

# Report and Recommendations of the Working Group on Regulatory Innovation



Produced by the Regulatory Innovation Working Group of the  
Commission to Reimagine the Future of New York's Courts

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***COMMISSION TO REIMAGINE THE FUTURE OF  
NEW YORK'S COURTS***

**REPORT AND RECOMMENDATIONS OF THE  
WORKING GROUP ON REGULATORY INNOVATION**

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## Summary of Recommendations

The charge given to the Working Group on Regulatory Innovation was to “explore regulatory and structural innovations to more effectively adjudicate cases and improve the accessibility, affordability and quality of services for all New Yorkers.” After study and interviews with many experts in the area of regulatory innovation, the Working Group makes the following recommendations that it believes have the potential to increase access to justice and improve the delivery of legal services in New York State:

1. The provision of certain “legal” services and advocacy by trained and certified social workers should be permitted;
2. The Court Navigators program should be expanded both in scope and substance;<sup>1</sup> and
3. Alternate Business Structures (“ABS”) for law firms should not be permitted in New York at the present time, but current experiments under way in Arizona, Utah, and California should be followed carefully and, if they are successful, the creation of an ABS model or models in New York State with the use of a “sandbox” should be reconsidered.

We explain each of these recommendations further below.

## Background

In its groundbreaking 2016 report, *Report on the Future of Legal Services in the United States*, the American Bar Association’s (“ABA”) Commission on the Future of Legal Services in

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<sup>1</sup> We also considered, but ultimately decided not to pursue for a variety of reasons, trying to resurrect and reimagine the Court Advocates proposal. Our recommendation with respect to social workers, if accepted, may serve as a potential forerunner of other possibilities for using non-lawyers to close the access-to-justice and delivery-of-legal-services gaps.

the United States found that “despite sustained efforts to expand the public’s access to legal services, significant unmet needs persist,” that “funding of legal aid providers remains insufficient and will continue to be inadequate in the future,” and that “pro bono alone cannot provide the poor with adequate legal services to address their unmet legal needs.”

There are at least two aspects of the problem that the ABA identified: inadequate legal services and inadequate access to justice. In a 2014 report, the ABA found that only sixteen percent of individuals who have a legal need even considered consulting a lawyer and in New York State, then Chief Judge Jonathan Lippman was told in 2010 that “each year, more than 2.3 million New Yorkers try to navigate the State’s complex civil justice system without a lawyer . . . 99 percent of tenants are unrepresented in eviction cases in New York City . . . 99 percent of borrowers are unrepresented in hundreds of thousands of consumer credit cases . . . 97 percent of parents are unrepresented in child support matters in New York City and 95 percent are unrepresented in the rest of the State . . . ”.<sup>2</sup>

The ABA Commission’s primary suggested solution was innovation: “Courts should consider regulatory innovations in the area of legal services delivery” and “the legal profession should partner with other disciplines and the public for insights about innovating the delivery of legal services.” Unfortunately, that is easy to state but hard to implement.

For decades, legal scholars such as Professors Deborah Rhode, William Henderson and Gillian Hadfield have argued that the legal profession has failed “to put aside self-interest and live up to its obligation to promote access to the justice system and the interests of consumers of legal

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<sup>2</sup> 2010 Report to the Chief Judge of the State of New York, *Permanent Commission on Access to Justice*, November 2010, p. 1.

services, particularly personal (as opposed to business) legal services.”<sup>3</sup> In its Resolution 115, passed on February 17, 2020, the ABA’s House of Delegates “encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services . . .”<sup>4</sup>

The situation in New York is serious. In its Annual Report for 2019, the New York State Permanent Commission on Access to Justice concluded that notwithstanding a number of significant reforms, including phased-in state funding for civil legal services of \$100 million annually and Legal Hand’s five neighborhood storefront centers that serve about 25,000 individuals annually by having trained community non-lawyer volunteers provide free legal information, assistance and referrals, “the gap between the number of people who need legal services and the resources available to meet that need (the justice gap) remains significant.”<sup>5</sup> The purpose of our Working Group was to explore ways to bridge that gap through innovation.

### Methodology

In addition to reviewing a selection from the literature available on this general subject, members of the Working Group interviewed a number of experts, who we would like to thank for their very helpful contributions to our work:

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<sup>3</sup> G. Hadfield, Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets, 60 Stan. L. Rev. 101 (2008); *see also* D. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1 (1981); W. Henderson, Legal Market Landscape Report, Commissioned by the State Bar of California, July 2018.

<sup>4</sup> There was an important caveat to that Resolution, however: “[N]othing in this Resolution should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject.”

<sup>5</sup> 2019 Report to the Chief Judge of the State of New York, *Permanent Commission on Access to Justice* November 2019, p. 2.

- Hon. Scott Bales, former Chief Justice of the Arizona Supreme Court;
- Professor Rebecca Sandefur, a sociologist who founded the American Bar Foundation’s access to justice research initiative and who is a Professor in the School of Social and Family Dynamics at Arizona State University;<sup>6</sup>
- Professor Alan Morrison, Associate Dean for Public Interest and Public Service Law, founder of the Public Citizen Litigation Group and an expert on unauthorized practice of law;<sup>7</sup>
- David Udell and Chris Albin-Lackey from the National Center for Access to Justice at Fordham Law School;<sup>8</sup>
- Professor John Sexton, former President of New York University and former Dean, New York University School of Law;<sup>9</sup>
- Zach DeMeola, Director of Legal Education and the Legal Profession, Institute for the Advancement of the American Legal System (“IAALS”) and Director of the IAALS Virtual Convening on Regulatory Innovation;
- Brittany Kaufmann, Director of the IAALS Unmet Legal Needs (“Justice Needs”) Survey;

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<sup>6</sup> See, e.g., R. Sandefur et al, Roles Beyond Lawyers: Summary, Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects, American Bar Foundation/National Center for State Courts, December 2016, reprinted in 122 Dickinson L. Rev. 825 (2018).

<sup>7</sup> See, e.g., A. Morrison, Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question, 4 Nova L.J. 363 (1980).

<sup>8</sup> See, e.g., R. Zorza & D. Udell, New Roles for Non-Lawyers to Increase Access to Justice, 41 Fordham Urban Law Journal 1259 (2016).

<sup>9</sup> See, e.g., J. Sexton, “Out of the Box” Thinking about the Training of Lawyers in the Next Millennium, Address delivered at the Churchill Auditorium, Queen Elizabeth II Conference Center, London, July 18, 2000.

- Rochelle Klempler, Counsel, NYS Judicial Institute on Professionalism in the Law and Counsel, NYS Permanent Commission on Access to Justice and an expert on unbundled legal services;
- David Byers, Administrative Director, Arizona Court System and Member of the 2019 Arizona Task Force on the Delivery of Legal Services, who is now leading the effort to implement the Arizona Alternate Business Structure and Legal Paraprofessionals program;
- Judge Constandinos “Deno” Himonas of the Utah Supreme Court, who led the efforts in Utah to create the Licensed Paralegal Professionals program;
- Andrew Arruda, Member and Co-Chair, State Bar of California Access Through Innovation of Legal Services Task Force;
- Debra McPhee, PhD, Dean, Fordham University Graduate School of Social Service;
- Nancy Wackstein MSW, Director of Community Engagement and Partnerships, Fordham University School of Social Work;
- Judge Anthony Cannataro, Administrative Judge, Civil Court of the City of New York, Justice of the New York Supreme Court and a member of this Commission;
- Jennifer Vallone, Associate Executive Director, Adults, Arts and Advocacy, University Settlement; and
- Melissa Aase, Executive Director, University Settlement.



## RECOMMENDATION ONE

### Trained and Certified Social Workers Should be Permitted to Provide Limited Legal Services and Advocacy.

The provision of certain legal services and advocacy by non-lawyers<sup>10</sup> is an idea whose time has come. For many years, law students working in clinics and elsewhere have been permitted to give legal advice and to make arguments in court under the supervision of law professors or other lawyers. In fact, there is a fairly long history of non-lawyers providing legal services in the United States.<sup>11</sup> For example:

- New York’s Housing Court Answers staffs desks within Housing Court with non-lawyers who provide information about the Court’s proceedings;
- Under the Resolution Assistance Program (“RAP”), discussed further below, law students and undergraduates assisted tenants in non-payment proceedings;

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<sup>10</sup> The use of the phrase “non-lawyer” to describe anyone who has not been admitted to a bar has come under significant criticism. Professor Alan Morrison has noted that with respect to no other profession is such a description used. A. Morrison, Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question, 4. Nova L. J. 363 (1980). For example, we do not refer to nurses as “non-doctors” or electricians as “non-plumbers.” Ralph Baxter has written that the use of the phrase “impedes the ability of our profession to make the changes we need to make” and he proposes that the better phrase would be “legal service professionals.” R. Baxter, Stop Calling Legal Service Professionals “Non-Lawyers”, Legal Executive Institute May 19, 2015. <https://www.legalexecutiveinstitute.com/stop-calling-legal-service-professionals-non-lawyers/> Out of custom we will continue to use the phrase “non-lawyers” in this Report with a full understanding of the difficulties that the phrase creates.

<sup>11</sup> As early as 1786, Benjamin J. Austin, a Massachusetts citizen who disguised himself as “Honestus,” attacked the legal profession as an “elite legal order” and recommended replacing it with a system that permitted lay advocates. Recalling that the Massachusetts Constitution recognized the right of self-representation in court, Austin went further and proposed that “every man has the privilege of being represented by his own counsel.” The “counsel” did not have to be a skilled orator, own legal treatises or possess certain educational qualifications. It was sufficient that the “counsel” would swear that he would not be “biassed [sic] to mislead the Court or Jury.” See K. Jeon, “This ‘order’ must be ANNIHILATED”: How Benjamin Austin’s Call to Abolish Lawyers Shaped Early Understandings of Access to Justice, 1786-1819, Senior Thesis, Yale History Department, August 6, 2020. Of relevance here, Ms. Jeon was a participant in the Court Navigator program in the New York State Office for Justice Initiatives program in the summer of 2018 and was supervised by our colleague, Judge Edwina G. Mendelson.

- Non-lawyers can become Guardians Ad Litem for mentally or physically impaired litigants facing eviction;
- Debtors in New York have received free legal information and limited legal assistance from law students through the Civil Legal Advice and Resource Office (“CLARO”);
- Non-lawyers have served as special advocates in Family Court for abused, neglected or at-risk children through the Court Appointed Special Advocates program (“CASA”);
- In certain tribal courts, non-lawyer lay counselors may represent clients in both civil and criminal proceedings;<sup>12</sup>
- The U.S. Social Security Administration allows non-lawyers to represent claimants seeking disability insurance benefits;
- In immigration cases, non-lawyers who are “accredited representatives” of a “recognized” nonprofit organization may participate in Immigration Court proceedings to the same extent as lawyers;
- New York State’s Unemployment Appeals Board allows non-lawyers to serve as “registered representatives” of claimants seeking unemployment benefits; and
- New York State’s Workers’ Compensation Board authorizes non-lawyers to practice before the Board, subject to a licensing requirement.<sup>13</sup>

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<sup>12</sup> See, e.g., Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, <http://www.narf.org/nill/Codes/uteuocode/utebodytt1.htm>.

<sup>13</sup> See generally, NY City Bar, Narrowing the “Justice Gap: Roles for Nonlawyer Practitioners, June 2013, pp. 12-20.

In addition, Washington State, Utah, Arizona and Minnesota have created Limited License Legal Technicians (“LLLTs”), Legal Paraprofessionals (“LPs”) and Licensed Paralegal Professionals (“LPPs”) positions that, when fully implemented, will permit trained and certified non-lawyers to offer legal services and to make appearances in certain courts.<sup>14</sup> While the details are still being worked out for three of those programs (the Washington program is in the process of closing), they will be implemented within the next two years. These programs are described further in Appendix B. We understand that several other states are also considering similar programs.

