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## Recommendations of the Conference

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# RECOMMENDATIONS OF THE CONFERENCE ON THE DELIVERY OF LEGAL SERVICES TO LOW-INCOME PERSONS<sup>1</sup>

## I. RENDERING LEGAL ASSISTANCE TO SIMILARLY SITUATED PERSONS

### A. *Benefits of Collective Representation and the Impact of Restrictions*

LIKE other individuals, low-income persons often have common legal problems, interests, or objectives, which can be served most effectively and efficiently through some form of collective action. Possibilities include: class actions; litigation on behalf of one or more individuals or entities that is intended to achieve a result that will affect others who are similarly situated; administrative or legislative advocacy; creating and engaging in action through a formal entity or informal association of individuals; and community education. Low-income persons should have available to them all these options. Where individuals seek to attain a common objective, lawyers should be encouraged to assist their clients in taking advantage of those options that will be most effective in a particular situation.

Lawyers serving low-income persons and communities should not be subjected to restrictions on professional practice that preclude them from assisting clients through class actions, administrative or legislative lobbying, or other forms of collective action that may, in a given situation, be the most effective and efficient means to achieve a common objective.

#### *Legislative Advocacy:*

The lawmaking process in the United States is structured to involve a "marketplace of ideas." Because legislators cannot be experts in all areas of the law, they depend on input from a range of persons with special knowledge about the impact on society, or on different groups, of existing or proposed laws. If lawmakers are deprived of access to persons who have relevant specialized knowledge, the fairness and effectiveness of the process is compromised (diminished), and the probability of producing fair, balanced, and effective laws is reduced.

Legislative access to legal expertise from lawyers representing the poor is particularly important because impoverished segments of society have particularly limited abilities to wield influence in the legislative arena, as well as limited abilities to obtain representation to

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1. The recommendations are consecutively numbered for ease of reference. Citations to these recommendations elsewhere in this volume shall be as follows: *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 Fordham L. Rev. 1751, Recommendation \_\_\_, at \_\_\_ (1999) [hereinafter *Recommendations*].

challenge problematic legislation, and, therefore, are particularly vulnerable to poorly designed legislation.

Moreover, laws that are poorly drafted, obsolete, or inefficient are breeding grounds for litigation. It is wasteful of the public fisc to hamper efforts to update and improve laws. Restrictions on the participation in the legislative process of legal services attorneys, who are uniquely able to identify and explain to lawmakers problems with existing and proposed laws affecting poor people, are contrary to efficient and effective lawmaking, and likely to encourage litigation. Legal problems that might be resolved through a change in law are more likely to be litigated if poverty lawyers are not permitted to propose and advocate for such a legislative change.

We believe that it is in the interest not only of low-income clients, but also of legislators, clients, and society at large, which pays for all the systems for making and enforcing the laws, to enable all attorneys, including publicly funded legal services attorneys, to carry out fully their responsibilities under Model Rule 6.1<sup>2</sup> (concerning voluntary pro bono publico service).

For the foregoing reasons, we recommend that:

1. Funders of legal services for the poor refrain from imposing limits on the access of legal-services attorneys to the law making process; and
2. Standards for evaluating legal-services programs should identify an ability and commitment to participate in lawmaking as one component of the most effective delivery system.

*Class Actions:*

The public has a strong interest in equal access to justice and in the efficient resolution of legal disputes affecting large numbers of people. Accordingly, we have considered the following in formulating our recommendations:

*Other persons affected by the common legal issue:* Many low-income persons affected by a common legal problem and who would benefit from a class action resolution are unable to obtain counsel at all. For them, justice would be denied altogether. In an era of very limited resources for low-income persons, if there is not a class action, then many people will go unrepresented.

*Judicial and public economy:* Repetitive litigation involving the same issue for different litigants is wasteful of judicial resources in that it involves repeated interpretation of the same law. It often leads to inconsistent decisions at the trial level, generating repeated appeals. This inefficiency is rendered even more wasteful if counsel for the party adverse to a legal services client is publicly funded.

*Impact on other users of the judicial system:* When court calendars are clogged with numerous cases involving the same issue because

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2. Model Rules of Professional Conduct Rule 6.1 (1998).

court and counsel are barred from using the class action mechanism to resolve the issue, resolution of the cases of other litigants is delayed. This makes the judicial system less efficient and reduces public confidence in, and support for, the judicial system. This is a serious concern, especially at a time when court case loads are growing faster than the judicial resources available to resolve them.

*Quality of justice:* One of the hallmarks of an effective government of law is that similarly situated persons are treated the same by the law. Multiple litigation in different trial courts on the same issue often produces inconsistent outcomes. In legal services programs, with limited resources, not all adverse decisions can be appealed. Some litigants are therefore likely to be harmed irreparably by a decision. Even if an appeal in another case leads to a favorable appellate decision for a low-income client, that appellate decision often cannot be applied to prior trial court decisions in other cases that have not been appealed. These inconsistent outcomes produce the conviction in those harmed that they have been treated unjustly by the justice system. This undermines or destroys their respect for the law, thus weakening the fabric of society.

*Legal services resources:* In appropriate cases, a class action is an extraordinarily effective way to address a legal problem affecting a large number of clients. A legal services program that cannot ask the court to utilize the class action mechanism to resolve a question efficiently is forced to bring the same case repeatedly before the courts, thereby wasting resources that are already inadequate to meet client needs and eliminating its ability to represent all clients. If the office attempts to refer the case to another lawyer to undertake it as a class action, then there may be no lawyer available with the requisite competence (as discussed below), or no lawyer available at all.

All attorneys have a professional responsibility to avoid wasting judicial resources and to seek the most efficient ways to resolve client problems. We therefore believe that denying a class of attorneys and their clients access to all of the tools of judicial economy, and denying the courts in a certain class of cases the ability to administer justice most fairly and efficiently, undermines the ability of both lawyers and judges to carry out fully their professional responsibilities.

For the foregoing reasons, we recommend that:

3. Funders of legal services programs refrain from denying legal services program counsel, or the courts in cases involving such counsel, access to class action mechanisms when appropriate; and
4. Legal services programs' boards, in light of their fiduciary responsibility to ensure that program resources are used most cost effectively, consider whether, in seeking funding, they have a professional responsibility to explain to funders the negative impact of such restrictions on the ability of legal services pro-

gram counsel to carry out fully their professional responsibilities to their clients and to the court.

*A Lawyer's Individual Role in Agency and Law Reform:*

ABA Model Rule 6.1 makes it the responsibility of every attorney to render public service, a responsibility which includes participation in activities that improve the laws and the legal system.<sup>3</sup> Legal services attorneys are not exempt from that responsibility. Therefore, we recommend that:

5. Legal services attorneys who are not permitted to use program resources to bring an issue to the attention of lawmakers consider whether they have a responsibility under Rule 6.1 to undertake such efforts on a pro bono basis, and that legal services programs that are subject to restrictions not discourage them from doing so.

*B. Competence*

In order to provide competent, high-quality representation in matters involving the common legal problems, interests, or objectives of low-income persons, the lawyer must possess not only relevant legal skills, but also knowledge about the community being served. Therefore, we recommend that:

6. The lawyer should strive to:
  - (a) understand the origin and dynamics of racial, gender, and economic inequality in the client community;
  - (b) know or strive to learn the context of community issues, including community history, economics, politics, and demographics, as well as its resources, leaders, allies, and adversaries;
  - (c) acknowledge and be aware of the lawyer's own biases and the limitations of the lawyer's own knowledge;
  - (d) identify and obtain information on institutions and people who affect the interests of clients (e.g., police, landlords, welfare departments, school officials, and the media);
  - (e) establish working partnerships and coordinate advocacy with others who work with client groups;
  - (f) respect clients' autonomy, privacy, and confidentiality; and
  - (g) overcome obstacles to establishing trust based on differences in race and class between the lawyer and client.

To the extent that restrictions by funders impede the lawyer's ability fully to represent client communities, they compromise the ability to provide competent representation and thus contradict the mission of seeking equal justice.

