gov/ooh/Legal/Paralegals-and-legal-assistants.htm#tab-3>. According to a 2002 interview with Lou Hangley, Managing Director of the National Federation of Paralegal Associations, five percent of the organization’s members are independent. Joi Pierce Cregler, *The Role of Independent Paralegals in Improving the Quality and Delivery of Legal Services 2* (2002) (unpublished manuscript), available at <http://www.law.harvard.edu/academics/clinical/bellow-sacks/Templates/Cregler%20-%20indep%20para.pdf>.

45. *Occupational Outlook Handbook: Lawyers—Pay*, BUREAU LAB. STAT. (Jan. 8, 2014), <http://www.bls.gov/ooh/Legal/Lawyers.htm#tab-5>.

46. *Occupational Outlook Handbook: Paralegals and Legal Assistants—Summary*, *supra* note 44.

47. *Occupational Outlook Handbook: Lawyers—Pay*, *supra* note 45.

48. See, e.g., Rigertas, *supra* note 17, at 95.

A. Non-Lawyers in Nonprofit Settings

In nonprofit settings, the justice gap creates incentives that push managers and staff—both lawyers and non-lawyers—to innovate to the extent possible to meet need, while staying within regulatory constraints. In this environment, the clarification, removal, or reconceptualization of constraints could potentially expand service delivery by non-lawyers substantially, but for one very significant constraint, which is the continuing shortage of resources. The risks to the public interest of such expansion are relatively small in the nonprofit context because the providers are mission-driven and generally concerned with assuring quality. Moreover, quality is less likely to be threatened if lawyers supervise non-lawyers (even through attenuated forms of supervision), as is typically the case within civil legal aid nonprofit provider organizations.

1. *Non-Lawyers Supervised by Lawyers (Paralegals)*

In civil legal aid organizations, paralegals take on a broad range of roles that may include diagnostic analysis of cases, application of law to facts, preparing of court forms and agency applications, making tactical and strategic choices, and representing clients at administrative hearings, including hearing preparation, witness preparation, advocacy document preparation, presentation of evidence, and argument.⁴⁹ In 2012, approximately fifty percent of the staff members of LSC-funded programs were non-lawyers,⁵⁰ and most of them were presumably doing work that was supervised at least nominally by an attorney.

In the administrative law setting, civil legal aid programs routinely allow paralegals to provide representation to parties pursuant to statutes and regulations that authorize this practice in the context of claims for benefits.⁵¹ In some agency proceedings the government is not represented by counsel, while in others, the government has counsel or an opposing party has counsel. The extent to which civil legal aid programs allow paralegals to undertake roles in negotiating

49. See, e.g., NAT'L FED'N OF PARALEGAL ASS'NS, PARALEGAL RESPONSIBILITIES (2011), available at http://www.paralegals.org/associations/2270/files/Paralegal_Responsibilities.pdf.

50. See LEGAL SERVS. CORP., 2012 FACT BOOK 37 (2012), available at http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012_Fact%20Book_FINALforWEB.pdf.

51. See *Representation by Paralegals Law & Legal Definition*, US LEGAL, <http://definitions.uslegal.com/r/representation-by-paralegals> (last visited Apr. 14, 2014).

with an opponent or with opposing counsel, outside of the administrative law setting, is unclear. For example, a civil legal aid program might employ three to five paralegals, typically college graduates without further education or degrees, who are formally supervised by a single attorney to represent dozens of people in filing claims for Supplemental Security Income (SSI) benefits and carrying out advocacy in administrative hearings on such claims.⁵²

As a practical matter, supervision models in the nonprofit sector vary, but in many settings supervision is attenuated. The law is relatively undeveloped on the nature and level of supervision required and delegation of authority that may be allowed, and it does not typically specify any particular obligation of a supervisor beyond remaining fundamentally accountable for the content of the pleadings.⁵³ Supervision relies on training, the exercise of discretion by non-lawyers to bring difficult issues to the supervising attorney, and the supervisor's final review of actions taken and pleadings filed.⁵⁴

Generally, supervised paralegals do not provide assistance in the courtroom, but some new models that place non-lawyers in the courtroom are being tested. For example, in Western Massachusetts Housing Court in Springfield, college students are trained and approved by the legal aid program to assist, under attorney supervision, self-represented tenants facing eviction.⁵⁵ This assistance includes, in addition to helping prepare papers and participation in mediation, supporting the litigant in the courtroom and facilitating the presentation of the litigant's case.⁵⁶ This facilitation may involve

52. This example is offered based on the authors' experience in working with and within legal services programs.

53. *See, e.g.*, STANDING COMM. ON PARALEGALS, ABA, ABA MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGALS (2004), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/paralegals/downloads/modelguidelines.authcheckdam.pdf>.

54. This is unsurprising since the regulatory framework is established by lawyers.

55. This experiment is briefly referenced in Allan G. Rodgers & Ernest Winsor, *Non-lawyer Representation in Court and Agency Hearings of Litigants Who Cannot Obtain Lawyers*, 93 MASS. L. REV. 257, 259–60 (2010). The article also proposes a process to expand such lay advocacy. *See id.* at 260.

56. A letter from the legal aid program that runs the Massachusetts Justice Project to the then First Justice of the Western Massachusetts Housing Court describes the scope of assistance:

In some cases, we believe these volunteer advocates will be capable of helping tenants complete answer forms and negotiate resolutions of their eviction cases with their landlords. Our volunteers are also being prepared for the possibility of assisting a tenant in the courtroom should such assistance be requested by the sitting judge in order to help him or her understand what are the disputed issues in a case. Our volunteers are not being trained to try cases or make legal arguments before the court; nor

summarizing the direction and key points of the case.⁵⁷ As a practical matter, the judge then often takes over, questions the tenant, and makes sure that needed testimony is obtained.⁵⁸ This approach works best when the judge is engaged rather than aloof.

The New York City Housing Court has now launched the pilot project announced by Chief Judge Lippman in which non-lawyer “navigators,” provided by the nonprofit Housing Court Answers, assist unrepresented parties in housing court under the general authorization of the court itself.⁵⁹

Paralegals work under lawyer supervision in many nonprofit environments, in addition to legal services organizations. Paralegals and social workers (sometimes called caseworkers if they do not have particular training or a graduate degree) perform roles in senior centers, hospitals, settlement houses, tenants’ rights groups, and the like.⁶⁰ Some of these caseworkers are supervised by attorneys, either operating programs within those organizations, or made available by civil legal aid programs that are off site but that visit periodically to provide supervision on site.⁶¹

There appears to be a broad practical acceptance that the social work portion of the system is working without significant problems, if largely out of sight. There are occasionally calls to increase the number of paralegals participating in these nonprofit systems, and the number of available attorney supervisors (notwithstanding the attenuated nature of the supervision). The familiar challenge of obtaining more funding has limited the response. It may be, however, that the practical acceptance of the practice is a product of its essential invisibility, and the fact that it essentially never extends into trial courtrooms.

should they be. If called upon to assist in the courtroom, we view their role as “facilitators” for getting factual information to the judge. As stated at the outset, all of this advocacy will be done under the supervision of an attorney.

Letter from Alan S. Ells, Exec. Dir., Mass. Justice Project, to William H. Abrashkin, First Justice, W. Mass. Hous. Court (Jan. 5, 2005) (on file with author).

57. *Id.*

58. *Id.*

59. See ‘Navigator’ Program Launches; Skeptics ‘Wait and See’, N.Y. L.J., Apr. 14, 2014, <http://www.newyorklawjournal.com/this-weeks-news/id=1202650236530?slreturn=20140405112509>; see also *Court Navigator Program*, NYCOURTS.GOV, http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml (last visited Apr. 14, 2014).

60. See, e.g., COMM. ON PROF’L RESPONSIBILITY, *supra* note 3, at 12, 14, 19.

61. Co-author David Udell worked in this capacity as an attorney at MFY Legal Services (NY) in its Mental Health Law Project, providing guidance to non-lawyers handling benefits claims for patients.

Moreover, there appears to be a similar acceptance of the cost-effectiveness of the seemingly pervasive reliance on non-lawyers. This consensus is hardly surprising, because paralegals and caseworkers are generally paid less than attorneys.⁶² But because attorneys in nonprofit settings are generally paid less than attorneys in for-profit settings,⁶³ some questions exist as to whether increasing the number of paralegals in nonprofit settings would reduce costs below current levels.⁶⁴ The simplest answer to this claim is to point to the already extensive involvement of non-lawyers in the present system.

There are many steps for further expanding the roles of supervised paralegals in nonprofit settings, which the following sections describe in more detail.

a. Develop Training for Lawyers on How to Train and Supervise Non-Lawyers

Few lawyers receive training on how to train and supervise non-lawyers, and law schools do not cover the subject. Developing training programs, especially on how to supervise non-lawyers in “outlier” environments such as hospitals, social services agencies, libraries, and community centers, would help to expand the usage and quality of non-lawyers’ services.

62. See *Occupational Outlook Handbook: Lawyers – Pay*, *supra* note 45 (2012 median lawyer pay was \$113,530 per year); *Occupational Outlook Handbook: Paralegals and Legal Assistants—Summary*, *supra* note 44 (2012 median paralegal pay was \$46,990 per year). However, there may be important caveats. See Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *LAW & SOC’Y REV.* 765, 783–84 (2003) (according to a study done in England and Wales, although hourly rates for lawyers were higher than those for non-lawyers, the cost per case for non-lawyers was double the cost per case for lawyers). At a minimum, this study teaches us that both cost and quality of paralegal services must be studied as part of any innovation. United States litigation costs are analyzed in Paula Hannaford-Agor & Nicole L. Waters, *Caseload Highlights: Estimating the Cost of Civil Litigation*, CT. STAT. PROJECT, Jan. 2013, at 1, available at http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx. Median civil case costs varied from \$43,000 to \$122,000. *Id.* at 7.

63. According to the National Association of Legal Career Professionals, “the median entry-level salary for a legal services attorney in the U.S. is \$42,000; at eleven to fifteen years of experience the median is \$62,550.” *New Findings on Salaries for Public Interest Attorneys*, NAT’L ASS’N FOR L. PLACEMENT (Sept. 2010), <http://www.nalp.org/sept2010pubintsal>.

64. For a comparison with the profit sector, see, for example, Jean Cotton, *Legal Technicians Aren’t the Answer: The Family Law Section’s Executive Committee Weighs In*, WASH. ST. B. NEWS, July 2008, at 30, available at http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/NWLawyer/~media/Files/News_Events/Publications/Bar%20News/2008%20Full%20Issues/200807JulyBarNews.ashx.

b. Publicize Effective Programs

Successful nonprofit non-lawyer programs are not well known or well understood. This knowledge gap could be remedied by recognizing successful programs with awards, highlighting their models of collaboration, publicizing the roles of those who develop the programs, and promoting and supporting replication of strong programs.⁶⁵

c. Permit Paralegals to Sign Pleadings and Documents

Permitting, or requiring, non-lawyers to sign pleadings in designated categories of legal matters, while still referencing the name of the supervising lawyer or still requiring the lawyer's signature (and without relieving the lawyer of responsibility for the integrity of the pleadings), would raise the profile of non-lawyers who are act as advocates. This would improve public understanding of the roles performed by non-lawyers.⁶⁶

d. Research Effective and Cost Effective Collaborations Between Attorneys and Non-Lawyers

Little comparative research has been done on “who does what best,” and even less has been done on how non-lawyers and lawyers can work effectively together.⁶⁷ Such research would look at factors that include complexity of certain categories of law, characteristics of clients, nature of activities and skills involved in carrying them out, types of agencies or forums involved, and characteristics of opponents.⁶⁸

65. See, e.g., *Events—Awards & Scholarships*, NAT'L FED'N PARALEGAL ASS'NS, <http://www.paralegals.org/default.asp?page=9> (last visited Apr. 14, 2014).

66. It would be important to research the impact of such an approach with a focus on what categories of paralegals such an innovation should apply to.