Arguments for such programs have been robust and are driven in part by uncertainty as to what is or is not the unauthorized practice of law. State legislative or administrative definitions leave much to be desired. The most that can be said of most definitions is that the practice of law is what lawyers typically do and the unauthorized practice of law is what non-lawyers should not do. Former ABA President Chesterfield Smith once said that “the practice of law is anything my client will pay me to do.”<sup>15</sup>

In an address to the United Kingdom-United States Legal Exchange sponsored by the American College of Trial Lawyers in September 2015, Justice (then Judge) Neil Gorsuch said “it seems well past time to consider our sweeping UPL [“unauthorized practice of law”] prohibitions. The fact is non-lawyers already perform—and have long performed—many kinds of work

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<sup>14</sup> For example, the Minnesota Supreme Court issued an order on September 29, 2020, approving a pilot project that will allow LPs to provide legal service in landlord-tenant disputes and family law. The rule becomes effective on March 1, 2021, and will continue until March 31, 2023. There was considerable adverse public comment but the Court responded that “we conclude that the point of a pilot project is to test the assumptions that underlie our decision . . .”. L. Moran, Minnesota will launch legal paraprofessional pilot project, ABA Journal, Oct. 1, 2020.

<sup>15</sup> A. Morrison, *supra* note 7, p. 365.

traditionally and simultaneously [performed] by lawyers.” He added that “exactly what constitutes the practice of law . . . turns out to be a pretty vexing question.”<sup>16</sup>

The ABA’s 2016 *Report on the Future of Legal Services in the United States* recommended that courts should examine the possibility of permitting “judicially authorized and regulated legal service providers” who were not lawyers such as Courthouse Navigators in New York (who do not actually provide legal services), LLLTs in Washington State and Document Preparers in Arizona. Similarly, in 2014, Professors Rhode and Lucy Ricca argued that the practice of law should be opened to qualified and licensed providers who were not lawyers. “[T]hat would surely be preferable to the current system, where, in contexts such as domestic relations or family law, the majority of cases involve at least one party who lacks representation by a trained professional.”<sup>17</sup> When Professor Rhode spoke to our full Commission, she told us that she believed that there was no real likelihood of harm from the unauthorized practice of law and she said that studies in the UK had confirmed that non-lawyers trained in specific legal areas often outperformed lawyers when giving legal advice.

On August 27, 2020, the Arizona Supreme Court issued an order that, among other things, created the Licensed Paraprofessional (“LP”), a position that would be occupied by non-lawyers who would be permitted to offer certain types of legal services, to make appearances in court and to represent in court defendants who are charged with misdemeanors that do not carry the possibility of incarceration.<sup>18</sup> The LPs would be qualified by education, training and examination

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<sup>16</sup> His address was reprinted in *Judicature*, Vol. 100, No. 3, Autumn 2016, p. 47.

<sup>17</sup> D. Rhode & L. Ricca, [Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement](#), 82 *Fordham L. Rev.* 2587 (2014). Professor Rhode made a presentation to the full Commission on September 24, 2020.

<sup>18</sup> For many years, Arizona has certified non-lawyers to become Legal Document Preparers.

to provide legal services within a limited scope of practice that is yet to be fully defined, but would include legal services offered by social workers to their clients. Arizona is in the process of developing ethical rules and regulation for the LPs. It is contemplated that the work of the LPs will typically “involve routine, relatively straight-forward, high volume but low paying work that lawyers rarely perform, if ever.”<sup>19</sup>

In 2015, a Task Force created by the Utah Supreme Court recommended the creation of licensed paralegal professionals who would be officers of the court and would be permitted to practice law. The program would be administered by the Utah State Bar. The Utah task force has written that “subject to proper regulatory oversight, [LPPs] will bring innovation to the legal services industry in ways that are not even imaginable today. Critically, we believe that allowing for that innovation will be the solution to the access-to-justice problem that plagues our country.” The Utah LPPs may practice law with respect to specific family law matters, forcible entry and detainer, and debt collection matters in which the dollar amount at issue does not exceed the statutory limit for small claims cases. They may represent natural persons, interview clients, advocate for a client in a mediated negotiation, complete a settlement agreement and explain a court order to a client. However, they may not appear in court and may not charge contingency fees.<sup>20</sup>

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<sup>19</sup> Arizona Task Force Report, *supra*, p. 40.

<sup>20</sup> Applicants must have either a law degree from an accredited law school, an associate’s degree in paralegal studies, a bachelor’s degree in paralegal studies, or a bachelor’s degree in any subject plus a paralegal certificate or 15 hours of paralegal studies. In addition, they must have 1500 hours of substantive law-related experience, take course in ethics and the substantive areas in which they will practice, must pass a professional ethics exam, pass a LPP examination and have at least one relevant paralegal or legal assistant certification.

In May 2020, the California State Bar Board of Trustees voted to keep alive the possibility of access to justice reforms, despite substantial opposition, by creating a regulatory “sandbox” that will test proposals to allow lawyers to partner with non-lawyers in offering legal services through innovative structures, such as online legal platforms offering services to the public and allowing big box retailers to offer flat fee legal services for consumers through a technology platform in their stores.<sup>21</sup>

After having thoroughly studied these programs, our recommendation for bridging the access-to-justice and delivery-of-legal-services gaps is more limited. We propose that the New York legislature or, if possible, the Office of Court Administration (“OCA”), create a program in which social workers would be trained and certified (or licensed) by the State to provide limited legal services to their social work clients including, in limited circumstances, appearing in court on their behalf. Some—perhaps all—of those services might not constitute the unauthorized practice of law under current definitions, in which case no authorization would be required. Even in that case, however, an acknowledgement of that fact from OCA might be in order.<sup>22</sup> There has long been a close relationship between social workers and lawyers in New York State and elsewhere. Often their clients are the same and the problems those clients present often reflect a variety of related legal and social issues. For example, Paula Galowitz, a Clinical Professor of Law at NYU Law School, has written about an experience she had in a clinic when a client was referred to the clinic because he had a housing problem. However, it turned out that the client’s issues were

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<sup>21</sup> Memorandum from J. Mendoza to California ATILS Task Force, Regulatory Sandbox Recommendation, January 31, 2020.

<sup>22</sup> The New York State Education Department (“NYSED”) currently oversees social work licensing. If certification is required for social workers who would be authorized to render “true” legal advice, certification could come either from the OCA, the NYSED or perhaps both.

not limited to the housing problem. The client was about to lose his telephone service because of unpaid bills and his food stamps because of his immigration status. The client also needed mental health services. She wrote:

The clinic's experience in that case forced me to rethink the role of lawyers and their need to collaborate with mental health professionals in some cases. As a social worker and a lawyer, I have given a great deal of thought to the relative similarities and differences between the two professions and the ways in which they intersect.<sup>23</sup>

She urged recognition of “the value of and a need for collaboration for lawyers and social workers, particularly in the legal services context.” Of course, in the case she described, the students in the clinic were law students, not social workers, but the point remains the same.

Similarly, Thea Zajac, a social worker, has written that as resources for underserved populations become scarcer and the populations' needs become greater, it is important that providers continually re-evaluate how they serve their neediest clients. Legal services clients often have more than just legal issues. Clients seeking legal services often have complex problems with health, housing, and social environments along with a multitude of other challenges. Several organizations have found innovative solutions to provide more comprehensive and holistic services to their clients by coordinating with other disciplines. One such partnership that has become more common—and even necessary—is the collaboration of social workers with legal services providers.<sup>24</sup>

A 1979 study of the relationship of lawyers and social workers in the UK and its relationship to unmet legal needs concluded that “if social workers do not spot the potentially legal problems in their clients' histories, often those problems will remain unsolved. The client relies on the social worker to use all means available to help; if law is not recognized as a legitimate tool of the social worker it is the client who will suffer.”<sup>25</sup> Our recommendation would, we hope, help

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<sup>23</sup> P. Galowitz, Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship, 67 Fordham L. Rev. 2123 (1999).

<sup>24</sup> T. Zajac, Social Workers and Legal Services Integrating Disciplines: Lessons from the Field, Legal Aid Association of California (2011).

<sup>25</sup> A. Phillips, Social Work and the Delivery of Legal Services, 43 Modern L. Rev. 29, 32 (1979).

to remedy such a situation. In 2005, the National Association of Social Workers (“NASW”) created an institute, the Social Work Ethics and Law Institute, to “enhance social workers’ understanding and knowledge of legal and ethical issues affecting the social work profession.” The Institute conducts educational activities and education programs related to legal, ethical and professional issues to assist NASW members, the social work profession and the public to understand the importance of ethical social work issues.

Fordham University’s School of Social Work, among others in New York State, teaches “forensic social work” and in July 2017 held a Forensic Social Work Conference titled “Social Justice in Tandem with Legal System.” Fordham’s Professor Tina Maschi told the conferees that “there are many definitions of forensic social work, but it’s often described as social workers working in legal settings or in justice centers, such as in the courts, in prisons, or in jails.”

From 2015-2018, the Fordham University School of Social Work offered an elective course on “Social Work and the Law” taught by Denise Colon Greenaway, an attorney and social worker with the NYS Unified Court System’s Office for Justice Initiatives (“OJI”), which is led by Deputy Chief Administrative Judge and Commission member Edwina G. Mendelson.

Brigit Coleman, a lawyer and a social worker, has written that in our complex world, legal problems are often intertwined with problems in other areas, including social problems, medical problems, and economic problems. [For that reason], it is critical that social workers have some familiarity with the law in order to understand and explain their clients’ legal rights. Since the two fields complement each other so well, both lawyers and social workers are increasingly called upon to consult with each other and work in multidisciplinary teams to provide better services to their clients.<sup>26</sup>

There are, to be sure, challenges that would have to be overcome if social workers were empowered to give traditional legal advice to their clients. One of the most obvious challenges is

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<sup>26</sup> B. Coleman, Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients, 7 Wash. U. J. L. & Pol’y 131 (2001).



the fact that the legal profession and the social work profession are governed by ethical rules that are not entirely the same. For example, Rule 1.6 of the New York Rules of Professional Conduct for lawyers severely limits the circumstances in which a lawyer may reveal or use confidential information coming from the client. The Code of Ethics of the NASW is more liberal, permitting or even requiring disclosure if there are “compelling professional reasons.”<sup>27</sup> If they are both representing the same client there is very little guidance as to which set of rules must be followed. The New York Rules do not address the lawyer’s obligations when dealing with professionals in other disciplines, but the NASW Code of Ethics calls on social workers to “cooperate with colleagues of other professions when such cooperation serves the well-being of clients” and expressly encourages social workers to participate in interdisciplinary teams.<sup>28</sup> One solution to this challenge may be to provide clients with a disclosure, at the onset of services, that clearly delineates what the client can expect from the social worker in terms of confidentiality and other potentially competing principles, and how this may be different from working with a lawyer. The up-front disclosure may also serve to engender trust and to promote public acceptance.

Assuming that the social workers would be rendering traditional legal services, another challenge would be insurance coverage for malpractice. If social workers who are certified to participate in this program are already employed by legal services agencies or legal aid agencies, this may not be a problem but if not, that issue would have to be addressed unless, of course, what the social workers were offering did not come within the definition of the practice of law, a subject that we discuss further below.

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<sup>27</sup> Section 1.07.

<sup>28</sup> Section 2.03.

Social workers are the natural object of experimentation in the offering of legal services because their training already requires skills in interviewing, empathetic listening, identification of clients' goals, evaluation, crisis intervention and referral.<sup>29</sup> Brigid Coleman put it like this:

Attorneys and social workers each have a central commitment to serve their clients. They both act as advocates for their clients, help their clients determine what their needs are, and then, help them to meet those needs. Both fields use a problem-solving approach to address their clients' needs and resolve issues. The two professions also require extensive training and have licensing requirements. The similarities are even more obvious when comparing a social worker with a public interest or legal services attorney because both focus on enhancing the lives of poor people through direct services to individuals as well as social reform of societal systems.<sup>30</sup>

Implementation of our proposal will require collaboration with schools of social work and law schools to develop an academic curriculum—probably in a school of social work—that will allow social workers to learn about the law and how to provide legal as well as social work services. The breadth of that curriculum will depend on the type of “legal” services that the social workers will be permitted to render. It will also require public acceptance. Arizona’s experience with the latter will be instructive. When the Arizona Task Force’s work was relatively far along, the Task Force commissioned a survey company to conduct a public opinion survey that later confirmed public support for Arizona’s Legal Paraprofessional program. The same could be done with respect to our recommendation. The sample might include social workers, lawyers and potential clients of both.