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3. *Id.*

*C. Class Actions*

7. Even if an individual client's interests may be adequately served through other means, the lawyer should be prepared, where appropriate, to provide full information about the possibilities for seeking a broader impact, so that the client has the option to consent to undertaking a course of action aimed at achieving that objective. If the lawyer is unable to provide this type of representation, then the lawyer should attempt to provide an appropriate referral.
8. Among the factors that a lawyer should consider in deciding whether to bring a class action are:
  - (a) whether the class action is likely to benefit the class, as well as benefit the named individuals;
  - (b) whether it is better to proceed with an organizational plaintiff rather than a class action;
  - (c) whether the lawyer has the capacity to handle adequately not only the litigation but anticipated monitoring and enforcement of the potential relief;
  - (d) whether the class action device is the preferable means to achieve the best relief for the class and the named individuals; and
  - (e) whether the class action is consistent with the resource allocation and priorities of the organization employing the lawyer.
9. Among the factors that a lawyer should consider in deciding how to define the proposed class are:
  - (a) whether potential class members in geographical areas other than the place of residence of the named individuals have access to attorneys likely to undertake similar litigation on their behalf;
  - (b) whether potential class members in other geographical areas who do have access to lawyers likely to undertake similar litigation on their behalf would be precluded from doing so by including them in the class;
  - (c) how a more inclusive class definition would provide representation to potential class members who would not otherwise be represented, would affect the likelihood of success or extent of relief, or would cause the lawyer to expend disproportionate resources on the litigation;
  - (d) the degree to which the lawyer has sufficient knowledge of the contextual circumstances in which the claim arises for differing potential members of the class (see the section above on competence);
  - (e) whether the lawyer has the resources or access to the resources necessary to monitor and enforce the anticipated relief for the defined class;

- (f) whether the class as defined will be manageable, and whether the lawyer is able and willing to manage it; and
  - (g) the effect of the definition of the class on the possibility of settlement.
10. Lawyers undertaking class representation should enter into a retainer agreement that clarifies the extent of representation and the responsibilities of the lawyer and the class representative. There is a need for further study on whether such a retainer can limit the scope of representation in a way that allows the attorney to refuse to represent the class on a potentially meritorious appeal, and, if so, the extent to which judicial knowledge or approval is required for such a refusal.
  11. In the class action context, the interests of individual class representatives may conflict with those of other class members. Lawyers should ensure that class representatives understand their role as fiduciaries for the class. Lawyers should attempt to protect individual representatives' interests within the context of advocacy for the class as a whole, but if a conflict is unavoidable, they must act in the interests of the class as a whole.
  12. Assuming that it is permissible for the lawyer to decide to withdraw representation at a particular stage of the case (e.g., post trial), the decision whether or not to do so should be made with due regard for such relevant considerations as: (a) possible limitations of the lawyer's available resources; (b) the impact of withdrawal on the class; (c) the class's or clients' reasonable expectations; (d) availability of alternative counsel; and (e) the likelihood of success.
  13. There may be situations where, because of unanticipated changes in the law or legal processes, or similar developments, it is appropriate for a lawyer to withdraw from the representation of a class. Although such situations are difficult to define precisely, further study should be undertaken toward developing principles that should guide this decision and the lawyer's obligations (such as to assist in obtaining substitute counsel) in such situations.

#### D. *Representation of Entities and Associations Serving or Comprising Low-Income Persons*

Representing community groups is important work in light of such groups' valuable role in improving neighborhoods and communities, building social capital, and solving collective problems. Community groups need legal assistance in a number of areas, including: initial structuring, acquiring resources, maintaining their operations, complying with regulatory regimes, and otherwise accomplishing their objectives.

14. In representing a group, lawyers should draft clear retainer agreements spelling out the scope and objective of the representation.
15. Representing a group competently often requires an understanding of a specialized area of transnational law. The lawyer also must develop a detailed understanding of the group, its history, its processes, and its objectives. The lawyer should recognize needs for other kinds of technical assistance, such as accounting and organizational development, and should work with the leadership to identify resources to address these needs.
16. The rules of professional conduct that govern entity representation apply in this context. For example, lawyers generally should advise the leadership of the group, and should defer to its decisions on behalf of the group.
17. Where clients with common interests would be served well by the creation of an entity, it is appropriate to advise them of the option and to assist them in exploring the possibility. Lawyers working with an emerging organization can play an essential role in assisting the group in choosing a structure, evaluating goals, and defining its processes. In counseling the group, the lawyer should be alert to situations where:
  - (a) the decisionmaking process departs from the process previously defined by the group in light of its mission;
  - (b) substantive decisions appear to be inconsistent with the group's mission or the interests of those whom the group represents; or
  - (c) substantive decisions appear to be inconsistent with the retainer agreement.In these and similar situations, the lawyer should be guided by Model Rule 1.13(b). However, the lawyer should be careful to avoid usurping the functions of the group's leaders or substituting her judgment for theirs.
18. Further study should focus on whether traditional conflicts-of-interest principles should control the representation of multiple community groups. Factors to be considered should include the availability of alternative representation (including pro bono representation from the private bar) and questions about the adequacy of clients' consent to waive conflicts.

#### E. *Building Coalitions and Collaborative Relationships*

Lawyers and law offices serving low-income clients and communities should be encouraged to participate in coalitions and to build collaborative relationships across professions and between client groups and other entities that address issues relevant to the client population. Doing so enables lawyers to better represent their clients or client



community by: (1) enabling lawyers to develop competence, by providing access to information relevant to the representation of their clients; (2) providing lawyers access to individuals and organizations that may assist the lawyer in dealing with processes with which those individuals or organizations have superior experience or expertise; (3) efficiently disseminating law-related information of relevance to the community, thus facilitating educational objectives of the lawyer or law office; and (4) expanding or providing support for participation in legislative advocacy and developing public awareness around client and community matters.

Coalitions or collaborative relationships with other professionals and client groups allow the lawyer to exchange information, skills, and strategies. In addition, organizers and client groups often possess both a knowledge of community resources and constraints and the skills and experience of bringing people and groups together. As the legal services community continues to shrink, these relationships are essential.

Increasingly, coalitions and professional collaborations are being recognized for their ability to disseminate information efficiently and train the community on law-related issues and procedures. Collaborations that provide another means to "legal access" are empowering to a client community.

Law reform is often best accomplished through legislative advocacy as well as litigation. Consequently, coalitions can provide a lawyer with an organized body that will advocate politically (and through the media) on an issue, as well as offer legal resources to clients with problems. In addition, members of coalitions may offer to organize a part of a client community.

Working in coalitions or forming collaborations also create opportunities to access additional resources for serving low-income persons. Therefore, we recommend that:

19. To the extent that lawyers or law offices participate in a coalition or collaborate in their individual capacity and not as a representative of a particular client (or as a representative of the coalition itself), they should clarify their role as appropriate to avoid misleading others about the role in which they act.

#### F. *Conflicts Issues*

20. Public interest lawyers are governed by the same ethical rules regarding conflicts of interest among clients as private lawyers. However, where alternative sources of legal representation are lacking, lawyers should consider ways to resolve conflicts through disclosure and informed consent, insofar as permitted by the ethics rules.

21. In addition to “formal” conflicts of interest among clients, public interest lawyers may experience tensions between the interests of an individual client or group of clients, and the interests of other members of the client community or the goals of the lawyer’s organization. Potential for such tensions should be considered in the case selection process. However, once an attorney-client relationship has been formed, lawyers must fulfill their ethical duties of loyalty and zealous representation even if such tensions emerge.
22. Lawyers should raise these issues in client counseling (i.e., discuss with clients how pursuing their interests may harm other people). If the client agrees after being advised of potential harm to other persons, the lawyer may pursue advocacy strategies that seek to reconcile the client’s interests with those of other unrepresented community members. If the client does not consent, however, the lawyer must pursue the client’s interests even if other community members are harmed.
23. Similar tensions may arise when a lawyer undertakes representation that later appears inconsistent with an efficient allocation of advocacy resources (e.g., when the only remaining issue in a case involves retroactive benefits for a small number of class members, or when an appeal is possible but unlikely to succeed). The decision whether to withdraw from ongoing representation involves different considerations from the decision whether to undertake representation initially. Lawyers must comply with ethical restrictions on withdrawal from pending cases, and, more broadly, should respect clients’ reasonable expectations of ongoing advocacy.
24. On the other hand, entering into a lawyer-client relationship should not require the lawyer to pursue every available remedy for the client for an unlimited time. Retainer agreements should clearly state the scope of representation agreed upon at the outset. Further study should be conducted on the question whether it is permissible to terminate the lawyer-client relationship in circumstances where the potential benefits of continued representation are greatly outweighed by the costs, risks of harmful results (e.g., making “bad law” on appeal), or by impairment of the lawyer’s ability to serve other clients.