67. See Moorhead et al., *supra* note 62, at 765–66 (describing a study in which paralegals turned out to be more expensive and provide higher quality than lawyers). However, the two groups in the study were compensated by different formulae, with the non-lawyers being paid on an hourly basis and the lawyers being paid by case. See *id.* at 783–84. The outcome is therefore not surprising, but underlines that certification alone may not be the driver of either cost or quality.

68. Funding would be needed to support such research, but might be available from the National Science Foundation, which has called for research on access to justice systems. See Myron Gutmann, *Dear Colleague Letter—Stimulating Research Related to the Use and Functioning of the Civil Justice System*, NAT'L SCI. FOUND. (Mar. 15, 2013), <http://www.nsf.gov/pubs/2013/nsf13076/nsf13076.jsp>; see also Richard Zorza, *Important Letter From NSF on Interest in Access to Justice*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (March 23, 2013), <http://accesstojustice.net/2013/03/23/important-letter-from-nsf-on-interest-in-acces-to-justice>.

e. Enhance Collaboration with Paralegal Training Programs

A review of paralegal programs and the laws governing paralegal practice (which vary state by state) would help to ensure that paralegals are appropriately trained for roles in which they would have increased autonomy and responsibility.⁶⁹

f. Test New Roles for Non-Lawyers in Nonprofit Settings as a Means of Considering Roles in For-Profit Settings

In theory it should be easier to evaluate new roles for non-lawyers in nonprofit settings (than in for-profit settings) since nonprofit settings operate without the same pressures and incentives to maximize the number of clients to maximize profits. While nonprofit organizations operate under pressures of their own (some of which are analogous to those in for-profit companies), they may offer opportunities to test new roles for non-lawyers that might be more difficult to test in a for-profit environment. Thus, it may be possible in the nonprofit environment to test models for intake, triage, training, supervision, case handling, discrete task performance, and assignments to handle particular categories of legal matters or particular categories of clients. Research is needed to see what works, and experimentation in the nonprofit environment may help guide the responsible development of new roles for non-lawyers in all settings.

2. Non-Lawyers Without Attorney Supervision in Nonprofit Organizations

Some non-lawyers work in nonprofit organizations where they provide a range of legal services without attorney supervision.⁷⁰ For example, a nonprofit social services organization might have the mission of delivering social work services to homeless, mentally ill persons, employing untrained caseworkers to help its members with their public assistance claims and SSI disability benefits claims.⁷¹ As a

69. For an example of such training, see NAT'L PARALEGAL C., <http://nationalparalegal.edu/> (last visited Apr. 14, 2014).

70. See, e.g., Kritzer, *supra* note 17, at 744 (describing the “delivery of legal services by nonlawyers working for social service or similar agencies” as occurring “in fields that private practice lawyers do not now find lucrative (e.g., unemployment compensation appeals, welfare benefit appeals)”).

71. We refer in this section to nonprofit organizations that include caseworkers in a variety of roles helping people in ways that are incidental to the larger mission of the organization. We are not aware of nonprofits established to employ caseworkers exclusively in roles as non-lawyer advocates.

general matter, the absence of attorney supervision creates less risk in nonprofit settings (compared to settings in which non-lawyers operate without supervision in their own free-standing for-profit companies), since nonprofit organizations typically have a formal supervisory structure of some kind.

This area of non-lawyer practice has the potential for expansion. A nexus often exists between a family's underlying legal problem and the nonprofit institution with which they are engaged. Hospitals are already experimenting with medical legal partnerships,⁷² and legal assistance is available in many other settings, including senior centers,⁷³ community centers (including faith-based organizations), and libraries.⁷⁴ New York's new pilot program that will provide courtroom navigators, if successful, would establish a model in which lay navigators might be able to operate in a variety of employment settings to provide help to otherwise unrepresented people.⁷⁵

There has been limited public discussion of non-lawyers handling legal matters without attorney supervision. Under-the-radar status may have virtues, but the downsides include a lack of awareness that such "case workers" exist in large numbers, that they are bound by the unauthorized practice laws (which they may even transgress on occasion), and that the model might offer a viable, albeit improvable, model for increasing assistance to people in need. Significantly, most if not all non-lawyers in nonprofit settings are supervised by someone, even if not by a lawyer. The non-lawyer supervisors may be physicians, social workers, lay administrators, or others. Some non-lawyers may also have the opportunity to consult with lawyers off-site, or lawyers who visit on-site on a periodic basis.

There are many steps the legal profession could take toward expanding roles of non-lawyers who operate in nonprofit settings without attorney supervision, which the following Subparts describe in more detail.

72. See NAT'L CENTER FOR MED. LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org> (last visited Apr. 14, 2014).

73. For an example of legal outreach to senior programs, see *Innovations in Benefits Access: A Year of Success*, NAT'L COUNCIL ON AGING, <http://www.ncoa.org/enhance-economic-security/center-for-benefits/beccs/innovations-in-benefits.html> (last visited Apr. 14, 2014) (describing Georgia Legal Services Program outreach).

74. See SELF-REPRESENTED LITIG. NETWORK, PUBLIC LIBRARIES AND ACCESS TO JUSTICE (2010).

75. See Richard Zorza, *New York Chief Judge Lippman Announces Court Navigator Program in State of Judiciary*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Feb. 11, 2014), <http://accesstojustice.net/2014/02/11/new-york-chief-judge-lippman-announces-court-navigator-program-in-state-of-judiciary>.

a. Research New Models for Relying on Non-Lawyers to Supervise Non-Lawyers

Can physicians, social workers, lay administrators, and other non-lawyer professionals supervise non-lawyers in the tasks of assisting people with legal problems in nonprofit settings? Research could test how much and what kinds of knowledge non-lawyers need to effectively supervise non-lawyers. Research is also needed to determine when a non-legal professional cannot provide adequate supervision. This question could be a matter of the legal complexity of the problem, the level of conflict between the parties, or the capacity of the client. The answer could also be contingent on the supervisor's profession.

b. Consider Developing Training and/or Certification Requirements Authorizing Professionals to Supervise Non-Lawyers in Their Legal Work

The legal profession could also establish safeguards to ensure that non-lawyers provide services at an established quality level. One such safeguard could be to create training and certification requirements for physicians, social workers, lay administrators, and other non-lawyer professionals who seek to take on supervisory roles.

c. Create New Profession of Paraprofessional Supervisor, Authorized to Supervise Paraprofessionals in Multiple Fields

Another possibility could be to develop a new profession of supervisors for paraprofessionals. A paraprofessional supervisor would be licensed to supervise paraprofessionals in multiple fields, which would relieve the experts in each profession of the supervisory responsibility, and allow those experts to focus on delivering other levels of client care. This supervisor would be trained to know when referral should be made to a traditional professional and to discuss how to identify the need for referral with paraprofessionals. This approach might facilitate a more professional, team-oriented approach to multi-disciplinary problems.

d. Provide Special Training and/or Certification in Being Supervised and/or in Working Without Supervision

Providing special training and certification to paraprofessionals for how to be effectively supervised by non-lawyer professionals could act as another safeguard. In other words, these training programs would sensitize non-lawyers to issues that a trained non-lawyer

professional supervisor might not catch. Relatedly, another important safeguard could be to train non-lawyers on how to work effectively without supervision to make sure the services are of good quality.

B. Non-Lawyers in For-Profit Settings

Models that would rely on non-lawyers to provide high quality legal services have the potential, in theory, to finally reach the millions of people who are currently unable to afford legal assistance or do not qualify for free legal services. Some for-profit models exist, and a dialogue has begun about whether more and different models would be possible, responsible, and viable.⁷⁶ Of course, when non-lawyers operate in for-profit settings, the profit motive can create incentives to increase the number of clients and to cut corners, raising concerns about quality. In this section, we describe models that already exist—supervised and unsupervised—and offer suggestions for strengthening them.

1. Non-Lawyers Supervised by Lawyers (*Paralegals*)

The traditional understanding of the role of paralegals in for-profit settings is that of the paralegal working under the supervision of a lawyer in a law firm. Some law firms rely on trained paralegals to support litigators. Paralegals handle responsibilities that include discovery, analysis, document management, and related tasks.⁷⁷ They typically operate behind the scenes in roles invisible to the firms' clients and the public.⁷⁸ Firms sometimes rely on paralegals to handle statutorily authorized administrative law cases that include social security, unemployment, immigration, and other claims for benefits.⁷⁹ Finally, other firms rely on paralegals to interact with the firm's

76. See, e.g., Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)corporate Practice of Law* (Ctr. for Law & Soc. Sci. Research Papers Series No. CLASS13-4, Oct. 31, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333990; see also *Until Civil Gideon: Expanding Access to Justice*, *supra* note 18.

77. See *Occupational Outlook Handbook: Paralegals and Legal Assistants—What Paralegals and Legal Assistants Do*, BUREAU LAB. STAT. (Jan. 8, 2014) [hereinafter *What Paralegals and Legal Assistants Do*], <http://www.bls.gov/ooh/Legal/Paralegals-and-legal-assistants.htm#tab-2>.

78. See *id.*

79. See, e.g., MASS. ANN. LAWS ch. 151A, § 39(b)(3) (LexisNexis 2008) (party in unemployment insurance claim proceeding has “the right of representation by an agent, counsel, or advocate”).

clients, helping to perform a range of tasks in simple civil legal matters, such as completing court forms needed to process uncontested divorces.⁸⁰

Among the factors limiting the expansion of roles for paraprofessionals in for-profit settings is the lack of a sufficient number of lawyers to perform a supervisory role. This is true even though, as noted elsewhere in this Article, the law generally does not fix an acceptable ratio of the number of supervisors to paralegals, but instead the lawyer is held accountable for the quality of final pleadings regardless of how many paralegals are involved or how directly they are supervised.⁸¹

As a general matter, approaches that work to expand attorney-supervised practice in nonprofit settings will apply equally to expand attorney-supervised practice in for-profit settings. But there may be a need for increased consumer protection to counter market pressures that may reduce quality (or be perceived as reducing quality). The challenge will be to develop models that assure quality. The following Subparts articulate various ways the legal profession could expand the roles of paralegals, and how to safeguard those expanded roles.

a. Record Keeping and Billing Rules

Requirements for specific record-keeping and billing for supervised paralegals would help protect against overbilling. If clients were required to know with more specificity exactly when they were paying for paralegal time, supervising lawyers might pay more attention to the division of labor.

b. “Quality Mark” for Paralegals

While most states offer paralegal training programs,⁸² and some have systems of registration or recognition,⁸³ additional forms of quality recognition might create incentives to employ higher-level paralegals. The United Kingdom “quality mark” process for legal aid

80. See *What Paralegals and Legal Assistants Do*, *supra* note 77.

81. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013) (holding lawyers responsible for the ethical obligations of their non-lawyer subordinates, which includes a duty of competence, but not otherwise providing much guidance on what level of supervision is required); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11 (2000) (same); see also *infra* Part I.B.1.f.

82. See *supra* Part I.

83. See, e.g., *LEX Honor Society Overview*, AM. ASS'N FOR PARALEGAL EDUC., http://www.aafpe.org/LEX_Honor_Society/index.asp (last visited Apr. 14, 2014).

providers, in which they are certified in areas such as skills and management, could provide a model for the United States.⁸⁴

c. Levels of Certification for Supervised Paralegals

The legal profession could use different levels of certification to recognize greater training and skill acquired by different classes of paralegals.⁸⁵ Creating incentives to acquire higher skill levels would also promote quality, neutralizing some of the pressures that accompany the profit motive. Certification might be more important in the for-profit sector than in the nonprofit, supervised sector.⁸⁶

d. Research Cost Effectiveness, Division of Labor, and Integration Strategies.