Many of the “legal-type” services and advice that we believe could be rendered by social workers may not constitute the practice of law. If we are correct in that opinion, no future certification or authorization would be required. In the event that the legal services to be offered by the social workers were deemed to constitute the practice of law, our proposal may require

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<sup>29</sup> B. Coleman, *supra* note 30, p. 139.

<sup>30</sup> *Id.* pp. 137-138.

authorizing legislation. It may also require formulating an oversight and ethical enforcement plan that will be able to regulate the social worker/legal-service provider and decide the extent to which the social worker/legal-service provider will be bound by New York's Rules of Professional [legal] Conduct or some variation of them. In such an event, the entity chosen to provide oversight and ethical enforcement should be well-versed in the role of a social worker as well as that of a lawyer and how they are distinguishable. Particular attention should be given to defining the social worker's role within a legal context. Social workers are trained to view people within a broad context of interrelating systems (e.g. family, community, work, health system, justice system and the like). Their approach to empowering clients to solve problems is governed by this broader thinking. Therefore, it is imperative that social workers in this program be trained to understand their expected role and scope of service delivery when rendering legal services to clients. We have already conferred with one Dean and one Director of a New York school of social work, both of whom were supportive of our proposal, and we expect to confer with others in the days ahead.

Our Working Group is unanimous in its support of allowing social workers who are trained, certified and properly regulated to offer limited legal and "adjunct" legal services to and to make limited court advocacy on behalf of their clients.<sup>31</sup> While not a complete answer to the access-to-justice and delivery-of-legal-services gaps, we believe that doing so will significantly improve access to justice and the delivery of legal services.

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<sup>31</sup> "Adjunct legal services" is our term for services that have legal components but that do not meet the State's definition of "the practice of law."

## RECOMMENDATION TWO

### New York's Court Navigators Program Should be Expanded in Scope and Substance.

The New York Court Navigators program had its genesis in 2007 when the New York courts became concerned about a serious access-to-justice gap in New York City's Housing Court. Whereas about 90 percent of the landlords were represented by lawyers, only five percent or fewer of the tenants who were being evicted were represented by counsel. As a result, the Resolution Assistance Project ("RAP") was created using law students as "assistants" who would stand with the tenants either in court or in hallways during negotiations to make sure that the tenant's voice was heard. The RAP assistants were not permitted to participate in the negotiations or conferences but were allowed to remind the tenants of what they wanted to say.<sup>32</sup>

In 2010, Chief Judge Jonathan Lippman created the Task Force to Expand Access to Civil Legal Services in New York and in June 2013, the New York City Bar published a report by its Professional Responsibility Committee and its Subcommittee on Access to Justice chaired by David Udell, with whom several members of the Working Group have consulted, titled *Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners*. The City Bar committees recommended the creation of "courtroom aides," non-lawyers who could assist litigants in proceedings before certain courts and administrative agencies: "Nonlawyers serving this function are not expected to match the skill level of a lawyer, but can facilitate communication between the litigant and the tribunal, offer legitimate arguments that might otherwise be overlooked, and provide emotional support to litigants who may be thoroughly bewildered by judicial or administrative procedures."

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<sup>32</sup> See generally, F. Fisher, Navigating the New York Courts with the Assistance of a Non-Lawyer, 122 Dickinson L. Rev. 825 (2018). Until she retired, Judge Fisher was Deputy Chief Administrative Judge for New York City Courts and was Director of the New York State Courts' Access to Justice Program.

Also in 2013, the New York Courts' Permanent Commission on Access to Justice recommended the use of non-lawyers to close the access-to-justice gap and Chief Judge Lippman created a Committee on Non-Lawyers and the Justice Gap, co-chaired by Roger Juan Maldonado, who is a member of the Commission to Reimagine the Future of New York's Courts and this Working Group. Among other things, that Committee considered the RAP program, a British program using non-lawyers called McKenzie Friends<sup>33</sup> and the use of health care navigators.<sup>34</sup> The Committee ultimately recommended the creation of a Court Navigator Program and Chief Judge Lippman called for such a program in his 2015 State of the Judiciary Address. He urged the creation of "a series of court-sponsored incubator projects to expand the role of non-lawyers in assisting unrepresented litigants." The purpose was to make use of trained and supervised persons with no prior formal law school training to provide one-on-one assistance to unrepresented litigants in court. Days later, the Chief Administrative Judge Gail Prudenti created the Court Navigator Program as a pilot by order dated February 10, 2014.<sup>35</sup>

The next year, New York's Task Force to Expand Access to Civil Legal Services in New York became the Permanent Commission on Access to Justice and in 2017, the Permanent

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<sup>33</sup> "McKenzie Friends are lay people in England and Wales who may appear alongside litigants in some court proceedings and are regulated by the courts. They may "quietly give advice on an aspect of the conduct of the case" but they may not address the court, make oral submissions or examine witnesses. See generally, *Practice Guidance: McKenzie Friends (Civil and Family Courts)*, <http://www.judiciary.gov.uk/Resoiurces/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf>.

<sup>34</sup> The health sciences professions have used trained paraprofessionals such as "Patient Navigators" and "Nurse Navigators" who, among other things, can "facilitate improved health care access and quality for underserved populations through advocacy and care coordination . . .". A. Pereira et al, *The Role of Patient Navigators in Eliminating Health Disparities*, Cancer, p. 117, August 2011. Patient Navigators were first created by Dr. Harold Freeman at Harlem Hospital in 1990.

<sup>35</sup> Administrative Order of the Chief Administrative Judge of the Courts Admin. Order No. 42/14, 1 (N.Y. Feb. 10, 2014) <http://www.nycourts.gov/COURTS.nyc/SSI/pdfs/AO-42-14.pdf>.

Commission recommended the “expansion of existing nonlawyer assistance programs such as Legal Hand and Court Navigators.”

The New York Navigators Program was not the first to use non-lawyers to facilitate access to justice. Beginning as early as 1981, many states have begun to use trained non-lawyers to offer services that reduce the access-to-justice gap. A July 2019 Report by Mary McClymont, of the Justice Lab at Georgetown University Law Center, noted that there were at least 23 legal navigator programs in more than 80 locations in 15 states and the District of Columbia. Most of those programs did not have formal authorization to deploy navigators in the court but “rather, they have been initiated (and are often currently managed) by the actions and impetus of multiple champions and supporters, including the judiciary, official bodies like state access to justice commissions or specially appointed task forces, discerning nonprofit and legal aid lawyer leaders, bar foundations, and creative court staff.”<sup>36</sup> Annexed hereto as Appendix C is a Memorandum prepared by Shante Thomas for Hon. Edwina G. Mendelson, a member of the Commission to Reimagine the Future of New York’s Courts and this Working Group, that provides further information on national and international non-lawyer navigator programs, including some of the 23 programs mentioned in Ms. McClymont’s research paper.

The February 10, 2014, Administrative Order authorizing Court Navigators, created a pilot program in the Consumer Debt Part in the Bronx and in Kings County Housing Court. It also established Navigators programs that collaborated with or were part of three nonprofit providers, the New York State Access to Justice Program (“A2J Navigator”), Housing Court Answers and University Settlement.

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<sup>36</sup> M. McClymont, Nonlawyer Navigators in State Courts: An Emerging Consensus, Justice Lab Georgetown Law, June 2019, p. 14.

The Navigators provide general information, written materials and one-on-one assistance to eligible unrepresented litigants and assist them in completing necessary forms. They attend settlement negotiations, accompany unrepresented litigants in the courtroom, facilitate access to interpreters, explain what to expect and what the role is of each person in the courtroom. They also provide moral support and help the litigants keep their paperwork in order. They are not permitted to provide legal advice and may speak in court only if a judge addresses direct factual questions to them.<sup>37</sup>

In February 2014, three distinct Navigator pilot projects began in New York City under the supervision of Deputy Chief Administrative Judge Fern Fisher. In the beginning, most Court Navigators, except those in the University Settlement pilot, were unpaid law students but after New York's 50-hour pro bono rule for law students was instituted in 2018, it became difficult to recruit law students to become Navigators because that service did not qualify for the pro bono requirement. As a result, thereafter, most of the Navigators were college students who used the opportunity to fulfill an internship requirement, a community service requirement or to receive academic credit.<sup>38</sup>

The first pilot project in New York City was the Access to Justice Navigators Project, which absorbed the RAP Assistants program and provided in-court assistance through the services of an unpaid "Navigator for the Day." The Navigators in this pilot accompanied unrepresented litigants when they met with judges, court attorneys and the other side's lawyers. They worked in courthouses that provided kiosk access to Do-It-Yourself ("DIY") document assembly computer

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<sup>37</sup> *New York City Housing Court Navigator Program*, N.Y. St. Unified Ct. Sys. <http://www.nycourts.gov/COURTS/nyc/housing/rap.shtml>.

<sup>38</sup> F. Fisher, note 32 *supra*, p. 830.

programs to create fileable papers for litigants. All Navigator volunteers received three hours of training, including videos containing role-playing scenarios, a manual and copies of informational materials. Each Navigator committed to serving at least 30 hours in a three-month period. Ultimately, the Access to Justice Navigators worked in housing courts in Brooklyn, the Bronx, Manhattan and Queens and some also worked in civil consumer debt cases.

The second pilot project was the Housing Court Answers Navigators Project. Its volunteers were also “Navigators for the Day” who worked only in the Brooklyn Housing Court. This pilot project was under the supervision of Housing Court Answers, a nonprofit organization that provides information about Housing Court and local housing laws and regulations. The Navigators would approach unrepresented litigants as they lined up in court, asking them why they were there and offering to assist them in preparing answers to the nonpayment papers they may have received. They used Court-approved DIY forms in assisting the tenants to complete their answers to the petitions for eviction. Because the answer forms were standard, the Navigators were able to walk the litigants through them easily and then to accompany them to the clerk’s window where the forms were filed. The Navigators in this pilot did not participate in any courtroom activities or in settlements.

The third pilot project was the University Settlement Navigators Project, also in the Brooklyn Housing Court. The Navigators in this pilot were all paid case managers employed by University Settlement, a nonprofit organization providing social and human services and they worked in the same courts as the Housing Court Answers Navigators, coordinating their activities with each other. The University Settlement Navigators concentrated on litigants with little English proficiency who were about to be evicted. They conducted intake interviews to determine social



services needs and they were able to offer social services such as mediation, mental health treatment and access to various state and federal benefits.

All three Navigators pilot projects were evaluated by Professor Rebecca Sandefur for the American Bar Foundation and the National Center for State Courts in December 2016. Professor Sandefur, with whom some members of the Working Group have spoken, found that

- those who received help from the Access to Justice Navigators Pilot Project were “56 percent more likely than unassisted litigants to say they were able to tell their side of the story”;
- those assisted by the Housing Court Answers Navigators Pilot Project “were 87 percent more likely than unassisted tenants to have their defenses recognized and addressed by the court”; and
- of those assisted by University Settlement Navigators, “zero percent of tenants experienced eviction from their homes by a marshal.”<sup>39</sup>

Her more general conclusions were as follows:

- People without formal legal training can provide meaningful assistance and services to unrepresented litigants;
- Those services can impact several meaningful outcomes;
- The attitudes and philosophies of the courts and court staff impact the tasks that the Navigators perform and the contributions they are able to make; and

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<sup>39</sup> R. Sandefur & T. Clarke, Roles Beyond Lawyers: Summary, Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects, American Bar Foundation/National Center for State Courts with support from the Public Welfare Foundation, December 2016. 122 Dickinson L. R. 825 (2018).

- The work of the Navigators would be aided by standardized legal forms and the availability and use of plain language.

Professor Sandefur made several recommendations, including making dedicated supervision available in all of the courthouses in which Navigators work, educating judges and court attorneys on the role of the Navigators, making DIY kiosks more generally available, making a triage referral system available and educating the public on the role of the Navigators. In addition, she recommended an increase in the size of the program, moving from limited pilot projects to expanded projects.