## II. THE USE OF NONLAWYERS

### A. *Eliminate Barriers*

25. To assist in the satisfaction of unmet legal needs and further access to justice for those unable to afford legal services as presently provided, expansion of nonlawyer roles should be encouraged.

*Explanation:* Nonlawyers who charge less and are more numerous than lawyers provide the potential for expanding access to justice for low-income people. Various studies of unmet legal needs of the public have demonstrated that a variety of factors inhibit access to justice for low-income people: costs of legal services are consistently cited as the greatest obstacle.<sup>4</sup> It is well known that many of the significant legal matters that seriously impact low-income people's lives do not generate fees sufficient to justify the involvement of a private lawyer. In addition, limited (and decreasing) funding for free legal services for low-income people cause these programs to be small and available only to a small fraction of those eligible. Furthermore, "costs" may be understood more broadly. For instance, "information costs" are higher for low-income people who may have less time or education to make effective inquiries about a legal problem or who lack networks that include people who provide reliable advice about legal problems and ways to obtain help therewith. Expanding nonlawyer use is one readily accessible way to overcome these cost barriers for low-income people.

It is worthy to note that if all lawyers were required to provide pro bono service, expanding nonlawyer use might not even be necessary to overcome these cost barriers. There are between approximately 200 to 400 people per practicing lawyer in the United States today. This ratio is low enough to suggest that if all lawyers provided pro bono legal services to low-income people, many more unmet legal needs might be quickly addressed. Since the proposal for mandatory pro bono has been debated and rejected by most bar associations, we chose not to pick up the torch on this issue.

26. Judges bear the ultimate responsibility for ensuring that those appearing before them who cannot afford lawyers obtain fairness and justice in court proceedings. To further that end, judges must ensure that unrepresented litigants receive extensive assistance and advice. Judges must provide the assistance as necessary to ensure that the choices of the unrepresented litigants are "informed" and that unrepresented litigants do not forfeit rights due to the absence of counsel. The active role for judges must not be construed as inconsistent with the need for impartiality.

*Explanation:* The basic responsibility of the courts is to insure that litigants receive justice and fairness. Recently, courts have experienced a flood of unrepresented litigants for which the judicial system is mostly unprepared. Members of the Working Group on the Use of

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4. See, e.g., Carolyn A. Eldred & Roy W. Reese, Temple Univ. Inst. for Survey Research, *Legal Needs Among Low-Income Households: Findings from the Comprehensive Legal Needs Study* 50 tbl.5-7 (1994) [hereinafter *Comprehensive Legal Needs Study*] (noting that 16% of households surveyed cited cost as the main reason for doing without legal help).

Nonlawyers<sup>5</sup> agreed that when judges treat unrepresented litigants in the same manner as represented litigants, justice and fairness are not well served. Society does not fund lawyers for all low-income litigants. Therefore, unless judges begin appointing counsel to all unrepresented parties, they must take a more active role with those unrepresented litigants in order to properly do justice to them. Otherwise, the courts will be used as instruments of unfairness and injustice, contrary to their fundamental social mission. Employing a standard of "informed consent" to the decisions of unrepresented litigants is borrowed from informed decisionmaking in the medical context.<sup>6</sup> We believe that a similarly substantial standard for legal decisionmaking should be applied, especially when major financial or housing decisions are being made. This more proactive role for judges need not be inconsistent with impartiality. While this new active role for judges would surely require the outlay of more judicial resources, it would save the negative consequences and social costs that arise from an unrepresented litigant waiving his or her rights improperly.<sup>7</sup>

27. To enable judges to ensure fairness and justice for unrepresented litigants appearing before them, courts should implement programs and procedures that use both lawyers and nonlawyers to provide assistance.

*Explanation:* Judges cannot increase their assistance to unrepresented litigants without enlisting the aid of lawyers and nonlawyers. Also, in order to address the increased outlay of judicial resources that is bound to occur as a result of the above recommendation for an expanded role for judges, courts must "implement programs and procedures" to maximize the effectiveness of the judges' efforts to aid unrepresented parties. Courts could draft special procedures for aiding unrepresented litigants, such as appointing counsel to assist those litigants or permitting nonlawyer representatives to appear in court. Courts could develop programs for unrepresented litigants, such as programs that would direct those litigants to court lawyers or nonlawyers.

28. Courts should establish guidelines prohibiting bias in the courts, and should ensure that all court personnel, including judges, lawyers, and nonlawyers, adhere to them.

*Explanation:* Recent studies of gender and race bias in the courts<sup>8</sup> have prompted certain judicial systems to begin to alter the status quo

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5. References to "the Group" throughout Part II refer to this working group.

6. See Black's Law Dictionary 779 (6th ed. 1990) (defining "informed consent" as "[a] person's agreement to allow something to happen (such as surgery) that is based on a full disclosure of facts needed to make the decision intelligently . . .").

7. For a more thorough discussion of this new role for judges, see Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999).

8. See, e.g., Rena M. Atchinson, *A Comparison of Gender Bias Studies: Eighth Circuit Court of Appeals and South Dakota Findings in the Context of Nationwide*

methods of doing business in order to address potential and actual prejudice. This type of study is an invaluable tool for toppling barriers to accessing justice for low-income people who are overwhelmingly members of minority groups. We suggest that any study of court bias should investigate institutional biases against nonlawyers in the courts, either the unrepresented person or the lay advocate.

29. Courts should provide court-approved forms that are in plain, understandable language and that are translated into the languages of the populations served by the court. Nonlawyers should be encouraged and permitted to assist unrepresented persons in completing the forms.

*Explanation:* The prohibitions on out-of-court document preparation by nonlawyers is one of the least sensible aspects of the rules prohibiting the unauthorized practice of law ("UPL"). In some states, such as Florida, where nonlawyers are permitted to aid in document preparation, access to justice has been greatly enhanced for people of limited means. So much of modern life is dominated by the filling out of forms for government benefits, private insurance, or other programs. If courts designed their forms to be used by unrepresented people, then the need for a lawyer to fill out these types of forms would be greatly lessened. In addition, we envisioned this reform as complementary to the new active roles of judges. Thus, where an unrepresented person has received nonlawyer assistance in form preparation, the court may be obliged to ask about possible claims or defenses included or excluded from these forms.

30. Court procedures should be modified to encourage nonlawyer assistance where doing so does not undermine the rights of litigants.

*Explanation:* With this recommendation, we intended to encourage the creation of court procedures that would allow unrepresented people and lay advocates to use the court system with greater ease. The Group sought a "modification" of court procedures to allow for context-specific reforms that would not necessarily abolish UPL restrictions imposed by courts or statutes. Through these modifications of court procedures, the Group envisioned lay advocates being permitted to represent low-income people while being held accountable by the same standards of competence applied to lawyers. However, the Group did not want court rules to be modified so that low-income people would receive "second-hand" justice. Any modification pursuant to this recommendation must be made with an eye towards expanding the quantity *and* quality of access to justice simultaneously. The Group opined that it was unacceptable to sacrifice quality of access for quantity of access. Nonetheless, we felt that experimentation

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*Studies*, 43 S.D. L. Rev. 616, 616, 626 n.67 (1998) (noting forty-one gender bias reports).

with nonlawyer advocacy was necessary in light of the unmet civil legal needs of low-income people.

Finally, for the unrepresented person, we envisioned reforms in procedure that were made with a represented adversary in mind. For example, default-judgment rules are based on the belief that one must assert one's rights or waive them. Default judgment rules negatively impact unrepresented litigants in a disproportionate manner which suggests that such defaults are not a by-product of informed action. As a result, simple reforms of these default judgment rules would result in far less injustice to low-income people.

31. Court employees and people working in court-annexed programs should not be subject to unauthorized practice of law rules and should not be prohibited from giving legal advice.