Research to analyze the cost-effectiveness, optimal division of labor, and best methods of integrating the work of non-lawyers with lawyers is needed to increase our understanding of the benefits of using paralegals. The clearest models currently in effect exist in high-volume practice areas such as social security and immigration,⁸⁷ where it is possible for non-lawyers to develop expertise and deliver cost-effective, high-quality services. In particular, research is needed to find the best strategies for integrating the work of lawyers and paralegals; indeed, such strategies today are largely developed only intuitively. We need to explain how attorneys and paralegals can best develop a division of labor and authority that is appropriate, flexible, and fits within the institutional structure of the firm, yet respects the individual strengths and weaknesses of each role.

e. Training for Attorneys on How to Integrate and Maximize Effectiveness of Paralegals

Effective lawyers already use paralegals successfully. Most lawyers can see potential savings in relying on non-lawyers and can appreciate the appeal of relying on non-lawyers to handle tasks the attorney may not want to do, such as reviewing voluminous discovery materials. Of

84. See *Law Society Accreditation Schemes*, L. SOC'Y, <http://www.lawsociety.org.uk/for-the-public/accredited-specialists> (last visited Apr. 14, 2014); *Specialist Quality Mark*, SPECIALIST QUALITY MARK DELIVERY PARTNERSHIP, <http://www.sqm.uk.com/specialist-quality-mark.html> (last visited Apr. 14, 2014).

85. For a summary of these certifications, see *Paralegal Credentialing—Overview*, NAT'L FED'N PARALEGAL ASS'NS, <http://www.paralegals.org/default.asp?page=62> (last visited Apr. 14, 2014).

86. See *supra* Part I.A.1.f.

87. See COMM. ON PROF'L RESPONSIBILITY, *supra* note 3, at 17–19.

course, in some categories of cases and in some markets, lawyers may have a different view. The lawyers might, for example, see discovery review (or other forms of service carried out by attorneys) as essential to their firms' bottom line. They may not want to hand off the work or see competitors hand it off at a lower cost.⁸⁸

f. Reconsidering the Definition of Adequate Supervision

The current regulatory framework holds the lawyer accountable for any failure to adequately supervise work done by non-lawyers.⁸⁹ While this is a fundamental and valuable element of the attorney-client relationship, it would benefit from close re-examination. The existing framework does not define the number of non-lawyers that a lawyer can responsibly supervise, specify the tasks expected of a supervisor, or provide guidance regarding what might constitute negligence by a supervisor.⁹⁰ Nor does it establish whether certain assumptions exist about standards of care for supervisors or non-lawyers. These ambiguities might allow reliance on non-lawyers to expand in some contexts where supervision by attorneys is quite attenuated, while chilling expansion in others. Nevertheless, it also tends to reduce public dialogue about whether better options might be possible, and whether they would allow greater expansion of roles for non-lawyers.

g. Inclusion in the Bar Exam of Questions on Ethical Rules for Supervising Paralegals

For many lawyers, what they are taught and what they learn is defined by what they anticipate will appear on the bar exam. Including questions on the multi-state bar exam that address the roles

88. For a sad (and fortunately rare) example of this phenomenon, see Molly McDonough, *Outcry by Family Lawyers, Solos Nixes Self-Help Clinic*, A.B.A. J. (Aug. 12, 2008), http://www.abajournal.com/news/article/outcry_by_family_lawyers_solos_nixes_self_help_clinic. For a better outcome to what could have been an even sadder story, see Richard Zorza, *Victory in Texas*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (November 15, 2012), <http://accesstojustice.net/2012/11/15/victory-in-texas-almost/> (describing approval by the Supreme Court of Texas after intense opposition of certain limited standard forms); see also *For an Easy, Affordable, Lawyer-Free Divorce, Check 'Yes': View*, BLOOMBERG (Mar. 4, 2012), <http://mobile.bloomberg.com/news/2012-03-05/for-an-easy-affordable-lawyer-free-divorce-check-yes-view.html> (detailing and challenging the opposition).

89. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11 (2000).

90. See, e.g., sources cited *supra* note 89.

of paralegals and the skills necessary to supervise paralegals would be a good way to responsibly instill those concepts early on.⁹¹

h. Integration into Incubator Programs

Similarly, if practical instruction on the skill of working with paralegals were included in the new curricula surrounding incubator programs—the programs now being designed by law schools to support law graduates as they transition into practice⁹²—the new lawyers would acquire increased competence in working with such non-lawyers.

2. Non-Lawyers Working Without Attorney Supervision

Some non-lawyers provide some types of legal assistance without attorney supervision in for-profit settings.⁹³ For example, some companies rely on non-lawyers to assist fee-paying customers to complete government-approved forms (e.g., applications to create nonprofit corporations under state law). The number of non-lawyers in for-profit arrangements is unknown, in part because of concern about the sweep of each state's unauthorized practice laws, but it is presumably quite large.

In the United States, unauthorized practice laws prohibit non-lawyers from charging a fee for activities considered to be the exclusive province of lawyers. The exclusive province of lawyers is most commonly understood to include: appearing in court on someone's behalf, providing individuated legal advice, assistance, or representation, and authoring and signing pleadings.⁹⁴ But despite the broad scope and threat of the unauthorized practice laws, non-lawyers may still lawfully offer certain legal services for a fee and without attorney supervision. It should be noted that these forms of

91. Massachusetts has recently finalized a decision to test bar applicants on their knowledge of law concerning access to justice. See Supreme Judicial Court of Mass., Notice of Approval (Apr. 25, 2014), <http://www.mass.gov/courts/docs/sjc/rule-changes/bbe-rule-301-amendment.pdf>; see also 'Access to Justice' Added to Bar Exam, MASS. LAW. WKLY. (May 1, 2014), <http://masslawyersweekly.com/2014/05/01/access-to-justice-added-to-bar-exam> (password required).

92. See generally G.M. Filisko, *Law Firm Incubators Help Both Grads and Needy Clients*, Fred Rooney Says, A.B.A. J. (Sept. 18, 2013), http://www.abajournal.com/legalrebels/article/2013_legal_rebel_profile_fred_rooney.

93. See COMM. ON PROF'L RESPONSIBILITY, *supra* note 3, at 12.

94. See, e.g., N.Y. JUD. LAW § 478 (McKinney 2013); see also TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, ABA, STATE DEFINITIONS OF THE PRACTICE OF LAW (2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf (summarizing state-by-state law concerning the unauthorized practice of law).

practice are also conducted in the nonprofit context. Examples of non-lawyer practice include the following:

- Agency assistance and advocacy: Non-lawyers provide information, assistance, and representation before agencies that authorize practice by non-lawyers.⁹⁵ They help people prove their eligibility for unemployment benefits, social security and SSI benefits, workers compensation benefits, and more.⁹⁶ Some companies that are not law firms and do not employ lawyers have established businesses to carry out this advocacy.⁹⁷
- Forms assistance: Non-lawyers provide information and assistance to self-represented litigants in areas of practice in which non-lawyer practice is either expressly authorized by law, or simply unregulated apart from the general prohibition contained in the state unauthorized practice laws. These services may include completing court forms⁹⁸ in such areas of practice as nonprofit incorporation.⁹⁹
- Information and other assistance: Non-lawyers have expanded roles in providing information and assistance in some states. As mentioned above, the state of Washington recently approved a model in which non-lawyers will be authorized to become Limited Licensed Legal Technicians (LLLTs), enabling them to perform tasks in areas of practice to be designated.¹⁰⁰

95. See NAT'L FED'N OF PARALEGAL ASS'NS, *supra*, note 49, at 5–7.

96. See *id.* at 3, 66.

97. See, e.g., DISABILITY ADVOCATES AM., <http://disability-advocate.com> (last visited Apr. 14, 2014). For representation in social security matters, 20 C.F.R. § 404.1705 permits appointment of non-lawyers as representatives, provided they meet certain non-disqualification standards and are “not prohibited by any law from acting as a representative.” 20 C.F.R. § 404.1705(b)(4) (2013). Payment of fees is strictly regulated, and representatives are bound by a code of conduct. See *id.* § 404.1740. ICE permits representation, among others, by those with direct personal connections to the represented person, provided that there is no remuneration, and subject to the approval of the immigration judge. 8 C.F.R. § 292.1 (2013). The VA permits representation by accredited service organizations, and agents under 38 C.F.R. § 14.629, as well as by unaccredited individuals provided they do not charge a fee under 38 C.F.R. § 14.630.

98. See, e.g., CAL. BUS. & PROF. CODE § 6400(c) (West 2003) (permitting legal document assistants who are registered in the counties in which they perform these services to “complet[e] legal documents in a ministerial manner, selected by a person who is representing himself or herself in a legal matter, by typing or otherwise completing the documents at the person’s specific direction,” giving out “general published factual information that has been written or approved by an attorney,” and filing and serving documents “at the specific direction of a person who is representing himself or herself in a legal matter”).

99. See, e.g., *Nonprofit*, LEGAL ZOOM, <http://www.legalzoom.com/non-profits/non-profit-corporation-overview.html> (last visited Apr. 14, 2014).

100. See WASH. REV. CODE ANN. Admission to Practice R. 28 (West 2003).

- Contract assistance: Non-lawyers provide representation in certain categories of proceedings in contract—for example, real estate closings in states that do not require a lawyer.¹⁰¹ Real estate companies and banks often assign non-lawyer employees to handle these matters. Some non-lawyers may also handle these matters out of individual for-profit businesses.¹⁰²

Outside the United States, non-lawyers provide legal services to large numbers of people in for-profit models. One for-profit model is the “McKenzie Friend,” which is operational and expanding in the United Kingdom and other common law countries.¹⁰³ McKenzie Friends are non-lawyers operating under guidelines issued by court systems in which a fee may or may not be charged for accompanying a party to court proceedings.¹⁰⁴ Another model is the “independent paralegal” as authorized in Ontario, Canada, where these non-lawyers are permitted to charge fees to 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.¹⁰⁵ Finally, the provision of information and advice outside the courtroom is freely permitted and generally not regulated in countries such as the United Kingdom.¹⁰⁶

101. *See, e.g.*, Vermont Bar Ass’n, Advisory Ethics Opinion 1999-03 (1999), available at <http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Unauthorized%20Practice%20of%20Law/99-03.pdf> (“With client consent, a supervising attorney may permit a paralegal to conduct a loan closing on behalf of a lender client where the client consents, the paralegal’s role is ministerial in nature, and the attorney is available for questions, at least by telephone.”).

102. *See* Daniel Fisher, *Non-Lawyers Find It Hard Avoid Breaking Bar’s Vague Rules*, FORBES (July 25, 2011), <http://www.forbes.com/sites/danielfisher/2011/07/25/non-lawyers-find-it-hard-avoid-breaking-bars-vague-rules>.

103. *See* Declan Morgan, Lord Chief Justice of N. Ireland, *Practice Note 3/2012: McKenzie Friends (Civil and Family Courts)*, N. IRELAND COURTS & TRIBUNALS SERV. (Sept. 5, 2012), <http://www.courtsni.gov.uk/en-gb/judicial%20decisions/practice%20directions/documents/practice%20note%2003-12/practice%20note%2003-12.htm>; *see also* Richard Moorhead, *Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation*, 22 CIV. JUSTICE Q. 133 (2003)

104. *See* sources cited *supra* note 103. The right is relatively recent, dating only to 1970.

105. LAW SOC’Y OF UPPER CAN., REPORT TO THE ATTORNEY GENERAL OF ONTARIO: PURSUANT TO SECTION 63.1 OF THE LAW SOCIETY ACT 2 (2012), available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147488010>.

106. U.S. law stands in marked contrast to, for example, the law of England and Wales, in which the lawyer monopoly is limited to six categories: “right of audience” (which we in the United States would call court hearings), litigation, certain conveyance instruments, probate, notary, and the administration of oaths. *See* Legal Service Act, 2007, c.29 § 12 (U.K.). Other activities are limited to other groups and

Among the more novel approaches, as mentioned above, the recently approved regulatory framework authorizing the use of LLLTs in Washington permit non-lawyers to provide unsupervised legal services, but the framework defines the permitted tasks narrowly, and establishes requirements for education, certification, and bonding.¹⁰⁷ This approach and others could potentially, and responsibly, provide a model for expanding roles for non-supervised non-lawyers in for-profit contexts.

a. Promote Best Service Providers

A comprehensive evaluation of companies' services based on a Consumers Union model would be useful.¹⁰⁸ Consumers should be able to compare the performance of each company based on the quality and cost of the services it provides. Because few companies currently exist in this largely un-established market, there is an opportunity to create open informational systems that will enable the public to make such comparisons.

b. Permit Non-Lawyers to Sign Pleadings and Documents When Appropriate.