In 2018, a Special Commission in New York, the *Special Commission on the Future of the N.Y.C. Housing Court*, recommended the expansion of the Navigator Program and recommended “ensuring that court staff and judges buy into the program through more communication about the program’s goals and operation to litigants, judges, court staff, court users, and other stakeholders to improve the program.”<sup>40</sup> Some of that work is already underway. Under the leadership of the OJI, the Navigator program was expanded and re-tooled. In line with Professor Sandefur’s recommendations, administrative staff and judges were trained on the benefits of the program. Input was also sought from each court to determine where Navigators were most needed. Some courts stationed Navigators as greeters,<sup>41</sup> others stationed Navigators in Help Centers and in courtrooms. OJI re-branded existing promotional materials and developed new strategies to

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<sup>40</sup> F. Fisher, *supra* note 32, p. 833.

<sup>41</sup> The recent *Report from the Special Advisor on Equal Justice in the New York State Courts*, submitted to the Chief Judge by former Secretary of Homeland Security Jeh Charles Johnson on October 1, 2020, proposed that “in line with a more “customer service”-oriented approach, [the] OCA consider establishing a “greeter” position in courthouses on a more widespread basis and that the OCA should “ensure that there is a designated individual within each courthouse whose role is to welcome litigants and answer basic questions about how to navigate the building and adhere to general procedures and practices.” *Id.* p. 99. Our proposal goes further than Secretary Johnson’s.

enhance recruitment efforts. A robust internship program was developed with local colleges to provide student Navigators with school credit for their service. One program, Apple Corps, also provided a summer stipend for participating students. In 2020, the Navigator program was expanded to Westchester County’s Family Court and to the White Plains City Court Housing Part.

We are very impressed by the principles behind the Navigator program and by the success that it has already had in New York City. Our proposal, therefore, is to expand the Navigator program both in scope and substance. We are mindful of the current budgetary constraints in New York and we understand well that the resources are not available to expand the Navigators program using State financing. However, we believe that a compelling case could be made to private organizations for whom improving access to justice is a passion. This is not a novel observation, to be sure; it has already been made by the OJI. In the United Kingdom, the Ministry of Justice brought together six independent organizations that were dedicated to improving access to justice and the group agreed to fund a Litigant in Person Support Strategy that provided services similar to those offered by the Navigator program in New York.<sup>42</sup>

The success of an expanded Navigators Program will require the support of the existing legal services providers such as the Legal Aid Society and many of the bar associations in New York. It will also require the continuing participation of the OCA and OJI.

With respect to scope, we recommend that a Navigator program should be expanded to include all “high traffic” courts in New York State. Such an expansion would require both more volunteers<sup>43</sup> and more supervisors. How would such volunteers and supervisors be found and

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<sup>42</sup> See Appendix C, p. 43.

<sup>43</sup> The University Settlement program demonstrated that using paid Navigators who are already part of another organization can work and could represent a template for the future. We recognize that as a practical matter, it is unrealistic to expect a corps of fully-paid Navigators anytime soon.

trained? This will be a challenge and our Working Group is examining several possibilities. For example, there are today fifteen law schools in New York State, each one of which already offers clinical programs for its students. Those law schools could be urged to create “Navigator Clinics” that could be offered to law students for credit and could be supervised by law professors or practicing lawyers. However, we recognize that it would be very expensive for the law schools to do so. The typical student-faculty ratio in a for-credit clinic is 8 to 1. In order for work in a law school’s Navigator clinic to qualify for New York State’s 50-hour pro bono requirement, the current rules require supervision by a law professor or a practicing lawyer. On the other hand, non-credit volunteer pro bono projects for law students with minimal on-site lawyer supervision might be far more efficient but may require additional training for the Navigators. The Working Group will continue to consider how all of this might be accomplished. We will also consider recommending the use of paralegals already employed in law firms as possible resources to expand the Navigator pool, as some other states have done. Some of the obvious issues we will consider include insurance and compensation.

Our proposal for expanding the scope of the Navigator program leads to our second recommendation concerning the substance of the Navigator program. Just as we have recommended with respect to social workers, we also recommend that the Navigators be trained and permitted to offer some “adjunct” legal services and other services that have heretofore been considered the practice of law and that have heretofore been offered only by members of the bar.

The Administrative Order currently in effect in the First and Second Departments prohibits Navigators from either giving legal advice to unrepresented litigants or negotiating on their behalf with counsel for the adverse party. We recommend that the Administrative Order be amended

either to redefine what legal advice is or to permit the Navigators to offer very limited and targeted “adjunct” legal services to unrepresented litigants.

The DIY legal form kiosk is a good example of what we are suggesting. The forms in the DIY kiosks are already simplified but the Navigators are still not permitted to advise the unrepresented litigants who fill out the forms about the legal significance of the information that is being provided. However, if the Navigators were already law students, they could be authorized to give such legal advice to unrepresented litigants just as they do with respect to their “clients” in existing law school clinics. However, we recognize that this would require hands-on supervision by the law schools or other lawyers, which may be prohibitively expensive.

Even if the Navigators are not law students, there is no reason why a category of advice they might offer to the unrepresented litigants relevant to the courtroom experience they are about to have could not be deemed not to constitute “the practice of law” when offered. For example, advising an unrepresented litigant to “tell the truth, the whole truth and nothing but the truth” when testifying should not be considered giving legal advice. Nor should advising an unrepresented litigant not to speak to the landlord’s attorney on her own but to wait until the court attorney is available to speak to everybody together. Nor should advising the unrepresented litigant to be respectful and to answer questions directly and clearly. Other examples of “legal advice” that the Navigators might provide include the following:

- informing a litigant that he or she has the right to speak with the judge or the judge’s court attorney before agreeing to a settlement and speaking to the court directly for the purpose of explaining to the judge the unrepresented litigant’s factual circumstances if necessary;

- informing the litigant that the solution offered in a proposed settlement is just an option, that there may be other options available and what those might be;
- pointing out legal and other fees that are not allowed to be included in a settlement agreement;
- suggesting that the litigant ask (or allowing the Navigator to ask) opposing counsel to adjust the terms of a settlement to enhance compliance (e.g. to modify a rent or arrears due date so that it becomes due after the litigant has received a regularly scheduled social security check); and
- explaining how to serve papers.

The Navigators could be trained and permitted to interview the unrepresented litigants to determine what their needs are, to explain all of the legal options available to them, to assist with Order to Show Cause filings, to fill out simple forms to assist litigants with disabilities, to serve as mediators and play a role in the ADR initiative, and to collect and distribute helpful checklists and other informational documents. In addition, they should be able to coordinate their efforts with the Volunteer Lawyers for the Day (“VLD”) who serve in Housing Court and in the civil court parts that hear consumer debt matters who, among other things, might be able to answer questions that the Navigators might have. The Navigators could provide the VLDs with the information and documents obtained and organized by the Navigators, explain to the VLDs the unrepresented litigants’ needs and goals, and request that the VLD then advise the unrepresented litigant how to proceed. This would provide the Navigators with a certain level of supervision and feedback, as recommended by Professor Sandefur.<sup>44</sup> In our view, this work could relatively easily be structured

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<sup>44</sup> See p. 26, *supra*.

so that it does not constitute the practice of law, and an administrative order to that effect might be appropriate.

An issue has arisen with respect to the proposed presumptive mediation process in Housing Court and consumer debt proceedings in which the plaintiff/landlord or plaintiff/corporation may be represented by counsel and the respondent/tenant or defendant/consumer may not be. Several legal services providers assert that given the continued phased roll-out of the right to counsel in eviction proceedings in New York City and the screening of proposed settlements role currently being provided by the Court Attorneys who serve Housing Court judges, it would be premature to require mediations in Housing Court matters when the landlord is represented by counsel and the tenant is not. The idea is that all indigent tenants soon will be entitled to representation in eviction proceedings and at that point, presumptive mediation could be reconsidered. The legal services providers also assert, however, that the Court Attorney is likely going to be much more knowledgeable about pertinent settlement considerations in an eviction proceeding than a volunteer mediator, thus making presumptive mediation less attractive in Housing Court matters generally.<sup>45</sup> Similarly, the Civil Court judges and their clerks are much more likely to be knowledgeable about pertinent settlement considerations in consumer debt matters than volunteer mediators.<sup>46</sup>

Unless legislation is passed or an administrative order is signed enabling Navigators to negotiate on behalf of unrepresented litigants, participation by Navigators in mediations on behalf

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<sup>45</sup> OCA either has commenced or is about to commence presumptive mediation in Housing Court where both parties are unrepresented. Legal services providers have expressed little opposition to such proceedings but note that absent required interpreters, the mediation may still be fraught.

<sup>46</sup> The New York City Civil Court has commenced a presumptive mediation program in small claims matters where both parties are unrepresented. Legal services providers have not opposed this measure.

of unrepresented litigants would not resolve the concerns raised by the legal services providers. Similarly, expanding the role of the Navigators will not do anything to right the imbalance of power in such mediations, which may serve to accelerate an adverse and potentially unfair result for the unrepresented litigant. Our Working Group will continue to monitor this issue. This issue should also be borne in mind by the OCA should it choose to implement the Working Group's recommendation with respect to the Navigators program.

We see the Navigator program as a good example of what Professor Sandefur referred to as "roles beyond lawyers" that could offer at least a partial solution to the access-to-justice gap and we believe that the existing Navigator framework, if broadened in scope and substance, would do just that.



### RECOMMENDATION THREE

#### Alternate Business Structures for Law Firms Should Not Be Adopted in New York at This

Time.<sup>47</sup>

Following the publication of the ABA’s 2016 report, several states took up the challenge and pro-actively considered (and a few actually adopted) regulatory reforms including ABSs. For example,

- Washington State created Limited License Legal Technicians (“LLLTs”), non-lawyers who could provide legal services in certain subjects, permitted them to have minority interests in law firms and permitted lawyers to share fees with them. Recently, however, that program has been suspended due to excessive costs and lack of interest. There are only about 40 LLLTs remaining in Washington State.
- Washington D.C., the only US jurisdiction to do so, permits non-lawyer partnership in law firms. Most of the non-lawyer partners are lobbyists. Washington D.C. is actively considering other regulatory innovations such as allowing non-lawyers to provide certain legal services.
- Arizona, Utah, and California have already adopted regulations that will permit law firms to consider ABSs that would include fee-sharing with non-lawyers and non-lawyer law firm ownership.<sup>48</sup>

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<sup>47</sup> A brief history of the debate over ABSs is set forth in Appendix A.

<sup>48</sup> In March 2020, California tabled its ABS proposal because of “opposition in some quarters” including lawyers who said they were concerned about potential dangers to clients. However, the proposal was adopted in May, 2020 and is expected to be implemented in 2021.

An important question for our Working Group was whether ABS firms would actually increase access to justice or improve the delivery of legal services in addition to improving lawyer productivity. We closely examined the recent proposals that have been adopted in Arizona, Utah, and California to learn whether those proposals would have that effect and the short answer is that we just don't know. There are no reliable data. We briefly describe the three programs and the stated reasons for their adoption below.

### Arizona

The October 4, 2019, Report and Recommendations of Arizona's *Task Force on the Delivery of Legal Services* took up Professor William Henderson's challenge and recommended that Arizona's equivalent to the ABA Model Code's Rule 5.4 be eliminated. Citing Professor Henderson's *Legal Market Landscape Report*, the Arizona Task Force concluded that its Rule 5.4 "has been identified as a barrier to innovation in the delivery of legal services." The Task Force consulted with legal ethicists and wrote that "a sentiment that resounded within the workgroup was that lawyers have the ethical obligation to insure legal services are available to the public, and that if the rules of professional conduct stand in the way of making those services available, then the rules should be changed, albeit in a way that continues to protect the public." The Task Force concluded that "no compelling reason exists for maintaining Ethical Rule 5.4 because its twin goals of protecting a lawyer's independent professional judgment and protecting the public are reflected in other ethical rules which can be strengthened." The trade-off was a recommendation that the Arizona Supreme Court explore entity regulation in addition to individual regulation, citing the UK's experience with entity regulation. What is curious about Arizona's program is that it was adopted even though there were no data suggesting that it would have any effect on the access-to-justice gap.

## Utah

Utah will allow the possibility of proposed ABSs for firms that successfully perform in a “sandbox” under the control of a new regulatory body and in which lawyers and non-lawyers can propose novel business structures for the delivery of legal services and with respect to which applicable laws prohibiting the unauthorized practice of law will be waived. The “sandbox” will “allow new providers and services a controlled environment in which to launch and test products, services and models. . . . In Utah, new legal practice providers and services will have to apply to enter the regulatory sandbox before they will be permitted to offer services in the legal market. If they are admitted, they will be able to offer service under careful oversight until they are able to show no increase in consumer harm.”