*Explanation:* Most unrepresented litigants interact with the non-lawyer staff of the courts or court-annexed programs much more frequently and for a greater duration than with judges. Currently, nonlawyers who work in the courthouse or in court-annexed programs<sup>9</sup> are subject to UPL restrictions. As a result, when an unrepresented person approaches a court clerk for help in filling out a court-approved form, the clerk may explain that he or she is prohibited from helping the party or explaining the form because of UPL rules. While this level of caution on the part of court staff is admirable, it is by no means uniform. On the flip side, many nonlawyers provide advice to unrepresented parties about how to proceed in their suit. This advice, however, is not necessarily competent.

The Group decided that UPL restrictions upon court employees and those working in court-annexed programs should be eliminated both to encourage assistance to unrepresented litigants and to discourage incompetent advice to them. This recommendation would achieve the desired results by expanding and formalizing the type and nature of assistance that court personnel could give. The court personnel would receive extensive training in giving legal advice and would be accountable to the litigant for the advice given. The Group expected that this recommendation would substantially improve the "consumer-friendliness" of the courts by making it the responsibility of court personnel to competently inform unrepresented litigants.

32. Per se prohibitions on nonlawyer representation before administrative agencies should be eliminated.

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9. We used the phrase "court-annexed programs" to include not only court clerks in the ambit of this recommendation but also programs administered or initiated by the courts, such as programs that provide advice to unrepresented parties. An example of such a program might be the City-Wide Task Force on Housing Court funded at the outset by the New York State Office of Court Administration. For more information on this program, see Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241 (1999).

*Explanation:* Representation of any kind greatly enhances the chances of success of a party appearing before an administrative agency. In fact, studies have shown that nonlawyer representatives appearing before agencies achieved a success rate for their clients only marginally below the success rate of parties represented by lawyers and radically better than unrepresented parties appearing before the same agency.<sup>10</sup> Hence, the Group made this recommendation to improve the chances for just outcomes for parties having matters before administrative agencies.

Nonlawyer representation before administrative agencies is not universally prohibited or universally approved. The federal Administrative Procedures Act authorizes agencies to *elect* to permit nonlawyer representatives to appear in administrative hearings and other procedures.<sup>11</sup> Not all federal agencies, however, have elected to permit nonlawyer practice. States may not prevent federal agencies from electing to permit nonlawyer practice based on the Supremacy Clause. States, however, may independently authorize state agencies to permit nonlawyer representation. Not all states permit nonlawyer practice before state agencies and no state permits nonlawyer practice before all state agencies.

Based on this hodgepodge of authorization for nonlawyer representation before state and federal agencies, the Group recommends that *any per se* rule prohibiting nonlawyer practice before a state or federal agency be eliminated. The whole notion of an administrative agency proceeding is that it should be less formal than a judicial proceeding, in part because agency proceedings are rarely traditionally adversarial. With this non-adversarial informality in mind, no *per se* prohibition on nonlawyer representation before an administrative agency makes sense.

The Group was aware that certain agency practice is very technical with final determinations that have lasting impact upon the party involved. Several members of the Group were particularly concerned with permitting nonlawyer representatives to appear in proceedings before the Immigration and Naturalization Service. In those agencies in which technical knowledge is required for competent representation, the Group suggests that the agency could require a nonlawyer to obtain some sort of prerequisite training. In this situation, the agency may require a type of specialty certification or nonlawyer registration with the agency to insure accountability and competence.

As a final note, nonlawyers who represent a party before an administrative agency may not represent that same party upon appeal to the courts. That nonlawyer representative has achieved great familiarity

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10. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581, 2597 n.106 (1999).

11. See 5 U.S.C. 555(b) (1994).

with the facts and law of the party's case. The judicial appeal involves the same parties: the agency and the challenger. The only difference is that there is a judge from a separate branch of government ruling on the case. Therefore, the courts should adopt some special rules to permit nonlawyer appeals of agency rulings where those nonlawyers meet the same competency and accountability standards as attorneys. Although the Group made no specific recommendation on this matter, it was our belief that our earlier recommendation that court procedures be altered to permit nonlawyer practice would encompass the authorization of nonlawyer appeals of administrative agency decisions in which the nonlawyer represented the party below and made some showing of minimum competence to pursue a judicial appeal.

33. Court rules that prohibit lawyers from assisting competent nonlawyers generally providing competent legal advice and assistance to the public should be eliminated.

*Explanation:* Many court rules still prevent lawyers from giving extensive assistance to unrepresented parties and competent independent nonlawyers who either prepare documents, give advice, or represent parties, before administrative agencies. A total prohibition on this type of assistance seems to make little sense in light of the great numbers of unrepresented litigants and their need for assistance. In addition, lawyers need not give this advice pro bono. As part of a notion called "unbundling" of various aspects of "full representation," advice is one discreet task for which the public ought to be able to pay without regulation.<sup>12</sup> Courts and critics of this type of assistance have raised the concern that when lawyers give such advice anonymously, they are not accountable to those advised.<sup>13</sup> Some courts address this perceived problem of accountability by permitting lawyers to assist nonlawyers while requiring that a nonlawyer indicate that he or she had been aided by a lawyer (giving that lawyer's name) in preparing for a case. The Group opined that aiding a document preparer or nonlawyer advocate served the same purpose as advising unrepresented persons. In the interest of justice, the ethics rules and codes should be interpreted to permit this type of assistance of nonlawyers.

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12. This notion of "unbundling" is discussed in greater detail in the report and recommendations of the Working Group on Limited Legal Assistance. *See Report of the Working Group on Limited Legal Assistance*, 67 *Fordham L. Rev.* 1819 (1999); *infra* Recommendations 47-64.

13. Cf. John P. Gillard, Jr., Comment, *Pay-Per-Call Legal Advice, Professional Integrity, and Legal Licenses: Why 1-900-LAWYERS Is a Call to the Wrong Number*, 79 *Marq. L. Rev.* 549, 555-56 (1996) ("Some people fear, however, that unscrupulous attorneys will establish 'boiler room' pay-per-call operations with no accountability to users . . .").



B. *Collaboration Between Lawyers and Nonlawyers*<sup>14</sup>

34. Interdisciplinary approaches to problem-solving should be encouraged and barriers, such as those imposed by rules and culture, to collaboration between lawyers and other providers of service and advocacy, should be eliminated.

*Explanation:* This recommendation sets the tone for the remaining recommendations of this part. Lawyers need to recognize that they are not the only professionals or practitioners providing law-related services and advocacy to low-income people. In particular, such professionals as social workers and such lay advocates as community organizers perform many service and advocacy tasks that impact important legal rights for their clients and community, respectively. Lawyers should work with a wide variety of other providers of services to achieve the best problem-solving available for their clients. The ethical rules of lawyers and other professionals that may inhibit these collaborations should be eliminated. In addition, lawyers are reluctant to get involved in anything other than straight legal solutions to their clients' problems in isolation from the wider issues in a client's life. This reluctance is part of lawyers' institutional culture and must be eliminated to make way for sharing competent representation with other advocates and service providers.

Nonlawyer providers of service and advocacy bring different perspectives to a client's problem that may prove crucial to achieving long-term solutions. For example, we will discuss a simple scenario, based on experience, where a low-income client comes to a lawyer's office owing rent. First, the lawyer represents the client in court, advancing the defense that she has not paid the rent in her apartment based on illegal conditions therein. Second, a social worker who sees the same client finds out that the client also has a pathological gambling habit. Unless this habit is treated, any resolution of the present lawsuit will eventually unravel in the not-so-distant future. Third, the community organizer talks to the client and finds out that her landlord owns three other poorly maintained buildings in the same community. The organizer begins to contact occupants of these buildings to begin a rent strike, so that the conditions that the original client complained about will not recur. In this scenario, it should be plain that lawyers acting alone would not be able to provide the perspective of other service providers nor will lawyers have the time or inclination to approach problems in the same manner as these other service providers. Collaboration is the appropriate solution for the lawyer.

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14. These recommendations concerning collaboration between lawyers and nonlawyers drew heavily upon Paula Galowitz's conference paper, which provides most of the background information necessary to explain these recommendations. See Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 *Fordham L. Rev.* 2123 (1999).

35. Lawyers should be encouraged to work with other professionals (i.e., social workers, mental health service providers, teachers, health care providers, community-based workers) to maximize competent representation.