Currently, companies offering services through the models described above provide assistance to customers, who then sign their own papers.¹⁰⁹ The services attempt to provide assistance to people who then formally represent themselves.¹¹⁰ This method works to

regulated by other mechanisms, but the overall environment is much laxer. The history of the creation of the categories of activity is recounted in LEGAL SERVS. INST., *THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE* (2010), available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>.

107. See Order at 2, *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-1005 (June 14, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>; see also Ernde, *supra* note 13 and accompanying text.

108. See *Legal DIY Websites Are No Match for a Pro*, CONSUMER REP. (Sept. 2012), <http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm>. Note, however, that this Article has been criticized for failing to take note of the broad range of legal aid and court sponsored sites. See Richard Zorza, *Consumer Reports Misses the Boat on Online Legal Tools*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Aug. 6, 2012), <http://accesstojustice.net/2012/08/06/consumer-reports-misses-the-boat-on-online-legal-tools>.

109. See *Legal DIY Websites Are No Match for a Pro*, *supra* note 108.

110. See, e.g., *Divorce*, LEGAL ZOOM, <http://www.legalzoom.com/legal-divorce/divorce-overview.html> (last visited Apr. 14, 2014) (“The spouse initiating the divorce prepares a petition for a divorce. If you’re the petitioning spouse, you create, review, sign and notarize (if required) the petition.”).

distinguish the matters in which no attorney is involved from those in which an attorney represents the party.¹¹¹ The method would facilitate review by judges and other decision-makers who may have an interest in avoiding ambiguity and false assumptions about the level of assistance provided and the skill of the provider. The approach would also facilitate research concerning the effectiveness of various models on a systemic basis. Allowing non-lawyers to sign pleadings when services had been provided as described generally above would promote the legitimacy of the new profession. It would also help to increase accountability of the non-lawyers.

c. Analysis and Research into Most Effective and Cost Effective Division of Law Activities

Research is needed to determine whether the forms and other types of assistance provided for a fee by non-lawyers deliver products of genuine value. More specifically, research is needed to evaluate the efficacy of the services, taking into account substantive areas of law, nature of clients, nature of activities, types of agencies or entities dealt with, and characteristics of opponent.¹¹²

d. Enhanced Collaboration with Paralegal Training Programs

Finally, a review of paralegal programs and the laws governing paralegal practice (which vary state-to-state) would help ensure that paralegals are sufficiently trained for roles in which they would have increased autonomy and responsibility.¹¹³

II. REFLECTIONS ON REGULATING THE NEW CATEGORIES OF LEGAL PROFESSIONALS

A. The Unauthorized Practice Laws Should Be Reconsidered in Light of the Changes that have Occurred Since Their Initial Promulgation

Ask ten lawyers, bar associations, or judges what the practice of law is, and you are likely to get ten different answers. If you rephrase the question and ask what the practice of law by non-lawyers is, you will probably get one answer: they should not engage in the unauthorized practice of law. Answers to the question about the

111. *See generally id.* (comparing no-attorney approach to attorney work).

112. *See, e.g.*, sources cited *supra* note 68.

113. *See, e.g.*, NAT'L PARALEGAL C., *supra* note 69.

definition of the practice of law range from the circular,¹¹⁴ to the overly general,¹¹⁵ to the overly specific.¹¹⁶

The core goals of unauthorized practice laws are as valid as ever. Non-lawyers must not hold themselves out as lawyers or undertake activities they are unqualified to perform. But while the core goals remain valid, a changing society and legal practice may necessitate significant alterations to the structure and operation of these laws.¹¹⁷

Consider that the exclusive right of lawyers to practice law not only predates computers, but also photocopiers, ballpoint pens, and air travel. The right predates the massive increase in the number of people obtaining higher education,¹¹⁸ the round of court simplification known as the Federal rules project,¹¹⁹ and the consumer rights movement (with its presumption that courts and other institutions, public or private, will be accountable to people). It predates the justice gap itself—the phenomenon in which millions of people

114. See *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 867 (Minn. 1988) (the practice of law is “what lawyers do”).

115. See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, ABA, REPORT 4 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.authcheckdam.pdf (stating that the practice of law is the “application of legal principles and judgment to the circumstances or objectives of another person or entity.”).

116. See, e.g., *Task Force on the Model Definition of the Practice of Law: Definition of the Practice Of Law Draft (9/18/02)*, A.B.A. (Sept. 18, 2002), http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html (last visited Apr. 14, 2014) (defining the practice of law using lengthy lists of activities, including some things that non-lawyers would be permitted to do in most jurisdictions, such as completing court forms). The ABA Task Force defined the practice of law:

A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a person.

Id.

117. For a list of state unauthorized practice laws, see TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 94. Indeed, it would be an interesting exercise to review all the states’ definitions of the practice of law to establish a definition that included only the activities prohibited in all states. Perhaps this would represent a baseline consensus about the set of activities that are harmful if done by non-lawyers.

118. See *Fast Facts*, NAT’L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Apr. 14, 2014).

119. See *generally Zorza*, *supra* note 30 (discussing the proposition that the Rules initiative should be seen as an access to justice project).

compromise their rights and interests annually because they proceed without counsel in our civil courts.¹²⁰

While the core goals of the unauthorized practice laws remain valid, these societal changes matter. In the modern era, the law itself (including case law, statutory law, and regulatory law) is now broadly accessible to lay people. Moreover, lay people are well equipped to deliver legal information to self-represented litigants (including, potentially, to large numbers of them). And this legal information may be dispositive in legal matters in which, but for this kind of assistance, parties might otherwise have received no assistance at all. Finally, a huge nonprofit sector and a broader variety of licensed skilled professionals with the potential capacity to supervise non-lawyers in certain contexts have emerged.

The court decisions that shaped the early prohibitions in the unauthorized practice laws, and that continue to remain in force today, make clear that the unauthorized practice of law prohibitions must be evaluated in their real world context. Thus, in *People v. Alfani*, in which New York's highest court held that the unauthorized practice laws prohibit actions outside of the courtroom in addition to actions within,¹²¹ the court wisely observed that “[a]ll rules must have their limitations, according to circumstances and as the evils disappear or lessen.”¹²² The Court therefore proceeded to hold that despite the unauthorized practice laws, it must remain permissible for a lay person to help a neighbor to draft a simple instrument.¹²³

Likewise, as we consider the limitations of unauthorized practice laws, it is necessary to consider whether the “evils”¹²⁴ targeted by these laws may “disappear or lessen”¹²⁵ in light of the context in which these laws operate in our modern times.

B. Reconsideration of the Unauthorized Practice Laws Follows Successful Modernization of Analogous Features of the Legal System

When analyzing how the unauthorized practice laws might be constructively interpreted or modified, it is important to remember that fifteen years ago, change seemed very unlikely with respect to many analogous areas of the legal profession that have now been

120. See COMM. ON PROF'L RESPONSIBILITY, *supra* note 3, at 1–2.

121. See 125 N.E. 671, 674 (N.Y. 1919).

122. *Id.*

123. *Id.* at 674.

124. *Id.* at 673.

125. *Id.* at 674.

modernized. At that time, judges did not ask questions of self-represented litigants, court staff were considered prohibited from responding to self-represented litigants' requests for help, and attorneys did not deliver limited-scope services to clients.¹²⁶

Now it is almost received wisdom, endorsed by the Conference of Chief Justices, that judicial engagement is appropriate when needed.¹²⁷ Similarly, most states have issued standards for trained staff on how to provide appropriate information to litigants,¹²⁸ and the ABA and almost all of the states have endorsed the delivery of unbundled legal services.¹²⁹

Interestingly, in almost all of these examples, prior law (or at least practice) was modified without being explicitly overruled. A thoughtful reconsideration of the actual wording of the governing law, and a renewed commitment to its underlying purposes, sometimes accompanied by clarifying language, allowed a more sound set of practices to gain approval and spread with immense implications for increasing access to justice.¹³⁰ Those looking to the future might note that a similar reanalysis has only recently begun with respect to the use of interpreters,¹³¹ non-judicial neutrals,¹³² and other elements of judicial and attorney practices.

A similar return to first principles may be equally important in evaluating the appropriate reach of the unauthorized practice laws, taking into account that the governing language may mean more (or

126. See CTR. ON COURT ACCESS TO JUSTICE FOR ALL, *supra* note 23, at 1–2.

127. See IN SUPPORT OF EXPANDING RULE 2.2, *supra* note 22. See generally Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J., Winter 2003, at 16; Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

128. See generally JOHN M. GREACEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE "STATE OF THE ART" (2011), available at <http://www.msbf.org/selfhelp/GreacenReportNationalEdition.pdf>.

129. See *id.* at 29–30.

130. See, e.g., *id.* at 31.

131. See ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS 26 (5th ed. 2013), available at <http://www.courts.ca.gov/documents/CIP-Ethics-Manual.pdf> (prohibiting interpreters from giving advice, but is arguably more ambiguous when it comes to information); see also CAL. R. CT. R. 2.890(e) (2014) ("An interpreter must not give legal advice to parties and witnesses, nor recommend specific attorneys or law firms.").

132. See Richard Zorza, *Mediation and the Self-Represented—Towards a New Paradigm*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (April 25, 2012), <http://accesstojustice.net/2012/04/25/mediation-and-the-self-represented-towards-a-new-paradigm>.

less) in the modern context than was intended decades ago. The important considerations include the following:

- The purpose of regulation is to benefit the public. Prohibitions are warranted only insofar as they protect consumers and increase access to justice. The public is now deeply skeptical of professions that self-regulate in the interests of the profession itself.¹³³
- Regulation need not be an “either/or” matter, but should take into account the breadth of circumstances. It may now be appropriate to allow “intermediate” categories of legal practice by non-lawyers that would not otherwise be handled by admitted attorneys, and that were inconceivable when the structure of regulation was put in place.
- Some activities that might traditionally have been considered the “practice of law” might not warrant continued prohibition under the unauthorized practice laws. For example, because many people now have access to higher education, non-lawyers may be better positioned to provide informational services than would they would have been in the early twentieth century.
- Advances in technology may provide new opportunities for non-lawyers to assist people with legal matters. For example, new software may help to structure the assistance provided by non-lawyers to help people complete court forms.¹³⁴
- Niche practice areas that are currently not being adequately handled by private attorneys may offer opportunities for practice by non-lawyers, especially for specific tasks that are relatively repetitive, or that depend on technical knowledge.
- Regulation of non-lawyers in nonprofit settings may be possible with less restrictive approaches than would be needed in for-profit settings. The concerns and incentives are different.
- Regulation of non-lawyers in supervised settings may require less restrictive approaches than would be needed in unsupervised settings. The concerns and incentives are different.

133. See, e.g., Katy Bachman, *Ad Biz Tries to Convince Senate Dems Self Regulation Works*, ADWEEK (June 28, 2012), <http://www.adweek.com/news/technology/ad-biz-tries-convince-senate-dems-self-regulation-works-141511>.

134. See, e.g., *Legal DIY Websites Are No Match for a Pro*, *supra* note 108.

C. Reconsideration of the Unauthorized Practice Laws Must Also Take into Account the Complexity of Responses Within the Courts and Bar

Although millions of people proceed annually in our courts without access to legal representation, the focus has only recently shifted to whether non-lawyers should be authorized to perform expanded roles in the courtroom. The slow pace of reform has been a product of cross-cutting interests and forces.¹³⁵ Notably, the ABA process to define the practice of law ultimately dissolved into a recommendation that led to individual states forming their own definitions.¹³⁶

Some players in some states have actively sought to block proposed reforms. For example, the State Bar of Texas' Unauthorized Practice of Law Committee prosecuted a company that was publishing kits to help self-represented parties (and was ultimately blocked from doing so by the state legislature).¹³⁷ More recently, the State Bar of Texas attempted (again unsuccessfully) to block the state Supreme Court from issuing standardized forms.¹³⁸ In Washington, the Board of Governors of the Bar similarly was unsuccessful in resisting authorization of the limited licensed legal technicians model even though the state's Access to Justice Commission supported the model.¹³⁹ While these examples are exceptions to the rule of substantial bar support for increased access, they nonetheless reveal some of the political complexities.