Even though Utah’s Work Group envisioned that its proposal would increase access to justice (the title of its report was “*Narrowing the Access-to-Justice Gap by Reimagining Regulation*”), its report actually proposed a solution that would “still fully protect clients without unduly hampering lawyers from harnessing the power of capital, collaboration, and technology.”<sup>49</sup> Utah’s Justice Deno Himonas said that “we cannot volunteer ourselves across the access-to-justice gap . . . What is needed is a market-based approach that simultaneously respects and protects consumer needs. This is the power and beauty of the [Utah] Supreme Court’s rule changes and the legal regulatory sandbox.”<sup>50</sup> Notwithstanding its “power and beauty,” we do not believe that

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<sup>49</sup> Report and Recommendations from THE UTAH WORK GROUP ON REGULATORY REFORM, August 2019, p. 11.

<sup>50</sup> The first Utah “sandbox” proposal to be accepted was an entity named “1Law” in which non-lawyers are partial owners and in which the entity is practicing law through technology platforms offering substantive legal advice through an automated agent (a “chatbot”) or through a “Do It Yourself” (“DIY”) legal assistance platform that enables persons to solve their own legal problems. Task Force Recommendation to the Court, Sandbox Proposal: 1Law Online Legal Platform, June 16, 2020.

such an ABS would *ipso facto* improve access to justice even though it might improve law firm profitability.

### California

On May 15, 2020, the State Bar of California’s Board of Trustees voted to move forward with a proposal from its Task Force on Access to Justice Through Innovation of Legal Services to allow a “sandbox” for companies and organizations to provide legal services in ways that might not be permissible under the current regulatory scheme.<sup>51</sup> However, the Task Force candidly conceded that “We will not know the extent of improvement to access to legal services until new entities and services are allowed into the market and proper data is kept and measured. . . . What we do know is that the justice gap continues to grow at an alarming rate with the status quo, and that there simply is [sic] not enough lawyers to provide free/low cost legal services to have a meaningful impact on the problem our society faces.”<sup>52</sup> That may be true but the suggestion that “loosening of existing restrictions” on lawyers might increase access to justice is not obvious to us. In fact, this proposal appears, at least to us, not to be a useful means of increasing access to justice.

In fact, there is no empirical evidence that in the U.S. an alliance between lawyers and non-lawyers would *ipso facto* increase either access to justice or the delivery of legal services for the simple reason that it has never been tried in this country. In fact, every time we put that question to those with whom we consulted, we were told that the primary reason for an ABS was to increase profitability and that there is no evidence that it will increase access to justice. Unlike the argument

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<sup>51</sup> ABA Center for Innovation, May 15, 2020.

<sup>52</sup> The State Bar of California, Task Force on Access Through Innovation of Legal Services, January 31, 2020, p. 9.

with respect to increases in capital and law firm profitability, which have an arguable empirical basis, the evidence with respect to access to justice and improved delivery of legal services is today non-existent.

Jayne Reardon, the Executive Director of the Illinois Supreme Court's Commission on Professionalism, has written that

there is, of course, no *guarantee* that ABSs will significantly improve access. But a leading expert on the access to justice problem, Gillian Hadfield, has unequivocally stated that there is no humanly possible amount of legal aid or pro bono services that could satisfy the unmet need for legal services and that only by permitting a change in regulations to allow ABSs do we have a chance of addressing this country's access to justice problem.<sup>53</sup>

We are unpersuaded. We do not really know whether an ABS in any form would have any effect in closing the access-to-justice and delivery-of-legal-services gaps and the available evidence is to the contrary.<sup>54</sup> For that reason, we do not support the adoption of an ABS in New York State at this time, at least not until we learn whether the Utah, California, and Arizona experiments have been successful and their results can be evaluated. We also do not think that a State-wide law permitting non-lawyers to be partners in or owners of law firms is feasible or practical at this time, nor do we believe that a case been made that such a state-wide program would be embraced by the legal profession.

We are fortunate that other states, such as Arizona, Utah, and California, are proceeding with ABS experiments and as we reimagine the future of New York's Courts, we foresee a time when one or more of the ABSs being tried elsewhere could be adopted in New York. Our Working

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<sup>53</sup> J. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 St. Mary's Journal on Legal Malpractice & Ethics 304 (2017), quoting G. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. (2014).

<sup>54</sup> In a Virtual Convening of experts on regulatory innovation held on October 26, 2020, and sponsored by IAALS, Professor Stephen Mayson, Honorary Professor of Law in the Faculty of Laws at University College London, who has recently completed a review of the effect of the Legal Services Act of 2007, reported that ABSs in England and Wales have not had any meaningful impact on the access-to-justice gap.

Group will continue to monitor all the ongoing regulatory change experiments, including the experiments in Arizona, Utah and California, and, if any of them demonstrates success—or any other worthy improvements—we stand ready to recommend adoption of similar ABS structural changes to meet our needs in New York.<sup>55</sup>

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<sup>55</sup> Many proponents of ABS see their benefit as promoting technology-based solutions that will make the providing of legal services to consumers more efficient. According to those advocates, ABS reform is necessary to provide the access to the capital markets that is necessary to fund technology startups. As we note in the text, whether that will work remains to be seen. But if the technology startups succeed in materially expanding access to justice in Arizona, Utah, or California, it would be a relatively simple matter to authorize the use of that technology in New York (e.g. through the expansion of those startups into New York).

## SUGGESTIONS WITH RESPECT TO IMPLEMENTATION

The programs in Washington State (now suspended), Arizona and Utah might provide useful templates should New York State consider adopting programs as broad as those three.<sup>56</sup> All three programs have many things in common. First, they require detailed applications, including such things as fingerprints and FBI background checks, driving and military records, credit histories and references. Second, they require extensive pre-licensing training, including many credit hours of courses about legal processes and substance, and post-licensing annual CLE training. Third, they require compliance with Codes of Professional Conduct. Fourth, they severely limit the types of legal services that can be provided, sometimes in bizarre ways.<sup>57</sup> There is one respect in which one of the programs is different: only Arizona allows LPs to appear in court on behalf of clients.

It remains to be seen how successful the Arizona and Utah programs will be. As noted, Utah anticipates that in the first several years of its LPP program, there would in fact be very few LPPs licensed. In addition, the Arizona and Utah programs appear to have some of the same components that ultimately led to the suspension of the Washington State LLLT program: complex machinery resulting in high costs with the expectation of relatively few licensees.

We believe that the prudent course would be to follow the programs in Utah, Arizona and elsewhere and to decide at a later time whether their more robust models, if successful should be reconsidered for use in New York.

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<sup>56</sup> A detailed description of each program is set forth in Appendix B.

<sup>57</sup> Recall that Washington State permitted its LLLTs to “Draft letters setting forth legal opinions that are intended to be read by persons other than the client.” There is no further explanation as to what this means nor does there appear to be a service limited to legal opinion letters that are to be read only by the client.

## New York's Social Workers

We do not recommend that at this time New York State create programs like those in Washington State, Arizona and Utah for its social workers. Those programs are in the nascent stage and may or may not be successful. Our recommendation is more limited. There are several reasons why. First, New York's social workers are already certified by the State to practice social work, a profession that contains many elements that are similar to legal practice, including, for example, interviewing clients and determining their needs and goals, reviewing and explaining documents to them, assisting them in obtaining records and obtaining relevant facts and explaining the relevancy of such information to the client. Second, the social workers who would be the subject of our recommended program are already employed and many of them are already working with lawyers. We would not anticipate that they would charge their clients any additional fees for providing legal advice along with their social advice. Third, the social workers who would be the subject of our recommended program already have advanced degrees, Masters of Social Work, from accredited universities.

We envision that with a little extra legal training, New York's social workers would easily be able to represent clients in certain designated courts such as the array of New York's "problem solving" courts, for example, in which the goal is not to score legal victories as such but to find ways to help the client to solve his or her problems.<sup>58</sup> Similarly, certain of the proceedings in Housing Courts present relatively straightforward issues of rent payment and eviction and the trained social workers with whom we have consulted believed that with minimal training, they

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<sup>58</sup> New York's Problem Solving Courts include Drug Treatment courts, Mental Health courts, Community courts, Sex Offense courts, Human Trafficking courts, Adolescent Diversion parts and Veterans courts. The goal of those courts is to look to the underlying issues that bring people into the court system and to employ innovative approaches to address those issues, often in coordination with outside services.



would easily be able to guide tenants through those issues. Other proceedings in Housing Court such as Housing Part Proceedings on behalf of tenants against the agencies charged with enforcement of the rules and regulations requiring landlords to make certain repairs, would benefit greatly from the expertise and experience of trained social workers. For example, we were told that trained social workers thought that they would be able to prepare tenants in Housing Courts for their court appearances, to explain the relevance of the landlord's failure to make required repairs and how to document the failure, and to explain the options and difficulties that might occur when a tenant enters into a payment agreement without sufficient funds to make the payments.

Although a significant proportion of the tenant litigants in New York City Housing Courts are able to take advantage of the City's right-to-counsel program, the vast majority of tenants appearing in Housing Courts outside of New York City today are unrepresented by anybody. Adding a trained, non-lawyer social worker would be a significant improvement in providing true access to justice for the otherwise unrepresented tenants. Even with respect to those tenant-litigants who are already represented by counsel, trained social workers often become valuable members of their team. We also believe that trained social worker-advocates<sup>59</sup> should be able to address the courts, including Housing Courts, directly, without waiting for a specific factual question from the judge, as the current Administrative Order requires. Speaking in court on behalf of an

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<sup>59</sup> We leave it to the OCA to come up with a title for the trained and perhaps certified social workers contemplated by our recommendation. Possibilities might include "legal social workers" and "social advocates." Utah and Arizona each struggled to come up with proper descriptive titles and admitted somewhat reluctantly that their chosen titles were less than entirely satisfactory. Arizona, for example, considered several titles, including "limited license legal practitioners," "licensed paralegals," and others. It finally chose "legal practitioner" because it was similar to the now well-understood "nurse practitioner" and because it would "resonate with the public better." The Arizona Task Force recognized, however, that the term "legal practitioner" was ambiguous, because lawyers were also "legal practitioners." The final term was in fact different from all the earlier proposals: "legal paraprofessionals." Reply and Final Amended Petition of the Arizona Task Force on the Delivery of Legal Services, *In the Matter of Petition to Amend Etc.*, Arizona Supreme Court, June 22, 2020, pp. 18-20.

unrepresented tenant should not, in our opinion, constitute the practice of law, as many other jurisdictions around the world have already recognized. Judges can easily recognize when a non-lawyer social worker has gone beyond the appropriate limits and can deal with the situation promptly. The benefits conferred on the system of justice should far outweigh any concerns about overreaching.

The drafting of documents might traditionally have been considered the practice of law but today, with the Do-It-Yourself Kiosks whose documents have already been pre-approved by the OCA, social workers should be permitted to read the existing instructions about such documents and to explain them to the tenant-litigant without running afoul of prohibitions on the practice of law by non-lawyers.

It should not necessitate the administrative superstructures that we see in Washington State, Arizona and Utah in order to train, certify and authorize social workers to take on those assignments and to assist their clients through the legal process. Indeed, social workers, who are already trained to care for the “whole person,” may be the ideal advocates for their clients.<sup>60</sup> And if the OCA should determine that the limited services that social workers would be authorized to provide did not constitute the practice of law, neither malpractice insurance nor conformance with the NY Rules of Professional Conduct should be required.