*Explanation:* This recommendation follows logically from Recommendation Thirty-four. It should be obvious from the explanation above that collaboration between lawyers and nonlawyer providers of advocacy and service will often maximize the competence of the representation of a particular client. There are certain issues upon which a lawyer must seek guidance from other service providers in order to maximize competent representation of a client. For instance, in the scenario described above, if the lawyer simply ignored the client's gambling problem as "not legal" in nature, the lawyer would not be able to save the client's home. While the lawyer would not have been incompetent as a lawyer, she would not have maximized the competence of her representation.

36. Lawyers should be encouraged to transmit legal knowledge to other professionals about the rights and responsibilities of low-income people; one of the purposes should be to enable the other professionals to identify legal needs, to provide assistance that addresses those needs where possible, and to make referral for further legal assistance where needed.

*Explanation:* This recommendation echoes Recommendation Thirty-three, concerning altering court rules to permit lawyers to advise and assist nonlawyers. Lawyers have legal knowledge that is usually only employed to serve the needs of their individual clients. If lawyers are encouraged to transmit this legal knowledge to a wider audience, for example, other providers of service to low-income people, their knowledge will have a broader salutary impact overall. Just as lawyers will tend to maximize the competence of their representation of low-income clients by seeking the perspectives and skills of other service providers, those service providers will enhance their effectiveness through being aware of the legal parameters in which they operate. As a result, nonlawyers who provide services and advocacy to low-income people will also know when to refer a matter for legal representation. In this way, lawyers do not end up doing social work, or organizing, or other work for which the lawyer is untrained. Rather, each service provider maximizes her effectiveness through this collaboration and sharing. In these times of limited funds for legal services for low-income people, this sort of effectiveness maximization for lawyers is crucial to the efficient use of funding for scant legal resources.

37. Ethical codes and statutes governing lawyers and other professionals should be changed so that where there is collaboration between a lawyer and another professional, subject to their

agreement, information gathered in the course of the collaboration is covered by the lawyer's confidentiality protections.

*Explanation:* As discussed in greater detail in the article by Paula Galowitz in this volume, many professionals and service providers are required to divulge information about their clients through reporting statutes.<sup>15</sup> Lawyers are exempt from these reporting requirements and may keep client confidentiality regardless of these reporting requirements.

In order to facilitate collaboration, the clients of those nonlawyers working with lawyers must be protected by the lawyer's standard for confidentiality. If clients of nonlawyer providers of service and advocacy are not protected by the lawyer's standard for confidentiality, lawyers will be substantially impaired in their ability to collaborate with those nonlawyers. For instance, lawyers would be reticent to share any information with the nonlawyer service providers except for the most superficial details of a case for fear of violating a client's confidences. This kind of defensive posture on the part of the lawyers would virtually eliminate any meaningful form of collaboration. At one point, the Group proposed the creation of a Unified Code of Ethics for the professions that would give all clients the same level of confidentiality protections. The Group arrived at this recommendation, however, as a more targeted solution to a barrier to collaboration.

38. We recommend further study to identify barriers to collaboration among lawyers, other professionals, nonlawyer advocates, and clients.

### C. Sites, Training, and Education for Nonlawyers

39. We recommend production of educational and other material to promote maximum competence, collaboration, and empowerment of nonlawyer advocates and their clients in the communities that they serve. Special attention should be paid to the use of new technologies; community agencies, clients, and communities should be enabled to obtain and use these new technologies effectively.

*Explanation:* The Group recognized that, regardless of any formal recognition by the states or bar associations, nonlawyers are providing advocacy to low-income people. In order to address this situation in a positive manner, the Group thought that lawyers and state authorities—either separately or together—ought to produce educational and other material to promote competence of these nonlawyer advocates. In addition, professionals who serve low-income communities should seek ways to collaborate with these nonlawyer advocates.

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15. See *id.* at 2137.

In seeking to fulfill this recommendation, the Group was mindful of the technological developments that have expanded and will continue to expand the activities in which nonlawyer advocates may engage. In particular, computer software and hardware can combine to permit nonlawyer advocates to perform many of the tasks formerly reserved to lawyers alone. For instance, tax preparation programs guide the lay user through all the steps of an income tax return, explaining the ramifications of each step of the filing and providing the user with many legally related decisions. Similar programs can and should be developed to permit low-income people to maximize available benefits, file uncontested divorces, make out a will, a health care proxy, a power of attorney, or other basic legal documents. In addition, giving low-income people meaningful access to the internet and its legal-research tools will permit them and their nonlawyer advocates and document preparers to gain access to knowledge that will undoubtedly empower them. Nonlawyer document preparers may be crucial in aiding low-income people who wish to use these new technologies. Lawyers are simply not available to perform these types of tasks for all who need or want them. This recommendation can support an additional "unbundling" of a legal service, whereby lawyers could be called upon to perform the discreet task of reviewing whatever legal documents or filings have been prepared by independent nonlawyers so as to confirm their competence and thoroughness.

The final piece of this recommendation is to ensure that these technologies are accessible and usable by low-income people through community groups and agencies and not just lawyers.

40. We encourage the development of community-based general advice, referral, and assistance centers or hotlines.

*Explanation:* In making this recommendation, the Group envisioned the development of community service centers based on the Citizens Advice Bureaus that exist in the United Kingdom. Essentially, this model of legal services is preventive in nature, seeking to reduce the information costs that act as such a high barrier to low-income people who have legal problems. In particular, the Group felt that these centers and hotlines should be targeted to help working families. However, we felt that such centers could achieve widespread public support if they were made available to people of any income. Some states, such as Pennsylvania, already have statewide legal hotlines in place. Hotlines are relatively inexpensive to start and maintain. Obviously, hotlines suffer from a major shortcoming: they do not reach those people who lack access to a telephone. A local drop-in center, however, will be accessible to almost everyone except those who have severe mobility problems, such as the severely disabled and certain elderly persons. These local centers could also make home visits to area residents who have severe mobility problems. Establishing local advice centers will be more costly than hotlines, but far less

costly than employing lawyers for every low-income person whose legal problem may end up in court for lack of good information at the outset.

41. We encourage the creation of programs and organizations for the training and advancement of client and community advocates. Such programs could be at community-based sites and established in partnership with organizations such as law schools, government agencies, local and state bar associations, adult education programs, and technical and community colleges.

*Explanation:* The Group made this recommendation in order to improve the competency, legitimacy, and accountability of nonlawyer advocates. Law schools have the expertise and ability to act as an important educational resource in training nonlawyers. Government agencies that permit nonlawyer representatives could provide training that would end in some sort of certification or registration of those advocates. This government training would serve the dual goal of competence and accountability for these nonlawyers. If bar associations got into the business of training nonlawyers rather than prosecuting them for UPL, then the bar could use its substantial resources to improve nonlawyer advocacy and expand access to justice for low-income people. Using more accessible educational institutions to reach low-income people and their nonlawyer advocates is essential. Adult education, technical, and community colleges should provide minimum education to all students in basic legal rights and responsibilities.

42. We encourage law schools and continuing legal education programs to educate law students and lawyers in effective collaboration with other professionals, nonlawyer advocates, community-based organizations, and client groups.

*Explanation:* The Group concluded that all lawyers, especially lawyers for low-income people, would greatly enhance their effectiveness by learning management and collaboration skills in law school and continuing legal education programs. Currently, law schools especially and continuing legal education programs to a lesser extent tend to focus solely on building individual skills in isolated areas of practice; some examples include trusts, wills, estates, real estate closings, and securities deals. While these skill-based courses are essential to the practice of law, they teach very little about how to practice law. Law school clinics have been attempting to address the gap between teaching "the law" and practicing law. Clinics also tend to encourage collaboration. Almost no clinics or law school courses, however, address how lawyers might work in coalition to share power with client groups and community-based organizations. Furthermore, few clinics arrange their work to replicate the functioning of an actual law office.

And, significantly, even fewer clinics or other courses focus on law practice management.

As to management, lawyers are usually managers or co-managers of an office. Lawyers must learn to delegate tasks to and collaborate with personnel inside and outside their own offices, such as secretaries, assistants, paralegals, investigators, interns, accountants, appraisers, and title searchers, to name a few. As to collaboration, lawyers must learn to collaborate with co-equal professionals and service providers as discussed above.<sup>16</sup> This type of collaboration does not simply occur spontaneously through the good will of all those involved. Collaboration is the product of hard work and deliberate systems for working jointly. For instance, business schools spend a great deal of time and effort on teaching these type of management and collaboration skills. Law schools, however, tend to atomize their students, pitting one against another. Collaboration is rarely encouraged.