Similarly, some courts that are generally sympathetic to innovation have not always been rigorous with respect to the implications and consequences of opinions on non-lawyer practice. The Ninth Circuit

135. See Zorza, *supra* note 30, at 851–57.

136. See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 115, at 3–4. It is significant that the Task Force Report included discussion of the relationship between access to justice concerns and the need for state-by-state balancing. See *id.* at 8–11. The report drew attention to the extent of non-lawyer practice that is already authorized. See *id.* at 9–11; see also *Task Force on the Model Definition of the Practice of Law: Comments on Draft Definition*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/draft_definition_comment.html (last visited Apr. 14, 2014).

137. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999); see also Underwood, *supra* note 38, at 454–55 (pointing out inapplicability of traditional regulatory approach in the technology environment).

138. See Zorza, *supra* note 88 (describing opposition and ultimate approval).

139. See Holland, *supra* note 8, at 90.

has found certain activities of non-lawyers impermissible, and included needlessly broad language that is likely to chill innovation.¹⁴⁰

Some speculate that legal practice may evolve slowly because courts' rulemaking processes governing the practice of law are removed from the popular pressures on legislative processes that shape the other professions.¹⁴¹ This might explain why the medical field has physical therapists, nurse practitioners, emergency medical technicians, health care navigators, and patient advocates, while the legal field has only paralegals.¹⁴²

But in recent years, the dynamics surrounding reform of the legal system to expand non-lawyer practice have become more fluid, precipitated in large part by the crisis in the courts, but also a product of many other factors. The courts themselves are now leading the call for reform, and the organized bar acknowledges the need as well.¹⁴³ The calls for reform cite, among other factors, the large number of people who receive no legal assistance in the courts,¹⁴⁴ the development of models authorizing practice by non-lawyers in other countries,¹⁴⁵ the apparent ability of specialists to outperform generalists,¹⁴⁶ and the stratification of professional roles occurring in the other professions.¹⁴⁷

D. In the Modern Era, Some Traditionally Prohibited Practices Are Likely to Be Permitted, for Good Reason

As we have already explained, times have changed. While there were conveyancing forms and form books intended for use by lawyers

140. See *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007) (finding, based on representations and actions, that bankruptcy software site engaged in prohibited practice of bankruptcy law). The result in *Reynoso* seems correct, but the reasoning is very broad: "The software did, indeed, go far beyond providing clerical services. It determined where (particularly, in which schedule) to place information provided by the debtor, selected exemptions for the debtor and supplied relevant legal citations." *Id.*

141. See Rigertas, *supra* note 17, at 81.

142. *Id.* at 100.

143. See *supra* Introduction; see also Zorza, *supra* note 19, at 156.

144. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets* 104 (Univ. of S. Cal. Law & Econ. Working Paper Series, Working Paper No. 76, 2008), available at <http://law.bepress.com/usclwps-lewps/art76>. As a general matter, discussion of the impact of the liberalization of the rules governing legal entity ownership and structure upon the profession as a whole is beyond the scope of this Article, although obviously of great importance.

145. See *id.* at 144–45.

146. See Kritzer, *supra* note 17, at 725.

147. See Rigertas, *supra* note 17, at 83–84.

over one hundred years ago,¹⁴⁸ there was no national access to justice movement inspiring state courts to publish easy-to-use form pleadings in multiple categories of cases,¹⁴⁹ no online interactive document assembly,¹⁵⁰ no web access available to laypersons to read court decisions and statutes, no training for judges and clerks in how to be access friendly,¹⁵¹ far lower legal fees,¹⁵² no robust nonprofit sector available to help supervise the work of non-lawyers, no diversified set of for-profit professionals potentially capable of supervising the work of non-lawyers, and no broad pro bono movement as it exists today. The volume of cases was also miniscule,¹⁵³ whereas today we see millions of people in civil court proceedings who will never talk to a lawyer or receive legal advice. They will go forward with their civil

148. *See, e.g.*, Book Review, 42 AM. L. REGISTER & REV. 252, 253 (1894) (reviewing LEONARD A. JONES, FORMS IN CONVEYANCING AND GENERAL LEGAL FORMS (1894)), available at <http://www.jstor.org/stable/3305478> (noting that a book of legal forms is an “invaluable aid” to a “young and inexperienced member” of the legal profession). It is, however, interesting to note with respect to the leading New York cases that in *Alfani* no reference was made to any form being used for generating the bill of sale the preparation of which was found to be the unauthorized practice of law. *See* *People v. Alfani*, 125 N.E. 671 (N.Y. 1919).

149. *See, e.g.*, SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES 41–42 (2d ed. 2008), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/best_practices_7_08.authcheckdam.pdf.

150. *See id.* at 44–47; *see also* GREACEN, *supra* note 128, at 19–22.

151. *See, e.g.*, *Judicial Education Curriculum*, SELFHELPSUPPORT.ORG, http://www.selfhelpsupport.org/library/folder.165143-Harvard_Judicial_Leadership_Conference_Nov_13_2007 (password required) (containing materials and resources distributed at the November 2007 Harvard Judicial Leadership Conference); *see also* SELF-REPRESENTED LITIG. NETWORK, JUDICIAL EDUCATION CURRICULUM PROJECT REPORT AND EVALUATION 7 (2008), (estimating that 5000 judges would be educated due to the development of the curriculum); *2008 Court Solutions Conference*, SELFHELPSUPPORT.ORG, http://www.selfhelpsupport.org/library/folder.208521-2008_Court_Solutions_Conference (password required) (containing materials distributed at the 2008 Court Solutions Conference for law clerks and court staff).

152. *See, e.g.*, Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 953–54 (2000) (discussing forces that have resulted in high legal fees and tendency for the legal profession to serve primarily commercial clients).

153. *See, e.g.*, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., ABA, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf (“Over the course of the past 20 years, domestic relations courts in many jurisdictions have shifted from those where litigants were predominately represented by lawyers to those where pro se’s are most common. In these areas of the courts, pro se is no longer a matter of growth, but rather a status at a saturated level.”).

legal matters entirely on their own. In this context, it is difficult to sustain the argument against considering whether non-lawyers should be permitted to provide certain forms of legal assistance that at least some jurisdictions have not traditionally allowed, such as the following:

1. Helping to Complete Forms not Requiring Legal Judgment.

Completing court forms was a task traditionally reserved for lawyers.¹⁵⁴ But now, because there is a broad range of forms designed by the courts for the public to complete, this prohibition makes little sense. In the real world, there is a large gray area in which people go a step beyond the traditional understanding of scrivenering. They assist others in filling out forms by helping them understand what is being sought and showing them how to be grammatical, brief, appropriate, complete, and whatever else is needed to comply with the form. These tasks generally do not require particular legal skills (indeed, forms if well designed would avoid drawing on the exercise of legal judgment by the writer), but instead require only the basic visual and mental processing abilities and knowledge acquired through conventional education. In light of this practical reality, it is difficult to justify the application of traditional scrivener limitations in a technical and wooden way.

Indeed, as a practical matter it seems likely that the level of help provided in many courts and nonprofit organizations (and in some settings by licensed document preparers) goes beyond scrivenering, and exceeds the level authorized in the technical wording of existing laws. While little, if any, scientific research has been done on the impact of the assistance provided, logic compels the conclusion that it is more helpful than not, so long as the helper knows the role and the rules. This does not mean that the practice of helping people in violation of local rules should be endorsed without qualification. Rather, it seems inevitable that the practice is occurring, and thus guidance is needed to promote accuracy and quality.

154. Even today, notwithstanding the fact that Maryland is an access to justice leader, the Maryland Code includes in the definition of the practice of law: “preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court.” MD. BUS. OCC. & PROF. CODE ANN. § 10-101 (h)(2)(iii) (1989). Interestingly, even this restrictive rule is limited to forms in some way linked to court cases.

2. *Providing Legal Information (i.e., Clearly Settled Legal Facts)*

Similarly, the provision of certain kinds of legal information—in particular, clearly settled legal facts—is no longer considered the practice of law in all jurisdictions. Thousands of court staff do this every day,¹⁵⁵ and it is generally now considered outside the practice of law when performed by court staff.¹⁵⁶ While there is debate about the scope of this principle,¹⁵⁷ it is clear that decades ago, if you wanted to know what the law is, you would go to a lawyer. Now, you might go to a website, a court, a library, a law library, or perhaps a nonprofit expert in the substantive area. Typically, the more general the information is (in other words, the less individuated to a particular client), the more likely it will be treated as a permissible service for non-lawyers to offer under state unauthorized practice laws.

3. *Performing Tasks Already Routinely Performed by Non-Lawyers.*

When the law of unauthorized practice was being formalized, there was an effort to exclude tasks already routinely performed by non-lawyers.¹⁵⁸ There are two ways to interpret the legal implications of this effort. One is that the analysis of what is prohibited today must be found in what was only done by lawyers one hundred years ago. Another is to believe the law must keep up with practical reality, and that, at least unless explicitly forbidden by the legislature, new tasks being routinely performed by non-lawyers should be outside the formal prohibitions. An example would be the task of providing assistance to persons to use technology to complete court forms.

4. *Non-Lawyers Can Now Perform Tasks Performed Primarily by Lawyers in the Past Because of Safeguards*

Because of technology, the simplification of laws, and increased access via the Internet to laws and policies, non-lawyers can perform

155. For a partial list of self-help centers, see *Self-Representation State Links*, NAT'L CENTER FOR ST. COURTS, <http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/State-Links.aspx> (last visited Apr. 14, 2014).

156. See John M. Greacen, *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 JUDICATURE 198, 198 (2001).

157. See Richard Zorza, *Unauthorized Practice of Law Issues and the “Not Malpractice” Test*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (July 31, 2011), <http://accesstojustice.net/2011/07/31/unauthorized-practice-of-law-issues-and-the-not-malpractice-test>.

158. See, e.g., *People v. Alfani*, 125 N.E. 671, 674 (N.Y. 1919). In part, this may have resulted from a desire not to upset the apple cart of current practice.

some tasks capably today that could not have been performed by non-lawyers in the past. For example, a non-lawyer may easily download a statute, regulation, or the opinion of a court and explain its content in plain English to someone less sophisticated with the Internet or less able to comprehend the meaning of the law.

5. *Authorizing “Friend or Neighbor” to Appear in Court*

Again, as presaged at least in New York case law, those with special relationships might be authorized not just to help with document preparation, but also with assistance in appearing in court.¹⁵⁹ This might even include a range of non-fee services, or services for which a fee is charged, when provided by members of community nonprofit organizations.

6. *Performing “Simple Instrument” Work that Is not the Primary Focus of an Entity*

Similarly, New York law has long recognized that “drawing a simple instrument as instructed by his customer” is permitted if incidental to an organization’s mission.¹⁶⁰ The law would appear to allow a non-lawyer to perform such work, possibly for a fee, regardless of the organization’s nonprofit status. This exception may have been intended to be practical, and if so, the spirit of the exception would seem likely to call for a broader reading in current circumstances, in light of the increased complexity of the law itself and the need that many people will have for legal help with a broad range of transactions. Moreover, the scope of this authorizing exception might be understood to be far broader in the modern era since, as a practical matter, modern technology simplifies the presentation and construction of documents (through software and/or instructions) that in earlier times would have seemed far more complicated.

7. *Counseling and Other Activities*

Finally, some of the basic communicative interactions between people today are much less formal than in the early twentieth century. The understanding of “counseling” would appear to have evolved over time into something that is not exclusively a role for lawyers. For example, it might be accepted today that certain tasks—such as

159. *See id.*

160. *People v. Title Guar. & Trust Co.*, 125 N.E. 666, 669 (N.Y. 1919).

coaching, explaining what is relevant or not, outlining what a judge might look for, or describing how to comport oneself in a courtroom—would be activities that many people would be willing and able to offer nuanced opinions on. Of course, not everyone’s opinion is equally wise, and some categories of communication should be reserved exclusively to lawyers, but changes in our culture create a strong basis for authorizing non-lawyers to engage in various types of communication, including some degree of counseling, that earlier would have been considered well out of bounds for non-lawyers.¹⁶¹

E. Technology Offers More Options for Best Practices

A different approach is to rely on technology—not just the Internet, but also forms, charts, and other informational presentations—to expand “informational” or “assistance” services non-lawyers are authorized to provide. The core idea is that these technologies allow for far greater quality control of the assistance provided by non-lawyers. When non-lawyers use these tools, and when lawyers have developed them, the non-lawyer is, in effect, sharing much of the knowledge and skill of the lawyers who prepared the materials.