In fact, social workers in New York have been members of Housing Court defense teams for many years. For example, New York’s Assigned Counsel Project Internship Program

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<sup>60</sup> J. Harkey, Social Workers on Transdisciplinary Teams: Pursuing the “Triple Aims” With a Holistic Approach, Social Work Today, (2020). [https://socialworktoday.com/archive/exc\\_070815.shtml](https://socialworktoday.com/archive/exc_070815.shtml). See also, M. Roberts et al, A Social Worker’s Role in Drug Court, SAGEOpen, April-June 2014; Criminal Justice Social Work in the United States: Adapting to New Challenges, National Association of Social Workers, (2010).

established in 2014 recruited and trained law students to conduct intake and assess the legal and social services needs of seniors who were at risk of eviction. When eviction proceedings were brought against seniors who, because of deteriorating health, were unable to manage their responsibilities, the Assigned Counsel Project would provide the senior with both a lawyer and a social worker or a social work intern who would work together to solve the senior's housing problems.<sup>61</sup>

With respect to training, we submit that the academic training, such as it would be, for such activities could take place in schools of social work in New York State, in particular those that are part of universities with law schools. Collaboration between professors of social work and law should be easy.<sup>62</sup> With respect to certification, if our recommendation that the services being rendered by social workers did not constitute “the practice of law” is accepted, then certification by OCA should not be required but a certification from the OCA that the recipient is certified to provide “adjunct” legal services (or a similar title) might be appreciated by the social workers. If the services do constitute the practice of law under today's definitions—a result that is far from certain—legislation or at the very least an OCA Administrative Order—would appear to be required.

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<sup>61</sup> New York City Housing Court: Assigned Counsel Project Internship Program, NY Courts.gov., (2016).

<sup>62</sup> Training could include the understanding the statutes applicable to and the procedures used by the “problem solving courts” and the Housing Courts, the evidentiary rules that are applied in those courts, the fundamentals of the applicable landlord-tenant laws, the burdens of proof borne by the plaintiffs and the defenses available to the defendants. It would also include understanding the alternatives available to the defendants and how to achieve them.

## New York Court Navigators

Our recommendation for allowing Court Navigators to offer limited legal advice and services to tenants in Housing Courts and in debt collection cases in Civil Courts contemplates three different types of Navigators: law students who are part of law school clinics that are supervised by law professors or other lawyers, Navigators who are already certified social workers, and other volunteers such as college or law students who are not in a clinic. With respect to the former group, little more need be considered, inasmuch as current rules permit law students in clinics to provide limited legal services and advice. It would be up to the law professors in charge of the applicable clinic to decide what type of services and advice could and should be rendered by the law students. With respect to the second group, our recommendation with respect to social workers would apply equally to Navigators who are also social workers.

With respect to the third category, other volunteers, there would be stricter limitations on what they could do and a limited training program would still be in order. If the volunteers are college or law students, the training could take place in their schools, perhaps with the supervision of trained members of the bar who routinely work in the Housing Courts. These non-clinical-law-student and non-social-worker Navigators would still be permitted to offer “adjunct” legal services that do not violate the unauthorized practice of law prohibitions but that still assist unrepresented litigants in court. The services that they would be permitted to provide would make a court experience by an unrepresented litigant less traumatic, more understandable and more likely to result in a just outcome. For example, they could help unrepresented litigants to use a DIY kiosk and to understand the legal documents that are being made available to them. These kiosks provide information to the unrepresented litigants, and Navigators should be permitted to help the unrepresented litigants understand that information. Advising an unrepresented litigant that

signing an affidavit that was false could be a criminal offense is common knowledge and should not be considered rendering legal advice. Similarly, making an argument in Housing Court on behalf of an unrepresented litigant should not be considered the practice of law if the argument is limited only to explaining the litigant’s factual situation and why, in fairness, a particular resolution should be considered by the court. In such a situation, the Navigator would be more like the common law “next friend” or a non-lawyer “guardian ad litem” rather than a lawyer.

\* \* \*

We submit this Report in the expectation—in fact a firm belief—that the recommendations we make will represent a small but significant step toward ameliorating the access-to-justice and delivery-of-legal services gaps in New York State. The solutions to those serious problems do not lie in increasing the pro bono requirements for members of the bar or in increasing the funding for legal services organizations. Nor do they lie in increasing the number of practicing lawyers in New York State. Rather, they lie in finding creative ways to increase the delivery of what have been considered “legal services” using resources that already exist. Every member of the Working Group on Regulatory Innovation has a profound respect for our shared honorable profession and its requirements of integrity, independence and diligence. There are today aspects of our profession that can and should be performed by non-lawyers, as Justice, then Judge Neil Gorsuch reminded us when he said that “the fact is that non-lawyers already perform—and have long performed—many kinds of work traditionally and simultaneously performed by lawyers. It is entirely unclear why exceptions should exist to help [financially capable populations] but not expanded in ways more consciously aimed at serving larger numbers of lower-and middle-class clients.”<sup>63</sup>

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<sup>63</sup> N. Gorsuch, *supra* n. 16, p. 49.

We hope that our Report will represent a small—but important—contribution toward the accomplishment of that lofty call that all should share. Our work on this project will continue.

Respectfully submitted,

*The Working Group on Regulatory Innovation*

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# APPENDIX A

## A Brief History of the Debate over Alternate Business Structures for Law Firms.

This issue has filled libraries and has generated a good deal of angst and opposition in the legal profession. As Professor Alan Morrison has reminded us, every Section, Commission or Committee of the ABA of which he is aware that has voted to approve non-lawyer financial interest in law firms was voted down by the House of Delegates. Indeed, the ABA House of Delegates Resolution 115, sponsored by the ABA's Center for Innovation and others in February 2020, was drastically watered down before it was adopted. In fact, the original background report was so controversial that it no longer appears on the ABA's website.

For nearly forty years, the ABA and others have discussed the possibilities of changing the allowable structures of law firms. The principal argument in favor of changing those structures was that it would unlock access to capital for law firms, permitting them to expand and increase their profitability. But it was not the law firms that were advocating for a change in the rules, it was the large accounting firms, whose ranks were being diminished and who perceived that an alliance with law firms would increase their access to clients and would enable both the accounting firms and the law firms to expand and increase in profitability. That argument obviously did not carry the day and is no longer being made by most observers. Rather, the argument that is being made today with some force is that allowing law firms to become affiliated with non-lawyers would increase legal productivity and, at least one hopes, increase access to justice and the delivery of legal services.

One of the principal proponents of ABSs is Professor William Henderson of Indiana's Maurer School of Law. In a watershed report commissioned by the State Bar of California and

issued in July 2018, *Legal Market Landscape Report*, Henderson found that there was a fundamental problem of lagging productivity in the legal market. Professor Henderson concluded that although many believed that the principle problem with today's legal profession was that "legal services cost too much . . . yet it is much more accurately characterized as a problem of lagging legal productivity." By that, he meant that the legal profession is a sector, like education and medicine, in which prices tend to go up much faster than worker income. "The reason for this upward spiraling price is that these activities are very human-intensive and involve specialized human capital." As legal services become more and more expensive, "a growing proportion of U.S. consumers are choosing to forgo legal services rather than pay a higher price." As a result, "the legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethical rules hinder this type of collaboration."

Similar to the "cost disease" that NYU Professor William Baumol wrote about in 1996, the cost disease of the legal profession cannot be solved because legal productivity cannot be increased in the current model. "The time and human effort it takes to perform a 45-minute Schubert quartet has not changed in hundreds of years."<sup>64</sup> Henderson's solution: modify the ethical rules to permit lawyers "to closely collaborate with allied professionals from other disciplines such as technology, process design, data analytics, accounting, marketing and finance." Unfortunately, although this solution might improve the delivery of legal services, it has little to do with access to justice.

The ABS model that is most discussed these days is that created by the UK's Legal Services Act of 2007, applicable to England and Wales. The ostensible purposes of that Act were "to support the rule of law, . . . to improve access to justice, . . . to promote the interests of consumers,

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<sup>64</sup> W. Baumol & W. Bowen, *Performing Arts: The Economic Dilemma*, p. 164 (1966).



. . . [and to encourage] the independent, strong, diverse and effective legal profession.” That was sufficiently and probably deliberately bland so that nobody could seriously oppose it and few did. The program is quite complicated and the legislation is hard-to-read. Basically, the law carved out six “reserved activities” including such things as litigation, the right of audience, reserved instrument activities and probate activities. They are reserved to nine categories of “authorized providers” most of whom are licensed lawyers; all other legal services are open to competition from alternative non-lawyer providers. Not every “authorized provider” is authorized to practice each category; only barristers, solicitors and legal executives can practice all of them. Each category of “authorized providers” is in turn regulated by a different “approved regulator” who can authorize the provider to practice any of the six reserved activities that the provider was otherwise not authorized to practice. The law also provides for the licensing of ABSs, including the entity as well as the individuals. Under the auspices of the Legal Services Board, there are five designated licensing authorities that are empowered to authorize ABSs. They include the Solicitors Regulatory Authority, the Council of Licensed Conveyancers and the Institute for Chartered Accountants, i.e. not all lawyers. Individual members of the ABS and the entity itself must be licensed. Each ABS firm must designate an officer who would be responsible for ensuring that professional obligations were met.

In the England and Wales today, there are many different ABS forms, including several in which US companies such as Ernst & Young, KPMG, PriceWaterhouseCoopers and Legal Zoom are authorized to offer legal services in areas other than the “reserved activities.” The expected benefit of this structure is more competition; there is no expectation that it will make either access to justice or access to legal services more available, although that may turn out to be the case. It

should be noted that unlike the US, the UK has a long tradition of non-lawyer-based legal advice and assistance.

A 2016 UK report on prices paid for legal services concluded that the costs for the legal services of conveyancing, divorce and wills were less when those services were delivered by an ABS and that “67% of consumers who paid for private legal work performed by ABSs said that they received ‘good or very good value for their money.’”<sup>65</sup> According to an unpublished study by IAALS, there is evidence that generalist solicitors in the UK, “in spite of their training and professional qualifications, were not apparently performing better than generalist lay advisers.” These surveys were neither robust nor statistically sufficient but they may be directionally correct. Nevertheless, English consumers have more options than American consumers, primarily because of unbundled services and a wide range of advisory services. According to several UK reports, ABSs are more likely than other practice entities to use technology and they show higher productivity and innovation. In addition, “there was no loss of employment for lawyers.”<sup>66</sup>

Professor Stephen Mayson of University College London has recently completed a study of the effects of the 2007 Legal Services Act and has concluded that the creation of ABSs in England and Wales has had no appreciable effect on the access-to-justice gap. The new ABSs are still essentially law firms, according to Professor Mayson.<sup>67</sup>

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<sup>65</sup> OMB RESEARCH, PRICES OF INDIVIDUAL CONSUMER LEGAL SERVICES RESEARCH REPORT, 3 (2016).

<sup>66</sup> G. Hadfield & D. Rhode, How to Regulate Legal Service to Promote Access, Innovation, and the Quality of Lawyering, 67 *Hastings L. Journal* 1191,1212 (2016).

<sup>67</sup> IAALS Virtual Convening on Regulatory Innovation, October 26, 2020.

The Arizona, Utah and California ABS proposals do not address the arguments that have been made against multidisciplinary practice in the past, including the following:<sup>68</sup>

1. Independence. Non-lawyers might compromise a lawyer's professional judgment even though lawyers must be independent from third parties and their clients;
2. Ethical Rules. Non-lawyers might act with impunity because they are not governed by a Code of Professional Responsibility and without training in ethics, might inadvertently violate the ethical rules.
3. Practicing Law. Non-lawyers might inadvertently "practice law" even though they are not licensed to practice.
4. Client Confidentiality. Non-lawyers might gain access to confidential client communications to which they are not entitled.
5. Disclosure of Client Information. Lawyers have ethical obligations to disclose certain client communications in certain circumstances, such as to prevent imminent death, but non-lawyers have no such obligations. The reverse is also true. For example, accountants have affirmative disclosure obligations that lawyers do not have. If accountants and lawyers working in the same firm are advising the same client at the same time, there might be a serious conflict of interest or obligations.
6. Attorney-client privilege. The involvement of non-lawyers in a matter with lawyers might destroy the attorney-client privilege and their presence may make clients reluctant to

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<sup>68</sup> B. Johnson, Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices, 57 Wash. & Lee L. Rev. 951 (2000). This article provides answers to these arguments.

disclose information to their lawyers. In addition, they may increase the opportunities inadvertently to waive the attorney-client privilege.