Poor management skills will tend to force a lawyer to do tasks that other staff should be doing, and imperfect collaboration will tend to force a lawyer to engage in work for which the lawyer is not qualified. As a result, a lawyer unskilled in collaboration and management will tend to do less lawyering for fewer clients, less competently. In conclusion, if lawyers for low-income people were taught how to manage and collaborate effectively, they would greatly expand the quantity and quality of their representation.

43. We encourage law schools to collaborate with university schools and departments of business, management, and public policy to develop courses, continuing education programs, and research partnerships for maximizing the organizational and technological capacity of law firms and organizations to incorporate nonlawyers to serve low-income clients and communities.

*Explanation:* This recommendation expands upon the previous recommendation. Essentially, we encourage law schools to avoid reinventing the wheel. Business, management, administration and public policy schools have long been interested in effective management and collaboration. Law schools need only tap into these vast resources, especially where the law school is part of a university that has one of these other schools, in order to begin the process of developing law practice management and collaboration clinics and/or courses. These other disciplines would most probably be delighted with the prospect of providing some structure and systemization to the practice of law. In the 1980s, some of the larger firms even employed management consultants to improve the efficient and effective deliv-

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16. See *supra* Part II.B.

ery of service. There is no reason why lawyers for low-income people should not employ the same knowledge to their practices.

In addition, law schools should seek to collaborate with members of scientific disciplines, such as psychologists, physicians, and computer scientists, to develop collaborations to expand the impact and effectiveness of legal work for low-income people. For instance, many low-income elderly people suffer from depression. An elder-law professor could invite a psychologist to share his or her perspective on mental illness to aid students in understanding lawyering to such a client. A professor teaching public benefits law could invite a physician to share his or her knowledge about the impact of certain injuries on a person's ability to work and how that ability is assessed. Finally, if law professors merge their legal knowledge with computer scientists' technical knowledge, together they may develop powerful tools that low-income people and their nonlawyer advocates may use to seek justice. It is essential, therefore, that law schools collaborate with other disciplines in order to foster collaboration among their graduates.

#### D. *Regulation of Nonlawyer Activities*

44. To ensure that competency and accountability of nonlawyer services are obtained, evaluation should be made whether requirements of training and appropriate regulation (registration, certification, or licensing) are necessary. The following criteria should be used to assess whether a particular nonlawyer activity should be unregulated, regulated, or prohibited:
- (a) Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety, or economic well-being?
  - (b) Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering services?
  - (c) Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

*Explanation:* The Group found that there were a variety of issues concerning the nature and type of regulation that might be appropriate for nonlawyer use and activity. In addition, any analysis of regulation would have to be highly context-specific. With these considerations in mind, the Group concluded that we ought to propose a framework for assessing whether regulation of nonlawyer use and activity is justified. The Group rejected a parsing of the minutiae of any particularized reform.

This recommendation is based verbatim on similar criteria proposed in the ABA Commission Report.<sup>17</sup> The Group referred to this test as

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17. See Commission on Nonlawyer Practice, American Bar Ass'n, *Nonlawyer Activity in Law-Related Situations* 137 (1995).

a the "Singsen Criteria" after its main proponent in the ABA Commission, Gerry Singsen. In application, these criteria will insure that any regulation of nonlawyer use and activity must be justified as: (1) a valid use of the police power of the state ("a serious risk to the consumer's life, health, safety, or economic well-being"); (2) based upon an actual—not perceived—vulnerability of the potential client population; and (3) of benefit to the public. Although this framework is quite modest, much of the current regulation of nonlawyer activity would not survive a test by these criteria. The Group proposes these criteria for use by tribunals and legislative committees alike in assessing alleged UPL violations as an alternative to the various test employed in the past.

45. We recommend further study concerning the repeal of criminal statutes that prohibit the unauthorized practice of law.

*Explanation:* In many states UPL is a crime by statute. While UPL may pose serious risks to clients, there is no strong public policy in favor of criminalizing UPL. First, UPL crimes are rarely prosecuted, whereas civil prosecutions are much more common. This suggests that the criminal UPL statutes are unnecessary. The infrequency of prosecution of UPL criminal statutes suggests that these statutes are, quite frankly, irrelevant and serve no justifiable penal purpose. Empirical study might show that UPL criminal statutes are not required to deter a wave of criminal conduct. The UPL criminal statutes, however, do exert a chilling effect on legitimate innovation feared to fall within its ambit. Second, UPL criminal statutes are unnecessary and redundant. UPL criminal conduct is covered necessarily and sufficiently by criminal fraud and other traditional penal laws. In fact, the aspect of UPL most often prosecuted is holding oneself out as a lawyer when one is not a lawyer. This is clearly fraud and does not require a separate UPL criminal statute. Third, states do not use their prosecutorial resources to address UPL violations. This suggests that the public does not support UPL criminal prosecutions. Fourth, UPL statutes are arguably void for vagueness because "the practice of law" is so loosely defined. UPL criminal statutes provide insufficient notice to a potential defendant of what conduct might constitute UPL. All of these factors suggest that states should undertake a review of the feasibility of removing UPL criminal statutes.

The Group consciously targeted only criminal statutes but *not* criminal sanctions. The Group did not conclude that a person who violated a court's order after a civil trial for UPL violations should be shielded from criminal contempt. In certain cases, a tribunal will find that a person has engaged in acts that amount to UPL that have been shown to injure others. In response, the court will order such a person to cease the harmful activity. If that person fails to comply with such a court order, he should not be shielded from the possibility of criminal contempt.



46. We encourage the development of a network and website to support competent nonlawyer advocacy, including assisting people involved in punitive actions related to the unauthorized practice of law.

*Explanation:* The Group concluded that there was a need to develop a rapid response network and website for people who would provide legal assistance to lawyers and nonlawyers who were being prosecuted for UPL. The Group envisioned this as a sort of “Nonlawyer Legal Defense Fund” network. The Group decided that there was a need to develop this type of network to protect those nonlawyers and lawyers involved in innovative uses of nonlawyers to expand access to justice for low-income people. The Group was aware of the existence of an organization in Washington, D.C. that serves as a clearinghouse on nonlawyer-use issues called HALT.<sup>18</sup> At this time, however, the Group opined that additional connection was required to combat abusive prosecutions of UPL. The Group hoped that the establishment of such a network would counter the chilling effect imposed by UPL criminal and civil statutes and regulation. The Group also thought that such a network might provide assistance to lawyers involved in the lawyer disciplinary process initiated by bar associations. In choosing which cases were meritorious to defend, the network would employ the “Singsen Criteria” discussed above. The network would not simply defend any UPL case. Only those meriting a defense based on using nonlawyers in good faith and in aid of access to justice would be selected.

### III. LIMITED LEGAL ASSISTANCE

#### A. Preamble

47. Access to justice must be maximized by an ongoing analysis of the purpose of law and legal proceedings and the implementation of modifications that simplify the administration of justice and serve the interests of the public without undue intervention.
48. Recent experiments in the delivery of legal services—some but not all driven by technology—suggest the possibility of significant increases in access to services, provided the rules governing the practice of law are not interpreted to inappropriately narrow the delivery and evolution of services.
49. The following principles are intended to facilitate this delivery and evolution, while advancing the core values of client autonomy, client protection and attorney professionalism.

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18. See HALT, *HALT—An Org. for Legal Reform* (last modified Mar. 3, 1999) <<http://www.halt.org>>.

50. These principles are drafted to facilitate use of these methodologies in the non-market context, but may apply universally.
51. The legal profession has a responsibility to facilitate access to justice; therefore, the Model Rules of Professional Conduct should be interpreted to encourage use and expansion of responsible modes of representation that increase such access.