Of course, this has long been the case with legal self-help books that are targeted at the general public, and case law recognizes the appropriateness of this approach.¹⁶² Thus, when a non-lawyer assists a client, there is a lower risk of error and the quality is higher when there is a documented trail of what information and assistance has been given. For example, online forms might contain detailed assistance and instructions through links. They might also contain logic trees or flow charts, which can tailor advice to a specific user who must then answer certain questions to complete the given form. This format saves time and provides a more sophisticated application of legal expertise. Courts sometimes use the fact that the logic is built in to the online program to justify the argument that the computer, or rather the author of the software, is practicing law.¹⁶³ That argument

161. See, e.g., COMM. ON PROF’L RESPONSIBILITY, *supra* note 3, at 10–11 (listing tasks that would be helpful in a debt collection or an eviction proceeding if performed by a non-lawyer).

162. See, e.g., N.Y. Cnty. Lawyers’ Ass’n v. Dacey, 287 N.Y.S.2d 422, 423 (App. Div. 1967); see also State v. Winder, 348 N.Y.S.2d 270 (App. Div. 1973) (holding the publication of “divorce yourself kits” not to be an unauthorized practice of law, but finding that lay author had committed unauthorized practice by giving personal legal advice to purchasers of his kits).

163. See Janson v. LegalZoom.com, 802 F. Supp. 2d 1053, 1065 (W.D. Mo. 2011); see also Richard Zorza, *Order in LegalZoom Case*, RICHARD ZORZA’S ACCESS TO

should be rejected because the author of the program is merely offering general information to be used by many people, contingent on their own particular actions based on their own perceptions of their facts and their goals.

What is not yet generally recognized is that these forms of branching logic,¹⁶⁴ which can also be produced in visual flow chart form, can be used to do far more than structure the gathering of data. They could, for example, be used to work through a question-and-answer process to determine legal rights and what steps and procedures are available, required, and appropriate to protect those rights. They could be used to assist a person in preparing to present his case in court. This would include gathering the facts needed to present the case, organizing those facts, and using techniques needed to successfully complete the presentation. This would also include providing guidance on how to conduct and present oneself in court.

Non-lawyers could similarly use branching logic in court to provide support to litigants by using the questions and flow chart to provide assistance. Non-lawyers can also use these tools to instruct the litigant in how to communicate with the court, parties, and counsel. More generally, the tools could be used to provide information specific to the individual's legal and factual situation and even suggest a course of action. The course of action suggested, though, would have to be based on expert-provided logic.

Such an approach would surely be more acceptable to those concerned with quality if it were limited to what is provided by forms, branching logic, and flow charts approved by the court and developed with appropriate professional input, including possibly the bar association. Nor would the approach operate without additional limits. Sometimes a lawyer's expertise—for example, in discovering necessary facts—can be essential, and steps can be taken to set certain triggers in place to flag matters that should be removed from more automatic processes and referred to individuals with greater expertise. But reliance on technology can increase the number and type of services that non-lawyers can responsibly provide.

JUST. BLOG (August 10, 2011), <http://accesstojustice.net/2011/08/10/order-in-legalzoom-case>.

164. Software that uses branching logic asks the user questions (such as, "Do you have a child?"), and then asks follow-up questions based on the user's specific answers (for example, gathering the name and age of the child).

III. A STEP TOWARD ESTABLISHING A SAFE HARBOR FROM THE UNAUTHORIZED PRACTICE LAWS

One potentially viable approach to identifying the tasks that non-lawyers should be authorized to perform would be to build on existing law that in most jurisdictions allows court staff to provide self-represented litigants with informational services.¹⁶⁵

Traditionally, court officials were afforded little leeway to communicate with parties about the requirements of the law in civil proceedings.¹⁶⁶ Judges and clerks operated under a broad mandate to preserve their neutrality and not provide information or advice beyond the performance of their fundamental judicial and ministerial functions.¹⁶⁷ These traditional rules prohibiting communication between court officials and parties were sensible. Judges and clerks need to maintain both their actual neutrality and their appearance of neutrality for the adversarial system to function fairly and to retain the confidence of those whose rights are adjudicated. Clerks must not only remain neutral, but must also, inasmuch as they are non-lawyers, make sure they do not provide inaccurate information.

While these concerns remain valid, the justice gap has forced a change in the traditional approach. Across the country, communities have modified the rules prohibiting communication between court officials and parties.¹⁶⁸ Slowly but definitively, communities have authorized judges to become engaged and proactive in their interactions with parties, while observing rules that preserve their neutrality and their appearance of neutrality.¹⁶⁹ Likewise, communities have authorized clerks to communicate certain kinds of information to parties.

Along the way, no community has abandoned the important need to preserve neutrality and assure competence, but communities now manage these expectations by deploying new strategies and techniques. For judges, the approaches include codes of judicial conduct and judicial training protocols that teach how to interact with self-represented parties.¹⁷⁰ For court clerks, the approaches include structured supervision, reliance on scripts, informational handbooks,

165. See SELF-REPRESENTED LITIG. NETWORK, ETHICAL GUIDELINES FOR CLERKS AND COURT STAFF: LEGAL INFORMATION VS. LEGAL ADVICE (Ricahrd Zorza ed., 2008); Greacen, *supra* note 156, at 198–99.

166. See, e.g., Zorza, *supra* note 127, at 427, 435.

167. See *id.*

168. See Greacen, *supra* note 156, at 199–200.

169. See *id.*

170. See GREACEN, *supra* note 128, at 35–41.

and court forms (accompanied by instructions), and the use of new software that provides direction on how to help self-represented litigants complete court forms online.¹⁷¹

As a consequence of these new approaches, most communities now authorize court clerks to deliver informational services to self-represented litigants.¹⁷² This can be interpreted¹⁷³ to include services such as:¹⁷⁴

- Explaining the requirements of procedural law and describing next procedural steps;
- Explaining the requirements of substantive law, covering what the law requires for the individual to prevail, and explaining what the other side must do to prevail;
- Giving court forms to litigants and in many jurisdictions telling the litigant about the particular form to file or answer a complaint, make or respond to a motion, commence or oppose discovery, seek appointment of a lawyer, or take other action to move a matter forward;
- Explaining the judge's expectations for decorum in the courtroom and anticipating the kinds of questions the judge may ask;

171. *See id.* at 45–47.

172. *See id.*

173. An important point about neutrality is the risk of circular analysis. Often a particular act by a neutral staffer may be perceived as non-neutral, not because it necessarily puts the helper on the side of the person being helped, but because in the past such acts have not been performed. The novelty of the approach (i.e. the provision of information by court officers) can, itself, create the perception of non-neutrality on the part of the court. The good thing about this is that clear rules that expressly permit designated activities can make them neutral, even if not so perceived in the past. In addition, as experience is gained, many additional activities may become perceived as neutral, particularly as ways are found to perform them in a manner that is neutral.

174. *See, e.g.,* CAL. ADMIN. OFFICE OF THE COURTS, GUIDELINES FOR THE OPERATION OF SELF-HELP CENTERS IN CALIFORNIA TRIAL COURTS 7 (2011), available at http://www.courts.ca.gov/documents/self_help_center_guidelines.pdf. The California Administrative Office of the Courts provides:

The information provided should not only be impartial but also maintain the appearance of court neutrality. Services are standardized in that self-help center staff should give the same answer to a question regardless of who asks the question. For example, they can tell a litigant that a declaration needs to be completed, and may provide guidance on what kinds of facts a court would need in order to decide the issues. The staff may ask appropriate questions to assist in clarifying the facts, and otherwise promote a focus on facts relevant to the court. But the declaration is in the litigant's own words. Staff would give the same information to the other side of the case should that individual come to the center for assistance.

Id. at 7.

- Explaining the kinds of evidentiary materials that will be required;
- Explaining the governing procedures for introducing evidence in the court proceeding; and
- Reading and explaining the requirements of court issued judgments and orders.

These same tasks are often performed by staff in non-court community organizations, such as libraries.¹⁷⁵

In light of these developments, we would suggest that the roles initially established for court clerks should be evaluated for possible adoption as roles for non-lawyer advocates in nonprofit and for-profit settings. But, before reaching this conclusion, it is important to consider whether the non-lawyer advocates are sufficiently similar to court clerks as to merit the same treatment under the same general regulatory schemes that govern clerks.

In fact, there are many similarities between court clerks and non-lawyer advocates. The primary similarities are the following: (1) both classes of individuals are non-lawyers; (2) both require training on how to provide essential information to self-represented parties; and (3) in both settings, the information needed by the parties is essentially equivalent. Thus, on initial review, the analogy holds.¹⁷⁶

Nevertheless, there are also several differences between the two. First, court clerks live and breathe the requirements of civil procedure. It is fair to ask whether the information court clerks absorb through their full time jobs can also be readily and efficiently acquired by non-lawyers to enable them to effectively communicate that information to self-represented parties. This distinction suggests that training will be especially important for equipping non-court, non-lawyer advocates to do the job asked of them.

Second, court clerks do not take responsibility for the outcome of a party's claim. Because they remain neutral, they typically maintain greater distance from the litigation. Thus, self-represented parties may expect to acquire more and different information from a non-

175. See SELF-REPRESENTED LITIG. NETWORK, *supra* note 74 (explaining the public library's role); see also JUDY MEADOWS, PUBLIC LIBRARIES AND ACCESS TO JUSTICE: WHAT PUBLIC LIBRARIANS CAN DO (Richard Zorza ed., 2010).

176. It should be noted that advocacy organizations may operate with similar but differing goals and perspectives. Some, such as tenant or domestic violence groups, want their non-lawyers to be as effective as possible in providing help without violating rules that prohibit the unauthorized practice of law, while others want their lawyers to be as effective as possible in providing help without violating rules that prohibit them from handling certain categories of matters (for example, the statutes and regulations limiting the activities of the Legal Services Corporation).

lawyer advocate than they would expect to acquire from courthouse clerks. This distinction suggests that part of the necessary communication with the potential client must focus on clarifying expectations and underlining the limitations governing the delivery of informational services by non-court, non-lawyer advocates.

But overall, the model built for delivery of information services by court clerks can serve as a platform for developing roles for non-lawyers outside the courthouse. Non-court non-lawyers must be accurate, just as court clerks must be accurate. The structures and tools used to assure the accuracy of information services delivered by court clerks in court settings can serve as a model for assuring the quality and accuracy of services provided by non-lawyers who are not affiliated with the court.¹⁷⁷

Indeed, because non-court non-lawyers are not bound by the same concerns about neutrality that govern the delivery of informational services in courthouse settings, non-court non-lawyers are free to go further in providing certain forms of assistance that might not necessarily be deemed informational under current practices, but which do not require formal legal training. Within appropriate structures, it may make sense to authorize them to help in the following ways:

- Optimizing responses to forms;
- Explaining the consequences of choosing one path or another;
- Gathering evidence;
- Preparing evidence and the presentation;
- Explaining to a court, when asked, the parties' position;
- Preparing for, and participating in, negotiations.

An expansion of tasks for legal assistance workers who are not limited to neutrality may require training, some form of licensure, and

177. The duties of zealotry, lack of conflict, and confidentiality should be noted as playing out differently for court staff, nonprofits, and advocates. These traditional obligations of advocacy representatives should not be imposed on court staff and court volunteers who operate in court-based programs. These factors are the antithesis of neutrality because they signify an attorney-client relationship by indicating that the representative is helping one side and not the others. However, with respect to non-lawyers helping outside of the court and advocacy relationships that are less formal in their nature, some form of all three obligations might be appropriate and practically useful as a means of promoting quality, enforcement, and disruption of the legal profession. While these important values can be addressed in the long term and can be tested in pilots, it might be more practically feasible in the short term to establish a framework that assumes equivalent treatment of court based staff and externally based non-lawyers, except insofar as externally based non-lawyers are authorized to provide formal advocacy or representation services.

some form of monitoring, of the kind discussed above and below. It might even be that the authorization would expand step by step based on the education and certification of the individual, but the key concept would be that authorization would match individual capacity and the nature of the problem and tasks at hand.