7. A Potential Conflict-of-Interest. Lawyers have an obligation to promote their clients' best interests, but if non-lawyers are owners in law firms, the lawyers may also have a fiduciary duty to promote the interests of the non-lawyers in their firms. If the lawyer believes that the non-lawyer has given the client incorrect advice, the lawyer's advising the client of that fact would create a potential conflict.
8. Unauthorized Practice of Law. Because the "practice of law" is not rigorously defined, it is possible that non-lawyers might intentionally or inadvertently engage in the unauthorized practice of law.
9. Fee-splitting. One of the reasons for the prohibition against fee-splitting is to prevent the practice of "running and capping" (sometimes called "ambulance chasing") in which a non-lawyer recruits clients in return for a percentage of the lawyer's fee, inducing lawyers to be more interested in profit rather than the client's interest.
10. Competitive Concerns. Some have argued that allowing non-lawyers to have financial interests in law firms might lead to "Walmart law" that would allow large retail companies to compete unfairly with small law firms, leading to the ruin of the legal profession by putting smaller law firms out of business. In fact, this is already happening with services such as "Legal Zoom."

Perhaps for those reasons, the ABA has steadfastly refused to change its rules to allow ABSs. As early as 1928, the ABA prohibited lawyers sharing fees with non-lawyers and its 1980 Canon 3 provided that "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law." The argument set forth in the ABA's Ethical Considerations for that Canon was that the "purpose

of the legal profession is to make educated legal representation available to the public” and that Canon 3 would allow the public to be able to rely upon the “integrity and competence of those who undertake to render legal services.” That may not be the case with an ABS.

In 1977, the ABA’s Kutak Commission, which was charged with reviewing and possibly revising the Model Code of Professional Responsibility, considered amending Rule 5.4 to permit non-lawyers to hold financial interests in law firms. In its “proposed final draft” issued in 1981, the Kutak Commission proposed amending Rule 5.4 to allow lawyers to partner in organizations in which a non-lawyer held a management interest or held stock or interests in the organization. But the reason proffered was unsatisfactory to the ABA: “Given the “complex variety of modern legal services,” lawyers could no longer “guarantee that their business structure guaranteed compliance with the existing Rules of Professional Responsibility.” The House of Delegates predictably rejected the proposal for four reasons: (1) the proposed rule interfered with the lawyer’s professional judgment; (2) the proposed rule might lead to corporate ownership and operation of law firms (called by some the “Fear of Sears”); (3) the proposed rule would destroy lawyer professionalism; and (4) the rule might have other negative but unknown effects on the legal profession.

Later, in 1998, the ABA created a Commission on Multidisciplinary Practice. That Commission also recommended that lawyers be permitted to share fees and to practice in concert with non-lawyers but that recommendation too was rejected by the House of Delegates. In fact, the ABA went even further and passed Resolution 10F that, among other things, called upon states that permitted law firms to own non-lawyer businesses to pass rules prohibiting non-lawyers from owning and controlling the practice of law. The Commission on Multidisciplinary Practice was disbanded promptly thereafter and the subject of multidisciplinary practice essentially

disappeared, as did the notion that an accounting firm or an investment bank might own or take a share of ownership in a law firm.

However, the subject did not entirely disappear; in fact, it has recently come back to life in a different form. Nevertheless, today, only one US jurisdiction, the District of Columbia, allows non-lawyers to have an interest in law firms, although at least three other states, Utah, Arizona, and California may soon be added to the list.

# APPENDIX B

## Lessons Learned from Washington State, Arizona and Utah

We describe below the requirements and implementation mechanisms of the three states that have already established licensing programs permitting non-lawyers to perform certain legal services. As noted above, these three programs are far broader than the limited programs that we recommend in this Report. However, in the event that the programs in Arizona and Utah are successful (Washington State's program has been suspended) they might provide a useful template for New York to consider in the future and for that reason, we believe that it is important to understand exactly how each of the three programs was designed to work and why one of the three was suspended.

### Washington State

The Washington Supreme Court gave control over its LLLT program to the Washington Bar Association, which created the admission requirements for the program. They were extensive and in hindsight most observers believe that was a mistake. Although the Bar Association "supported" the program, the requirements were so onerous that very few actually applied for the license. Today, there are only 39 LLLTs in Washington State.

Applicants for the program had to have an Associate's degree or higher and were required to take 45 credits of legal studies at an ABA-approved law school or an ABA-approved paralegal program. Those requirements included eight credits of Civil Procedure, three credits of Contracts, three credits of Interviewing and Investigation Techniques, three credits of Law Office Procedures and Techniques, eight credits of Legal Research, Writing and Analysis, and three credits of Professional Responsibility. Waivers were allowed for applicants who had ten years or more of

experience as a paralegal. Applicants had to pass three examinations, a Core Competency Exam, an LLLT Practice Area Exam,<sup>69</sup> and a Professional Responsibility Exam. Applicants were also required, prior to licensing, to obtain 1,500 hours of substantive law-related work experience as a paralegal or legal assistant supervised by a lawyer. Applicants were also required to pass a character and fitness review.

The practice of LLLTs was supervised by an LLLT Board and rules of professional conduct were created that were nearly identical to the rules of professional conduct for lawyers. Under the Supreme Court's Admission to Practice Rule 28, LLLTs were permitted to render legal assistance only in the area in which the LLLT was licensed and to perform only the following limited legal assistance:

1. Obtain relevant facts and explain the relevancy of such information to the client;
2. Inform the client of applicable procedures and the anticipated course of the legal proceeding;
3. Inform the client of and assist with applicable procedures for proper service of process and filing of legal documents;
4. Provide the client with self-help materials prepared by a Washington lawyer or approved by the LLLT Board, which contain information about the relevant legal requirements, case law basis for the client's claim, and venue and jurisdiction requirements;
5. Review documents or exhibits that the client has received and explain them to the client;
6. Select, complete, file and effect service of forms that have been approved by the State of Washington . . . forms the content of which is specified by statute, federal forms, forms

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<sup>69</sup> For example, the Family Law Practice Area Exam was a 90-minute essay question a 90-minute performance test session and a 90-minute multiple choice session.



prepared by a Washington lawyer or forms approved by the LLLT Board and advise the client of the significance of the forms to the client's case;

7. Perform legal research;
8. Draft letters setting forth legal opinions that are intended to be read by persons other than the client;
9. Draft documents beyond what is permitted in paragraph (6), if the work is reviewed and approved by a Washington lawyer;
10. Advise the client as to other documents that may be necessary to the client's case and explain how such additional documents or pleadings may affect the client's case;
11. Assist the client in obtaining the necessary records, such as birth, death, or marriage certificates;
12. Communicate and negotiate with the opposing party or the party's representative regarding procedural matters, such as setting court hearings or other ministerial or civil procedure matters;
13. Negotiate the client's legal rights and responsibilities, provided that the client has given written consent defining the parameters of the negotiation prior to the onset of the negotiations; and
14. Render other types of legal assistance when specifically authorized by the scope of practice regulations for the approved practice area in which the LLLT is licensed.

At the time the LLLT program was suspended, the LLLTs were only permitted to render legal services in certain specified domestic relations matters: divorce and dissolution, parenting and support, parentage or paternity, child support modification, parenting plan modification, domestic violence protection orders, committed intimate relationships only as they pertain to parenting and

support issues, legal separation, nonparental and third party custody, other protection or restraining orders arising from a domestic relations case, and relocation. In addition, the LLLTs were required to complete five credit hours in basic domestic relations subjects and ten credit hours in advanced and Washington specific domestic relations subjects. They were also required to take annual CLE courses and to have professional liability insurance in the amount of at least \$100,000 per claim.

The Washington State program was suspended in mid-2020 because it was deemed to be too expensive and because there were very few applicants for the program. At the moment, there are only 39 LLLTs in Washington State.

### Arizona

Arizona's LP program was created by an amendment to the Arizona Code of Judicial Administration<sup>70</sup> and was limited to certain substantive areas of the law and appearances in certain courts: family law, limited civil cases before a municipal or justice court (including landlord-tenant and debt collection cases), criminal misdemeanor matters where the penalty of incarceration was not at issue, and administrative law before an administrative agency that allows appearance by LPs.

Applicants to the Arizona LP program must have at least an associate's degree in paralegal studies or an associate's degree in any subject plus a certificate in paralegal studies approved by the ABA. Such applicants for a license in family law and civil practice had to complete three credit hours in Family Law, six credit hours in Civil Procedure, three credit hours in Evidence, three credit hours of Legal Research and Writing and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy. There are similar requirements for criminal law and administrative law licenses. For all three licenses, there was

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<sup>70</sup> Section 7-210 of Chapter 2 of Part 7.

also a three credit hour requirement in Professional Responsibility. The credit hour requirements were similar for applicants with a bachelor's degree in law, a Master of Legal Studies degree, a JD degree or an LLM from an accredited law school (for foreign lawyers only). Within one year of being licensed, LPs must complete the Arizona state bar course on Professionalism.

If the applicant does not meet the credit requirements described above, the applicant must have completed seven years of full-time substantive law-related experience within the ten years preceding the application and must have had at least two years of such experience in practice area in which the applicant seeks licensure.

All applicants must also successfully pass an examination that includes questions on legal terminology, substantive law, client communications, data gathering, document preparation, the ethical code for LPs and professional and administrative responsibilities pertaining to the provision of legal services. They must also make the same required public disclosure that lawyers are required to make with respect to the availability of malpractice insurance and they must submit fingerprints for a criminal background investigation. They are bound by most of the provisions in the Arizona Rules of Professional Conduct and they are affiliate members of the state bar.

Quarterly each year, the Arizona State Bar is required to supply to a newly created Board of Nonlawyer Legal Service Providers data concerning charges filed and complaints lodged against LPs and recommendations concerning modifications or improvements to the LP program.

### Utah

Utah's LPP program was originally opposed by sixty percent of the bar, according to the Utah Task Force, and perhaps for that reason, Judge Deno Himonas anticipates that when finally implemented, the program will be small. In December 2019, Judge Himonas told *Above the Law*

that he anticipates that there will be only 20 LPPs in two years and only 200 LPPs in the next decade.<sup>71</sup>

The program requires applicants to have a law degree from an ABA-approved law school, an associate's degree in paralegal studies, a bachelor's degree in paralegal studies or a bachelor's degree in any subject plus a paralegal certificate from an accredited program or fifteen credit hours of paralegal studies from an accredited school. Waiver requests may be granted to applicants who can show that they have completed seven years of full-time substantive law related experience, 500 hours of substantive law-related experience in temporary separation, divorce parentage, cohabitant abuse, civil stalking, custody and support and name change under a supervising attorney. They must also provide proof that they have passed an ethics exam and the exams for the practice area in which they will be licensed.

In addition, applicants other than those with a law degree must have 1500 hours of substantive law-related experience within the last three years, including 500 hours of experience in the above-mentioned domestic relations matters for licensure in family law or 100 hours of substantive law-related experience in forcible entry and detainer or debt collection, all under the supervision of a licensed Utah attorney or LPP. Applicants without a law degree must also complete an approved course on Ethics and must have a recognized paralegal certificate.

All applicants must pass exams in ethics and in the specific area in which they will be practicing. They must also pass a character and fitness review and they must supply an FBI background check, driving and criminal records, military records, credit history and references from three persons, one of whom must be a lawyer.

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<sup>71</sup> L. Moran, Utah's Licensed Paralegal Practitioner Program Starts Small, Above the Law, December 12, 2019.

Utah's LPPs will be licensed to practice law in three areas: family law, landlord-tenant law (including forcible entry and detainer) and debt collection matters in which the amount in question does not exceed the limit for small claims courts.

When licensed, the Utah LPPs will be permitted to offer the following legal services:

1. Enter into a contractual relationship with a natural person;
2. Interview a client to determine a client's needs and goals;
3. Assist a client in completing required forms and obtaining documents to support these forms;
4. Review documents of another party and explain those documents to a client;
5. Inform, counsel, assist and advocate for a client in a mediated negotiation;
6. Complete a settlement agreement, sign the form and serve the written settlement agreement;
7. Communicate with another party or the party's representative regarding the relevant forms and matters; and
8. Explain to a client the court's order and how it affects the client's rights and obligations.

Unlike Arizona's program, Utah's LPPs cannot appear in court on behalf of their clients. However, the LPPs are governed by LPP Rules of Professional Conduct and LPP Discipline and Disability Rules and are considered officers of the court. They are subject to a requirement to have trust accounts and to perform pro bono services. The program is administered by the Utah State Bar.