### B. *Issues and Major Considerations*

In attempting to define the ethical and professional considerations relevant to limited legal assistance, the following principles were developed to guide recommendations in this area:

52. There should not be two systems of justice, one for the poor and one for those with resources. Ethics provisions applied to limited legal assistance must not be based on the ability or inability to pay for that assistance.
53. In crafting a delivery system, it is critical to establish criteria that clearly and objectively determine which clients receive which level of services and to establish who will make these decisions.
54. It is anticipated that lawyers and legal services programs may offer a range of options to clients, including traditional “full-service” representation. It is acknowledged that in certain circumstances traditional representation may be the best, and perhaps only, successful mechanism for addressing a client’s problem.
55. Principles of informed consent should be taken into account in adopting limited legal assistance methodologies.
56. Limited legal assistance methodologies implicate a range of considerations regarding the definition and parameters of the attorney-client relationship.
57. Methods of delivering legal services, particularly experimental methods such as limited legal assistance, must be evaluated on an on-going basis.

### C. *Recommendations*

58. A lawyer or legal services program that offers individuals the option of one or more types of legal assistance, including limited legal assistance, has a professional obligation to respect client autonomy and choice. A lawyer or legal services program may limit the range of options due to resource limitations.
59. There are three general categories of assistance that a lawyer or legal services program may offer. These categories are: (1) traditional, “full-service” representation; (2) limited legal

assistance; and (3) general advice. These recommendations further define category two, limited legal assistance.

60. Within the Limited Legal Assistance category, there are two subdivisions: (a) brief, specific advice, and (b) assistance requiring a diagnostic interview.

(a) *Brief, Specific Advice*: An individual may interact with a lawyer or legal services organization for the limited purpose of obtaining brief, specific advice. "Brief, specific advice" shall be defined as answering a specific question or limited set of related questions without follow up or exploration by the legal services provider. In such circumstances, the client must be advised that the service is limited to brief advice only.

The lawyer or legal services provider offering brief advice is bound by obligations of confidentiality, competence, and the duty to avoid conflicts of interest appropriate to the context. The lawyer or legal services program has no duty to provide complete assistance with respect to the individual's legal problem. Under the ethical rules governing conflicts of interest which apply to potential as well as actual conflicts, the lawyer or legal services program should not be restricted to the same degree as the lawyer who renders more extensive representation. A lawyer or legal services organization that provides brief advice must develop systems that prevent disclosure of client confidences and must avoid the risk of divided loyalty by terminating the communication as soon as it appears that there may be a conflict with a previous recipient of brief advice services. A provider of a brief service that also operates a full-service or diagnostic system must have in place a mechanism to avoid actual conflicts of interest between recipients of brief advice and those who receive assistance under the full-services or diagnostic models.

Examples of brief, specific advice:

- (i) Potential client calls legal services office and states, "My boyfriend registered his car in my name because he had so many parking tickets. Now, he has more parking tickets under my name. Do I have to pay them?" The answer is "yes."
- (ii) Consumer calls legal services office and states that she was turned down for credit and that her credit report is incorrect, and asks what should she do. Legal worker advises her how to get a copy of her credit report, that the report is free, and the steps she should take to get the credit reporting agency to revise the information.

- (b) *Assistance Requiring a Diagnostic Interview:* In all other circumstances, the lawyer or legal services provider shall conduct a diagnostic interview before providing legal assistance. That diagnostic process shall elicit sufficient facts to enable an appropriate decision as to the limited service(s) to offer the client and for the client to make an informed decision about how to proceed. An informed decision includes knowledge of the circumstances under which the recommended course of action might change and when additional services might be necessary. Information obtained in this process is protected as confidential regardless of whether an attorney-client relationship results from the process. When the limited services identified through an appropriate diagnostic process have been competently provided, the lawyer or legal services program has no further obligation with respect to this client.

**Example:**

Following a diagnostic interview, a legal services program offers a survivor of domestic violence the following legal assistance choices:

- (i) Daily pro se clinic on how to get your own order of protection;
- (ii) Website on how to get an order of protection;
- (iii) Hard copy of pro se materials and a how-to video;
- (iv) Limited representation for the sole purpose of obtaining a temporary restraining order; and
- (v) Being placed on a waiting list for traditional, full-service representation.

The diagnostic interview should elicit a variety of factors that would assist the provider in determining the most appropriate choices for this client. Depending on the facts, some options would be excluded. For example, the provider should determine the caller's ability to use pro se materials. If the provider learns the client is unable to read and write, the provider should eliminate options two and three. Once the inappropriate choices have been eliminated, the client can choose from the remaining options.

61. Systems providing limited legal assistance must be internally and externally evaluated.
62. As a nation of laws, our courts serve as the centerpiece for the peaceful resolution of conflicts. To continue in that role, the courts must effectively serve the public, maximizing access and ease of use. The courts have an affirmative obligation to help litigants and advance limited service methodologies which in-

crease access to the courts. Rules regarding the administration of justice, rules governing the practice of law, and rules prohibiting the unauthorized practice of law should not be created, advanced, interpreted, or applied so as to obstruct such efforts to increase access. The courts and the legal profession should be encouraged to explore innovative efforts to assist pro se litigants.

#### D. *Recommendations on Further Study*

63. Further study is needed regarding the application of these principles to particular methodologies, including hotlines, websites (informational, unintelligent form fill-in, intelligent form fill-in, email with an attorney, and online videoconferencing), ghostwriting, pro se clinics, unbundled services, form pleadings, community education, and those methodologies to be developed in the future.
64. The application of the above recommendations to current ethical provisions, including standards of competence and diligence, confidentiality, and conflicts of interest, needs concrete assessment and evaluation, particularly with respect to the impact on clients and the resolution of their legal problems or questions.

### IV. CLIENT/MATTER/CASE SELECTION

#### A. *Delivery Systems*

65. A delivery system of legal services for low-income persons includes all available legal resources for low-income clients in that community. The system should ensure delivery of a full range of services including the following: class, group, and individual representation; legislative and administrative advocacy at the state and local level; and counseling, advice, and community education. A delivery system that only provides advice and brief legal services cannot meet this goal.
66. Programs should collaborate with each other on the use, availability, and allocation of resources and make efforts to increase available resources to ensure a delivery system offering a full range of services. The resulting delivery system should reflect and have the capacity to respond to local priorities and input on the community level.
67. Programs should encourage experimentation with different delivery techniques, including centralized intake and other innovative methods.

*B. Program Priorities*

68. Programs have an affirmative obligation to reach out to underserved groups. Program intake systems should be structured to overcome barriers created by geography, language, culture, physical and mental disabilities, and employment or family obligations.
69. Programs should clearly identify their goals and set priorities. Programs should publicly disclose their goals and priorities. All criteria for selecting cases, including any grounds for exceptions to general principles, should also be made public.
70. Programs have an affirmative responsibility to set goals and priorities through a process of consultation with the client community and to periodically reassess the decisions made.
  - (a) Programs have an affirmative responsibility to ensure that the process of consultation is meaningful and effective.
  - (b) Meaningful consultation requires an ongoing dialogue with the community through many information sources including both formal and informal community interaction. Advisory boards and surveys should not be the principal means of obtaining community input.
  - (c) In order to receive meaningful input from the community, programs must collect and disseminate information that would help community members to understand and evaluate the program's goals, priorities, and effectiveness.
71. Program goals must include efforts to make institutions (such as government benefit departments, schools, hospitals, and financial and other private institutions) that are important to the client community more responsive to its needs.
72. Programs should give serious consideration to the goal of assisting institutions and community groups in promoting activities that increase economic stability and growth in the communities that they serve.
73. Because priorities are set by the board, programs should have broad discretion to determine the composition of their boards in order to reflect the needs and resources of the community.
  - (a) Legal Services Corporation requirements concerning the composition of Boards are unduly restrictive.<sup>19</sup>
  - (b) Further study of the composition and role of boards is needed.
74. In order to better meet the needs of low income individuals, consideration should be given to raising LSC mandated income guidelines. Non-LSC programs should also consider

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19. There was some dissent to this subpart.

whether their income guidelines unduly hamper their ability to represent low income individuals in need of legal services.

75. Programs should not seek or accept funding that requires the diversion of ongoing resources from legitimate program priorities.