One distinction that may be helpful in drawing the appropriate lines is whether the provider takes formal responsibility for the case, or merely acts as an assistant to the party or to the court. Finally, it may be that individuals who are specifically supervised by lawyers should be allowed to perform all of these tasks, regardless of their level of training and certification.

Given the concerns about unregulated for-fee information providers, a somewhat different approach might be to modify the safe harbor to limit authorization to the following broad list of situations in which no fee is charged and:

- the service is provided by a government institution;
- the information provider is supervised by a licensed professional, such as a doctor or social worker;
- the service is provided by a person employed or supervised by a nonprofit organization; and,
- the provider is registered and has a bachelor's degree.

Such an approach would minimize the risk that any for-fee provider might take advantage of a poor, uneducated victim, while still establishing a foundation on which to develop a robust for-fee environment and an expanded free service sector.

IV. DESIGNING TRAINING REQUIREMENTS AND A REGULATORY STRUCTURE TO ASSURE QUALITY

It will be possible to move forward with approaches such as these only if the public and state bars are persuaded of non-lawyers' competence (at least to a degree no less than that of attorneys) and that quality is not at risk.

Because quality is a product of the complexity of the activities to be performed by the non-lawyer, some categories of non-lawyer advocacy will require more training than others. Complexity varies based on whether such activities occur in the courtroom or outside of the courtroom, in nonprofit settings or in for-profit settings, with the supervision of an attorney or without such supervision, and in a relatively simple area of law or in a more nuanced area of law.

Quality can be promoted through reliance on codes of conduct. Paralegals typically operate under codes of conduct (although these

have generally been developed for models in which the paralegal is supervised by an attorney).¹⁷⁸ New codes will need to be developed to guide the activities of non-lawyers, covering the same general topics as attorney codes, but crafted to draw lines around prohibited activities. The new codes must not allow non-lawyers to perform functions that in fact require unique training and skills possessed by lawyers.

Quality can be promoted through training that is calibrated to the activities that will be performed by non-lawyers. Training may range from none at all to nearly the equivalent of a degree in law, and everything in between.¹⁷⁹ It may be narrow and deep, or broad and shallow. It may extend for one, two, or three years.¹⁸⁰ In theory, training should be less expensive and time consuming than a three-year legal education, since an important goal is to make services from non-lawyers available at cost-levels beneath those charged by lawyers.

Quality can be promoted through training that draws on existing curricula developed for paralegals and court clerks. To design the curriculum, it would be valuable to analyze courses offered by paralegal programs and social work programs. Also, it would be worthwhile to examine how nonprofit organizations¹⁸¹ and courts train staff who are already engaged in providing assistance to self-represented litigants.¹⁸²

Quality can be promoted through training programs established in a variety of institutions. These include law schools, social work schools, colleges, community colleges, and specialty paralegal programs.¹⁸³ Many of these institutions already offer certificate courses that could form the core of more comprehensive programs that would qualify new categories of legal professionals to offer a range of legal services.¹⁸⁴ Whether law schools will undertake to offer

178. See, e.g., *NALA Code of Ethics and Professional Responsibility*, NAT'L ASS'N LEGAL ASSISTANTS, <http://www.nala.org/code.aspx> (last visited Apr. 14, 2014).

179. See, e.g., *Paralegal Educational Programs*, NAT'L ASS'N LEGAL ASSISTANTS, <http://www.nala.org/paralegaleducation.aspx> (last visited Apr. 14, 2014).

180. See *id.*

181. See COMM. ON PROF'L RESPONSIBILITY, *supra* note 3, at 12–13.

182. See *Prospective Court Navigators*, NYCOURTS.GOV, http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml (last visited Apr. 14, 2014).

183. See TASK FORCE ON THE FUTURE OF LEGAL EDUC., *supra* note 15, at 3, 13–14 (recommending that law schools consider providing such courses and noting that paralegal schools might be appropriate sources for such training).

184. See, e.g., *Advanced Certificate in Forensic Social Work*, LONG ISLAND U., <http://www.liu.edu/CWPost/Academics/Schools/SHPN/Dept/SW/Graduate-Programs/Advanced-Certificate-in-Forensic-Social-Work> (last visited Apr. 14, 2014);

the new degree programs, or whether the social work schools, colleges, or other entities will seek to address the need, still remain open questions.

A certificate program could help promote quality. The practice of issuing certificates is used to confirm that graduates have completed courses and obtained skills necessary to qualify for state licenses in a variety of fields.¹⁸⁵ Certificates also help to establish a prestige incentive that may draw individuals into a field. Programs that award certificates in legal advocacy to non-lawyers are already abundant on the web.¹⁸⁶

Additionally, a license requirement could add another level of protection that can help to assure quality. Authority to issue licenses is commonly reserved by states, but municipal, county, or state governments may also possess that authority.¹⁸⁷ Once established by law, a license requirement may prompt the development of cottage industries that focus on qualifying people to secure the license. For example, drivers' license requirements have prompted the creation of drivers' schools, which provide drivers' education and training for a fee.¹⁸⁸

A primary virtue of the license requirement is that it tests the quality of the applicant's skills, thereby assuring some level of fundamental competence in the field. License requirements for new classes of legal professionals would have impacts similar to those in the medical community, where licenses are available to authorize practice by nurses, physical therapists, and chiropractors.¹⁸⁹ Applicants would be required to demonstrate that they possess the

Legal Nurse Consultant Certificate, HUNTER C., <http://www.hunter.cuny.edu/ce/certificates/legal-certificates/LNC> (last visited Apr. 14, 2014); *Master of Arts in Mental Disability Law Studies and Certificate in Advanced Mental Disability Law Studies*, New York Law School: Application for Admission, N.Y.L. SCH., http://www.nyls.edu/documents/academics/graduate-programs/mdl_masters_application_2010_v1r1_form.pdf (last visited Apr. 14, 2014); *Paralegal Certificate Program*, PACE U. CONTINUING & PROF. EDUC., <http://www.pace.edu/continuing-professional-education/paralegal-certificate-program> (last visited Apr. 14, 2014).

185. See PHILLIP A. BARNHART, *THE GUIDE TO NATIONAL PROFESSIONAL CERTIFICATION PROGRAMS 1-2* (2d. ed., 1997).

186. See, e.g., *Paralegal Certificate Program*, *supra* note 184.

187. See BARNHART, *supra* note 185, at 1.

188. See *Drivers Training*, DMV, <http://www.dmv.org/drivers-training.php> (last visited Apr. 14, 2014).

189. See, e.g., *New York State Licensed Professions*, N.Y. STATE EDUC. DEPARTMENT, <http://www.op.nysed.gov/prof> (last visited Apr. 14, 2014) (listing licensed professions in New York).

skill to perform competently the tasks necessary to deliver services as newly licensed legal professionals.

Quality can be promoted through adoption of rules that provide for fines, suspension of the right to practice, and legal causes of action when practitioners engage in misfeasance and malfeasance. Suspension and termination are likely to be powerful tools for ensuring quality. Finally, insurance requirements may offer yet another level of protection for consumers by ameliorating consequences when errors occur.¹⁹⁰

V. MARKETPLACE IMPLICATIONS

There is no crystal ball that can predict what effect the authority of non-lawyers to practice law would have on the market.¹⁹¹ While expanded reliance on non-lawyers may take many forms, it is conceivable that for-profit models of non-lawyer practice might not prove economically viable if fees must be kept so low that practitioners are unable to sustain their practices, or if fees rise so high that they are unaffordable to the potential clients.

A. Viability Challenges

Some critics of authorizing independent non-lawyer practice argue that it might not be economically viable.¹⁹² They claim it will not be sufficiently cheaper to educate, certify, and regulate non-lawyers.¹⁹³ Nor will it necessarily be more efficient, given the potential cost savings in the legal profession due to attorneys' increased use of technology.¹⁹⁴ As a theoretical matter, these arguments have at least some merit, although they may ultimately depend on the claim that non-lawyer education would be as expensive as the education of lawyers. It is true that there will need to be an educational system for non-lawyers, and it is also true that lawyers can reduce costs by

190. While all of the preceding factors are worthy of consideration as means of promoting quality, one factor militates in the opposite direction. A regulatory scheme that is too elaborate may establish barriers that inhibit entry into the field. Moreover, it may create regulatory costs that make the overall approach infeasible for the state. Regulatory requirements must be narrowly tailored to achieve the dual goal of promoting quality and facilitating viability.

191. See Order at 8–9, *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005 (June 14, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

192. See, e.g., Cotton, *supra* note 64, at 31–32.

193. See *id.* at 31.

194. See *id.*

making better use of technology. The following Subparts evaluate some of the ways to reduce costs for non-lawyer certification, and legal services generally.

1. Educational Costs

Given that a three year legal education costs around \$250,000¹⁹⁵ (albeit frequently discounted by a variety of mechanisms),¹⁹⁶ it is hard to believe that a quality education sufficient to equip non-lawyers to perform a set of core tasks in a core subject area could not be provided in far less time and, particularly with use of technology, with less cost than the law school model.¹⁹⁷ While loan forgiveness programs can reduce costs for those who enter low-income practice, similar programs could reduce the costs of non-traditional practice education.¹⁹⁸ Costs of non-lawyer education could be further reduced by apprenticeship models, in which the trainees would be adding value as they learned.¹⁹⁹

195. See *Non-Discounted, Debt-Financed Cost of Attending Law School*, L. SCH. TRANSPARENCY, <http://www.lawschooltransparency.com/reform/projects/Non-Discounted-Cost> (last visited Apr. 14, 2014).

196. See TASK FORCE ON THE FUTURE OF LEGAL EDUC., *supra* note 15, at 1.

197. Indeed, it is estimated that the educational cost of certification for the Washington program can be as low as \$12,750 (\$9000 for the appropriate Associates Degree and \$3500 for the practice-area education), which is obviously a fraction of what college and law school combined would cost on the path for a traditional legal degree. Email from Paula Littlewood, Exec. Dir., Wash. State Bar, to Richard Zorza (Mar. 25, 2014) (on file with author). In addition, the applicant for an LLLT license must have completed 3000 hours of practice under an admitted lawyer, and during that time can be paid for the work. *Id.*

198. Loan forgiveness programs offered by law schools tend to be available primarily at elite schools. See Jason Delisle & Alex Holt, *How Elite Law Schools Are Offering Free Rides on the Taxpayers' Dime*, CHRON. HIGHER EDUC. (Aug. 13, 2013), <http://chronicle.com/article/How-Elite-Law-Schools-Are/141103>. Federal government loan reduction formulae for certain loans would apply broadly, not just to law schools. See *Public Service Loan Forgiveness Program*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service> (last visited Apr. 14, 2014). The Public Service Loan Forgiveness Program provides:

Qualifying employment is any employment with a federal, state, or local government agency, entity, or organization or a not-for-profit organization that has been designated as tax-exempt by the Internal Revenue Service (IRS) under Section 501(c)(3) of the Internal Revenue Code (IRC). The type or nature of employment with the organization does not matter for PSLF purposes. Additionally, the type of services that these public service organizations provide does not matter for PSLF purposes.

Id.

199. Given the repetitive nature of much of the proposed non-lawyer job description, the apprenticeship model is perhaps more realistic. Non-lawyer education could also give extensive credit for prior work, allow for some or all of

2. *Culture of the Profession*

Many lawyers price and deliver services according to very traditional models, charging a high hourly fee and declining to offer discrete task representation.²⁰⁰ In part, the established culture of craft pride in which lawyers perform all tasks from scratch may be among the factors that heighten costs. It seems likely that non-lawyers, unaccustomed to the tradition of full representation and hourly billing, would be more likely to experiment with discrete fees for the performance of discrete tasks.