# APPENDIX C

## Memo

To: Hon. Edwina G. Mendelson,  
Deputy Chief Administrative Judge for Justice Initiatives

From: Shante Thomas, MPA

Date: October 2, 2020

Re: Research on National and International Nonlawyer Programs

Below are general descriptions and information on national and international nonlawyer programs. Please note that this is an ongoing research project and as I uncover additional programs or resources these materials will be updated.

### **Report: Nonlawyer Navigators in State Courts**

In July 2019, the Justice Lab at Georgetown Law Center published a study to survey the landscape of nonlawyer navigator programs in state courts assisting self-represented litigants. The report identified and analyzed 23 programs in 15 states and the District of Columbia. The study presents a new look at the outlines of these programs and suggests recommendations to further incorporate nonlawyer navigators into justice system settings. Information about national programs referenced in this memo were drawn from this study.

### **Varied Approaches to Nonlawyer Navigator Programs**

The Georgetown study found no visible single model for the navigator program; rather, there were considerable variations in staffing, scope, and design. The most common staffing arrangements involved paid staff, AmeriCorps members, and community volunteers (including high school, undergraduate, and graduate students). All of the programs studied required navigators to undergo training prior to assisting litigants, and navigators were supervised in some manner during their time with the programs.

With considerable variation across programs, navigators assisted litigants in several ways, including help filling out paperwork, physically navigating the courthouse, getting information and referrals, and communicating with opposing counsel. Some navigators also reported serving as emotional support to self-represented litigants. While many of those served by these programs were self-represented, some services were offered to both parties in a case.

## Program Impacts and Recommendations for Further Expansion

At the time of the study, several of the programs had conducted evaluations to assess impact. The most common themes were the beneficial impact on the completeness and accuracy of self-represented litigants' forms and filings, as well as feeling prepared. With respect to procedural justice measurements, the impact of giving litigants a space to be heard and share their stories also had positive impacts.

One major takeaway from the study was the need for funding to maintain navigator programs. According to the report, "many programs lack the institutional commitment to garner necessary resources for longer-term program sustainability, let alone expansion." The report also highlights the opportunities presented by these programs for courts to learn more about the self-represented litigant experience.

## **Canadian Report on Public Legal Education**

I also reviewed a report conducted by Clare Shirtcliff, a solicitor with Law for Life: The Foundation for Public Legal Education, a charity which runs the website AdviceNow. This website provides quality information on rights and legal issues for the general public in England and Wales. Ms. Shirtcliff spent five weeks in four provinces researching Public Legal Education (PLE) projects to find out how Self-Represented Canadian citizens are given the knowledge, skills and confidence to help them resolve everyday legal problems (and see if it could be replicated in the UK).

The report looked at four service providers: Vancouver Access to Justice Centre, Law Information Centres (LinC), Genesis Project and the Legal Services Society (LSS). In terms of service delivery, these programs reminded me of similar programs we have like Help Centers, Law Libraries and Legal Hand. The one program that stood out to me was the Legal Services Society. This organization accepts and processes applications for Legal Aid but also provides some direct legal services to the public. Unlike the other programs, only LSS provided limited legal advice and representation in family law.

## **Litigant in Person Support Strategy - England, Wales and Scotland**

Part of the research done by Clare Shirtcliff in Canada contributed to the development of the Litigant in Person Support Strategy (LIPSS). LIPSS is a national partnership of charities working together to improve the experience of people facing the legal process alone by improving access to information, practical support, advice and representation. It is a collaborative project involving The Access to Justice Foundation, RCJ Advice, LawWorks, Law for Life, and Support Through Court and Advocate. Working in partnership with the Ministry of Justice, these six organizations, while independent, come together to deliver on the aims of LIPSS ("the Partners"). Through these services, people can access help online, in person and over the phone. The journey of a litigant in person is not linear, people access help at different points and require support tailored to their legal matter and wider needs. Whether it be through using an online benefits calculator and letter writing tool, getting one-time pro bono advice and representation, or having someone

provide emotional support during their hearing, the Partners work to ensure that each or all of these services are available for those who need them.

### **New York Court Navigator Program**

Angela Redman, Esq., Coordinator of the NYS Court Navigator Program met with colleagues in the Office for Justice Initiatives (OJI) in April 2020 to discuss revamping the program. The consensus was that for the program to be expanded statewide there are a few considerations. The program would need a funding source and partnerships with non-profit organizations, legal service providers and local colleges. The OJI should provide guidance and support to establish the programs, but they would ultimately be supervised by the local court.

Listed below are some of the national programs that have been identified:

1. **Alaska-** Abused Women’s Aid in Crisis (AWAIC) is fortunate to have three legal advocates, covering all open courthouse hours, including evenings and weekends. Their legal advocates provide assistance with protective orders and can make referrals to outside agencies for legal representation in matters of divorce and custody. This service ensures that victims who are in crisis will have access to someone who can help them navigate a sometimes-confusing process.
2. **Maricopa County, AZ-** Providing Access to Court Services (PACS) AmeriCorps Members help self-represented litigants navigate the often-confusing court system. While serving in the PACS program members: learn about the judicial system and court process, gain real-life experience assisting court customers, promote access to justice to court visitors and provide resources to court customers.
3. **California-** JusticeCorps is a unique national service program that has helped over one million Californians find access to justice since it began in 2004. Powered by a partnership among California courts, campuses, community legal assistance providers, and AmeriCorps, JusticeCorps recruits college students and recent graduates who help people coming to court without attorneys. JusticeCorps members assist self-represented litigants by serving in court-based self-help centers in the Bay Area, Los Angeles and San Diego educating litigants on their legal options, mapping out next steps, and helping them tell their story. By providing neutral assistance—not legal advice—JusticeCorps members empower litigants to understand their options, to have their voices heard, and to confidently move forward with their legal matter.
4. **Westchester, NY-** The mission of the Bravehearts, a youth-led non-profit, is to empower young adults touched by the child welfare system to become active and authentic leaders in their own lives as they transition into adulthood. Bravehearts M.O.V.E. New York is the chapter-lead for the state. They work to improve services and systems that support positive growth and development by uniting the voices of individuals who have a “lived”



experience in various systems including mental health, juvenile justice, education and child welfare. *(not currently active)*

5. **New York City-** Housing Court Answers (HCA) was founded in 1981 when a group of concerned advocates working at community-based groups and legal service offices started two task forces to help tenants without lawyers in the Bronx and Brooklyn Housing Courts. HCA educates and empowers NYC tenants and small homeowners through information tables and a hotline. They provide guidance and support on Housing Court and housing law, rent arrears assistance, and homeless prevention. They also assist NYCHA tenants with an information table at 803 Atlantic Avenue in Brooklyn. HCA also conducts trainings for community groups, unions, elected officials and others on Housing Court procedures, eviction prevention programs and housing law. And, last but most important, they fight every day for the rights of unrepresented people in Housing Court.
6. **Queens, NY** - Pro Bono Net partnered with Legal Services for the Elderly in Queens (Part of Jewish Association for Services for the Aged - JASA) to develop a new web app that enables social workers to perform quick legal screenings for homebound and disabled seniors. JASA assists many at risk Queens seniors with their emergency issues, in particular housing, consumer debt, and elder abuse cases. However, many seniors are homebound or face significant obstacles getting legal help and to a courthouse. In many ways they personify the broader justice gap in America.
7. **New York City-** Legal Hand trains local volunteers at storefront centers in some of New York's most vulnerable neighborhoods. These volunteers provide free legal information and referrals to their neighbors. Assistance can take many forms, including help with navigating the social services system, completing online legal forms, and drafting form letters. A legal services attorney is on-site at each Legal Hand office to train and assist volunteers.

Legal Hand operates in the Brooklyn neighborhoods of Brownsville and Crown Heights, in Jamaica, Queens, and in the Highbridge and Tremont neighborhoods of the Bronx. The program is run by the Center for Court Innovation in collaboration with the New York State court system, the Legal Aid Society, Legal Services NYC, and New York Legal Assistance Group.

8. **New York City-** Guardian Ad Litem Program (GAL). While most GALs are attorneys, it is not necessary to be an attorney to become a GAL in Housing Court. It is necessary for the prospective GAL to have some legal or social service background. Court-appointed GALs are expected to advocate on behalf of their client with the goal of making any necessary interventions to prevent eviction. Although the specific responsibilities of a GAL vary according to the case, common duties often include making court appearances, coordinating with social service agencies to secure needed entitlements or services, and negotiating settlements with other parties involved in the case

9. **New York City-** Sanctuary for Families Court Advocates Project (CAP) trains and mentors summer associates and new law firm associates not yet admitted to the bar to advocate for pro se domestic violence victims seeking orders of protection. CAP places advocates directly in the courthouse and supervises them while they interview petitioners, draft petitions, and serve as advocates during their initial court appearance. CAP participants receive a five-hour intensive training and a detailed training manual before going to family court.
10. **Nassau County, NY-** Nassau County's Matrimonial Navigator Program utilizes students from Hofstra Law School who are taking the Family Law and Skills class during the school year, and it utilizes court interns during summer months. The Navigators help unrepresented litigants fill out motion papers, statements of net worth and Judgment of Divorce packets. The Navigators are trained by the Supervising Matrimonial Judge's staff and personnel from the clerk's office. Navigators explain the paperwork and identify where information should be listed on the forms, but do not provide legal advice. Due to the pandemic, the program is currently operating virtually.
11. **District of Columbia-** Supportive Advocacy Team (SAT) members are essential personnel at the city's two Domestic Violence Intake Centers (DVIC), providing comprehensive court-based advocacy services. SAT Advocates are a foundational link to further support survivors navigating the aftermath of a crisis. Some of the services they provide include: guidance through the Civil Protection Order process; referrals to a pro bono attorney; court preparation and accompaniment; social service referrals for mental health services, housing, and more; safety planning; assistance with public benefits; basic needs support; and assistance with any other portion of the court or social services system.
12. **Georgia-** The Southwest Georgia Legal Self-Help Center began the Legal Navigator program in June 2018. They provide legal information while also helping people navigate through the court system. While the courts were closed during the height of the pandemic, navigators went outside to serve people wearing masks and practicing social distancing to help patrons fill out forms. Calls to the center were re-routed to their personal cell phones. Navigators also used Facebook to inform the public and even met with people in local grocery stores to provide legal assistance. They maintained contact with 38+ partners, meeting almost anywhere. Between March 1, 2020 and June 30, 2020, they serviced 1,033 patrons. They have also used technology like Lifesize, Zoom or Facebook for videoconferencing purposes. Looking forward, navigators hope to host virtual town halls and zoom classes for the public.
13. **Illinois-** The Illinois JusticeCorps currently serves 13 courthouses in 11 counties. Three years ago, the Access to Justice (ATJ) Commission launched the Self-Represented Litigant (SRL) Coordinator grant program which is the second program to serve SRLs. This year, to fulfill a major goal of the Illinois Judicial Conference's strategic agenda, the ATJ Commission expanded these existing networks to encompass representatives in all 24 judicial circuits. This Court Navigator Network of clerks and court staff based in

courthouses throughout the state serves as a bridge, linking their courthouses with others throughout the state to share ideas, develop new resources, and establish programs for assisting SRLs, perhaps through additional and new methods because of COVID-19.

14. **Maryland-** Court navigators are undergraduate, graduate and law students who have been trained about how the court works and can help an unrepresented person navigate the steps of the court process. This program focuses on helping tenants who are suing landlords for failure to repair hazardous housing conditions. The program also assists defendants in debt collection cases, working alongside attorneys from the Maryland Volunteer Lawyers Service and Pro Bono Resource Center.

Court navigators provide tenants with basic information about their legal options, assist them with filling out court forms, go with them into the courtroom hearings and into hallway negotiations, and aid with any follow-up steps afterward. They also help tenants with organizing their paperwork, figuring out budgets, and getting access to resources.

15. **Montana-** Justice for Montanans Americorps project places 23 members directly in local Montana communities to help provide and expand intake and outreach, legal information and referral services for low to moderate income residents seeking civil legal assistance.
16. **Oklahoma-** The courthouse Navigator Project provides guides to assist individuals who don't have legal representation. Initiated by the Access to Justice Commission, in collaboration with Americorps, Legal Aid Services and the University of Oklahoma College of Law. The project stations volunteer law students within the Office of the Court Clerk to provide basic legal information and serve as guides for self-represented court users.

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