3. *Technology*

Similarly, while most solo attorneys have no choice but to use technology, the rate of uptake relative to the potential for technology usage is still relatively low.²⁰¹ Given the routine nature of some of the tasks in which non-lawyers would engage, and given the fact that this would be a new profession, comprehensive integration of technology would be easier than it is for lawyers. Tools for diagnosis, information provision, form completion, hearing preparation, and more would likely reduce costs, help ensure predictability, and provide for higher quality. There might also be the possibility for crowd sourcing and expanded use of social media to help provide professional support.

4. *Structure of Professional Organization and Ownership*

Since the structure of non-lawyer practitioners' organizations is very much up for grabs, there may be opportunities to create less restrictive forms of organization that provide non-lawyers with

training to be completed through apprenticeships to lawyers or paralegals, and develop new institutions with less faculty, research support, and library costs.

200. See Darin Klemchuk, *Can the Traditional Pyramid Law Firm Structure Meet Today's Price and Service Pressures*, KLEMCHUK KUBASTA LLP (Feb. 21, 2014), <http://www.kk-llp.com/548-Can-the-Traditional-Pyramid-Law-Firm-Structure-Meet-Todays-Price-and-Service-Pressures>.

201. See, e.g., Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training A New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199, 202 (2013) (noting that "the legal profession has historically been hesitant toward new technologies" and discussing implications of new technology in light of ethical rules and privacy laws). Recent studies indicate that use of new technology, such as cloud based computers, is on the rise, but overall rates are still relatively low and the highest among solo practitioners. See *Lawyers Say They Like Storing Data Online*, A.B.A. J. (May 1, 2013), http://www.abajournal.com/magazine/article/lawyers_say_they_like_storing_data_online (summarizing data from the 2013 ABA Legal Technology Survey Report).

needed capital, organizational skill, and other kinds of technical support.

5. *Regulatory Environment*

Similarly, a regulatory environment could be built from scratch to minimize economic burden. In particular, a consumer protection system of regulation could potentially focus on post-error enforcement, rather than on accreditation, examination, and other systems that tend to create barriers to entry and raise costs.

6. *Existing Models*

Finally, existing models suggest that there are opportunities for non-lawyers to establish niche practices in which they would charge sustainable fees that allow them to offer affordable services. Vibrant markets for the profession have developed in countries such as Canada and the United Kingdom.²⁰² In the United States, document preparation firms have established profitable businesses, and some companies that help people complete forms have established very substantial businesses despite the shadow of the unauthorized practice laws.²⁰³

Ultimately, the test of whether for-profit markets exist will play out on the ground as communities begin to expand into new categories of practice, as Washington State has done,²⁰⁴ as New York seems to be laying the groundwork for in its pilot projects,²⁰⁵ and as California appears to be considering as well.²⁰⁶

B. Organizational Options for Building Sustainable Non-Lawyer Roles

The regulatory structure in the United States strictly limits the forms of organization within which lawyers are permitted to

202. See LAW SOC'Y OF UPPER CAN., *supra* note 105, at 26; Moorhead et al., *supra* note 62, at 775.

203. See, e.g., *Legal Documents & Legal Forms*, ROCKET LAW., [http://www.rocketlawyer.com/legal-documents-forms.r?utm_source=103&utm_medium=cpc&utm_account=RL-Docs-Search-Text-GDN&utm_campaign=Beta-General-Search&utm_adgroup=\(none\)legal-forms\(general\)&utm_term=%252Bforms%2520%252Blegal&pkw=%252Bforms%2520%252Blegal&mkwid=sdSU4m5Om_dc&perid=41792621585&pmt=b&plc=&gclid=CPngw6yjn0CFUVp7Aod3m0Aqw](http://www.rocketlawyer.com/legal-documents-forms.r?utm_source=103&utm_medium=cpc&utm_account=RL-Docs-Search-Text-GDN&utm_campaign=Beta-General-Search&utm_adgroup=(none)legal-forms(general)&utm_term=%252Bforms%2520%252Blegal&pkw=%252Bforms%2520%252Blegal&mkwid=sdSU4m5Om_dc&perid=41792621585&pmt=b&plc=&gclid=CPngw6yjn0CFUVp7Aod3m0Aqw) (last visited Apr. 14, 2014).

204. See *supra* note 8 and accompanying text.

205. See *supra* Introduction.

206. See CAL. ADMIN. OFFICE OF THE COURTS, *supra* note 174.

practice.²⁰⁷ Proposals to modify these rules to allow non-lawyer ownership of, and investment in, law firms have been rejected in the United States.²⁰⁸ Proponents of reform maintain that the current framework leaves law firms undercapitalized, unable to make full use of technology and branding, and therefore more expensive and less flexible in the way they deliver services.²⁰⁹

It might be that a new authorization of practice by non-lawyers would facilitate experimentation with new forms of organization that would address these problems (perhaps showing the way to new opportunities for the traditional profession as well). Such models would need to be carefully designed to protect against control by groups that might provide low quality, take a high percentage of the fees, or have such market power that they would not be held liable for their failures. Some of the organizational options that might help to promote sustainable roles for non-lawyers are discussed below.

1. *Cooperative Model*

One approach might be for non-lawyer professionals to organize through a cooperative model, in which each non-lawyer professional would be independent, but would share marketing, resources, training programs, and technology. Such cooperatives could be based in community organizations and might therefore be particularly appealing to middle income individuals.

2. *Affiliations with Other Institutions*

Non-lawyer professionals could also create affiliations with other organizations such as hospitals, banks, realtors, community centers, and faith-based groups. The relationship might allow the non-lawyer to be professionally independent, but to reap the benefits of collaboration, access to clients, physical space, and the like. Community groups focusing on specific issues such as tenant's rights

207. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013) (restricting lawyers' ability to share fees or enter partnerships with non-lawyers); see also Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 5-6 (2012) (discussing bans on corporations from owning or investing in law firms).

208. Compare COMM'N ON ETHICS 20/20, ABA, INTRODUCTION AND OVERVIEW (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf, with Memorandum from Comm'n on Ethics 20/20 Working Grp. on Alt. Bus. Structures, ABA, Re Issues Paper Concerning Alternative Business Structures (Apr. 5, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

209. See generally Hadfield, *supra* note 76.

or domestic violence might be particularly appropriate as hosts for such groups. Moreover, such groups might provide a form of supervision that would both improve quality and reassure clients and the traditional legal profession.

3. *Court Based Models*

Another model might be for non-lawyers, even in for-a-fee arrangements, to be court based. It would need to be made clear that the non-lawyers do not speak for the courts themselves, and that the courts have no liability for the non-lawyers' actions. Such fears are often a barrier to establishing court-based referral programs.²¹⁰ A court-based arrangement might be easier for courts to accept if the group were a cooperative open to all who met certain criteria, including, potentially, parties on both sides of disputes. The New York pilots, which will place navigators in the courthouse under the general authorization of the court, will provide information useful for this approach.²¹¹

4. *Ownership by Lawyer Groups*

Another mixed model would permit (or perhaps require) non-lawyer businesses to be owned by lawyer partnerships, without a requirement of formal or individual supervision by the lawyers. This could offer practical and financial advantages to the participants at all levels. Such a proposal would be much more likely to be acceptable to the traditional legal profession, while delivering less expensive services.

5. *Participation in Incubators*

The law school incubator movement is spreading, propelled in part by the realization that support from law schools can help law graduates transition into sustainable jobs running their own small firms. These incubators provide space, mentoring, technology, and access to clients. Paralegals could be permanently associated with such incubators, serving as mentors and teachers in their substantive fields.²¹² Connections to law school incubator programs would

210. *See, e.g.*, CAL. ADMIN. OFFICE OF THE COURTS, *supra* note 174, at 22.

211. *See supra* Introduction.

212. At the Harvard Law School Wilmer Hale Legal Services Center, law students are routinely supervised by paralegals "in ratios averaging no more than five students per full-time staff attorney or paralegal." *History*, LEGAL SERVICES CENTER HARVARD L. SCH., <http://www.legalservicescenter.org/about-the-legal-services-center/history> (last visited Apr. 14, 2014).

provide legitimacy as well as resources. These programs could also provide the educational and certification component for non-lawyer professionals.

C. Relationship to Changes in the Current Lawyer Market

While it is difficult to predict the impact of expanded non-lawyer roles on the existing provision of services by lawyers, some possibilities warrant consideration, described in the following Subparts.

1. *Division of Labor, Specialization and Marketing*

A robust non-lawyer practitioner segment would enable attorneys to practice at the top of their license. This would mean that the attorneys could rely more on the skills that really do require three years of law school, rather than those that are more ministerial and repetitive. While that *might* mean less earning power for lawyers, it might also present a marketing opportunity for lawyers, since many people might initially seek non-lawyer professionals for triage, and as a result of the triage process, be referred to lawyers. This referral process already happens at many self-help centers.²¹³ It is conceivable that people living in low and middle-income communities would find this to be a better gateway to lawyers than the options that are currently available.

2. *Pricing Impact*

When lawyers do work that non-lawyers can also do, the price that lawyers can charge for that limited expertise is likely to go down, at least in some settings. This is bad news for lawyers that can only do this kind of work, good news for the consumer so long as quality is assured, and probably good news for those lawyers who do a wider variety of work. A more varied market would in theory make it easier for lawyers to justify higher fees for the work that they do, as contrasted with the work that only non-lawyers do. In such a mixed market, however, unreasonably high fees and unreasonably rigid fee structures may become more difficult to defend.

213. Often such attorney referrals are through bar referral organizations. *See, e.g., Welcome to Legal Referral Service*, N.Y.C. B., <http://www.nycbar.org/get-legal-help/legal-referral-service> (last visited Apr. 14, 2014).

3. *Legitimacy and Regulatory Pressure*

Bar cooperation with a more mixed market would likely ease pressures to increase regulation of the profession as a whole, since it would indicate a commitment by the bar to flexibility and innovation. Questions have, for example, been raised about possible antitrust problems regarding limitations on non-lawyers.²¹⁴ It is also likely to help rebut the critique that the bar is excessively self-interested.

4. *Helping the Traditional Profession Withstand Technology Monopoly Risk*

Perhaps the largest impact on market structure may be the decrease of risk that technology aggregation will push lawyers to become merely additional providers associated with volume websites—in other words, the risk that lawyers will become, in effect, just subcontractors to referral websites.²¹⁵ As more and more of the content and tools go online, and as lawyers become more dependent on access to those tools to be effective, the risk becomes that the information aggregators will in fact control the profession, because lawyers will not be able to practice without those tools—for example, consider travel agents. Adding a lower cost but human component will make it easier for professionals to maintain their functional independence, by reducing the pressure for deregulation that comes from the perception that lawyer self-regulation is the cause of barriers to access.

D. Making Progress Toward One Hundred Percent Access to Justice

Perhaps, however, the largest impact on the profession of law is speculative. If the addition of a new profession of inexpensive non-lawyers were to make it possible for the country to give life to the guarantee of access to justice by increasing the funding of access services—including legal aid, court services, and assistance to middle income litigants—the traditional legal profession would gain greatly,

214. “By including overly broad presumptions of conduct considered to be the practice of law, the proposed Model Definition likely will reduce competition from nonlawyers. Consumers, in turn, will likely pay higher prices and face a smaller range of service options.” Press Release, Dep’t of Justice, Department of Justice and Federal Trade Commission Provide Comments on American Bar Association Proposed Model State Law Defining the Practice of Law (Dec. 23, 2002), *available at* http://www.justice.gov/atr/public/press_releases/2002/200598.htm.

215. Richard Zorza, *The Emerging Tech Challenge to the Legal Profession*, 84 JUDICATURE 302, 302 (2001).

even if some of the new resources were to go to those practicing in the new profession.

CONCLUSION

In response to pressures created by the justice gap, legal academics, leaders in the organized bar, bar committees, chief justices, and other stakeholders have begun to call for a deeper consideration of whether new categories of non-lawyer legal professionals can make a difference for the millions of people who proceed annually in civil legal matters without opportunity for any legal representation. As pilot projects and experiments develop across the county, it will become possible for rigorous evaluation and comparison to take place, hopefully within a common analytic framework. From this process of discussion, innovation, and evaluation, a set of answers that can help to light the way ahead will emerge, making a major contribution to the cause of access to justice for all.