### C. *Client and Matter Selection*

76. In situations where the program does not have sufficient resources to provide services to all eligible clients, programs should consider the following factors in selecting cases. The relative importance of each of these factors may vary depending on the overall objectives of the program:
  - (a) the importance of the interests at stake: Ordinarily, this reflects the level of pain, discomfort, or harm associated with the legal matter;
  - (b) the degree to which the use of the program's resources will make a difference in the outcome desired by the individual client: The application of this concept would result in a lower preference for representing clients who would be successful even without representation as well as who would most likely not be successful regardless of representation. The concept of "legal success" is broader than merely whether the case is won or lost;
  - (c) whether a case offers a long term benefit rather than merely short term relief;
  - (d) whether there is a collective benefit to the community;
  - (e) the commitment of program resources required;
  - (f) any alternative resources that may be available, including other legal and social services programs;
  - (g) the degree of emergency: While it is appropriate to consider the urgency of the situation, programs should resist putting all resources into responding to emergency cases to the exclusion of other cases that may provide long term solutions and collective benefits to the community; and
  - (h) whether the case has been referred from a community-based organization when cooperation with such organization is part of the program's goals and priorities.
77. Case acceptance should not be influenced by the attorney's personal judgment of the moral worth of the client or the unpopularity of the issue.

The Working Group on Client/Matter/Case Selection did not agree on the weight to give attorney preference and the need for professional development. Views varied from treating this as a positive factor, an impermissible factor, or a tie-breaking factor among competing and important matters.

V. INFLUENCE OF THIRD PARTIES ON THE  
LAWYER-CLIENT RELATIONSHIP

*Preamble*

Third-party funders can significantly influence the attorney-client relationship. When that influence takes the form of unreasonable restrictions on the independent professional judgment of the lawyer, or on the attorney-client relationship, it puts the attorney in a serious ethical dilemma. This issue is heightened because legal resources for poor people are insufficient to provide access to justice.

Restrictions imposed by third-party funders on lawyers for the poor subvert the functioning of the courts in ways that violate the separation of powers. Courts must be able to rely on the assumption that lawyers will exercise independent professional judgment. Lawyers should not only say what funders permit them to say, as this will undermine the rule of law.

We strongly urge that the following recommendations for amendments to the comments to the Model Rules be considered by the Ethics 2000 Committee and by state regulatory authorities.

A. *Considerations and Recommendations*

*Consideration 1: Restrictions*

78. Commentary to Model Rule 1.8(f) and an ethical consideration to DR 5-107(B) should be added to reflect the following:

Third-party funders can significantly affect the attorney-client relationship. When that influence takes the form of unreasonable restrictions on the independent professional judgment of the lawyer or on the attorney-client relationship, it can create serious ethical dilemmas. The dilemma may be heightened when there are insufficient legal-services attorneys to provide access to justice for the poor.

- (a) A restriction imposed by a third-party funder is likely to be unreasonable if:
  - (i) it denies tools essential to competent representation;
  - (ii) it interferes with the lawyer's professional judgment to select the manner of representation;
  - (iii) it constrains the lawyer's independent professional judgment in using funds from other sources;
  - (iv) it interferes with the lawyer's ability to counsel a client freely on lawful goals;
  - (v) it requires the lawyer to violate another ethical rule; and
  - (vi) if
- (b) A restriction is more likely to be unreasonable when imposed during the course of the representation.

*Consideration 2: Positive Influences*



*Issue:* Third parties can have a positive influence on the attorney-client relationship when they seek to expand client access to justice or to enrich the lawyer's representation of individual clients.

79. The legal profession should explore the potential for positive influence by third parties.

*Consideration 3: Withdrawal*

*Issue:* The public funding and public provision of legal services have heightened their importance for poor people. Withdrawal due to inadequate funding or restrictions may leave clients without representation. Market forces may work to correct this problem in many areas of practice, but not in this area. Funders of lawyering programs for the poor and the legal profession should not impose unreasonable restrictions.

*Issue:* If a tribunal determines that the lawyer must continue the representation of a client despite the restrictions imposed by the funder, the funder should respect the tribunal's determination.

80. Commentary should be added to Model Rule 5.4 and an ethical consideration to DR 5-107(B) to reflect the following:

- (a) Even if other representation is possible, withdrawal is not desirable because it disrupts the ongoing representation and may prejudice the client's case. Therefore, restrictions that require a lawyer to withdraw from representation are objectionable.
- (b) To protect the client's interest, a lawyer may challenge the law that requires withdrawal.

*Practice Guideline:* When seeking leave to withdraw, the lawyer should, consistent with the duty not to reveal information relevant to the representation of the client:

- (i) provide the tribunal with a full explanation of the reasons for the withdrawal;
- (ii) request the tribunal to enjoin interference by the third party;
- (iii) request the tribunal to hold a hearing to explore reasons for withdrawal, the harm to the client, the availability of other counsel, and other consequences;
- (iv) request a declaratory judgment against the restriction;
- (v) request the tribunal to issue orders regarding transition and cooperation with substitute counsel;
- (vi) request the tribunal to consider whether under all the circumstances, new counsel will be able to adequately represent the client; and
- (vii) advise the court of any other relevant consequences.

*Consideration 4: Consent*

*Issue:* If a third party imposes a restriction that interferes with the lawyer's independent professional judgment, a client's consent to the services offered under those restrictions may be ethically problematic because it may result from the client's limited access to legal services and, therefore, may be involuntary.

81. Commentary to Model Rule 1.8(f) and an ethical consideration to DR 5-107(B) should be added to reflect the following:

A client's limited access to a lawyer is a coercive influence that compromises the client's ability to consent to the restrictions imposed by third parties including:

- (a) limitations on the scope and manner of the representation;
- (b) conflicts of interest; and
- (c) disclosures of information relating to the representation.

*B. Issues for Further Study*

82. Further study should be undertaken to answer the following questions:

- (a) To what extent do ethical issues accompany the unionization of the staff of a legal services program?
- (b) To the extent that ABA Committee on Ethics and Professional Responsibility, Formal Opinion 96-399 does not provide adequate guidance on the specific ethical considerations posed by the influence of third-party funders, should it be revised or rescinded?
- (c) To what extent can the government, in connection with a funding decision, reconceptualize the traditional lawyer-client relationship? For example, in child support proceedings in which the state is paying lawyers to assist indigent custodial clients, may the state specify that the state is the client, and deny the existence of a lawyer-client relationship between the lawyer and the custodial client?
- (d) To the extent that the government has an obligation to take all steps possible to ensure equal access to justice, should government influence be viewed differently from other third-party influences? Is there a different expectation when legal services programs receive funds from the government rather than from private sources? Is there any distinction when it comes to ethical implications?
- (e) To what extent does the auditing or assessment of results of the lawyer's representation constitute undue influence? Are there chilling effects from the publication or use of case outcomes, strategies, and results? Does that publication or use compromise the attorney's ability to exercise independent professional judgment?
- (f) To what extent might collaboration between lawyers and other professionals influence client representation? Lawyers and other professionals should explore ways to collaborate, to communicate effectively with clients, and to share responsibility without violating the attorney-client relationship. Cooperating disciplines may include those comprising social workers, aging-services providers, medi-

cal professionals, clergy, accountants, and community organizers.

- (g) To the extent that restrictions on existing funding limited access to legal services, should additional state, local, and private funding sources be developed that do not impose unreasonable limitations on the attorney-client relationship? For example, sources of additional funding might include escheat, *cy pres* and punitive damages funds, and filing fees.

### C. Education

We strongly urge conference participants to:

83. Educate the legal community and the general public on how the restrictions imposed by third-party funders impact the lawyer-client relationship and undermine equal access to justice. Legal educators have a particular obligation to address these issues pervasively in substantive courses and in law school clinics.
84. Develop a plan to communicate to private funders the recommendations, supporting analyses, and comments regarding third-party influence. We suggest that such a plan should utilize educational programs and publications that target the professional philanthropic community.

## VI. REPRESENTATION BY PRIVATE LAWYERS

### *Preamble*

As reflected in the Model Rules, each lawyer has a special responsibility to provide legal services to low-income individuals and to provide disadvantaged persons with access to justice.<sup>20</sup> A critical part of the delivery system of legal services to low-income persons are private practitioners, including pro bono lawyers, private practitioners who deliver services to low-income individuals for a fee or a reduced fee, and pre-paid legal service organizations. Any efforts to better serve civil legal needs of low-income individuals require a better understanding of how private practitioners serve low-income individuals and the types of service they provide, and better coordination among legal service providers and private practitioners. In addition, state planning efforts should address pro bono and private practitioners as components of any future delivery system and how private practitioners can be better supported through training and other support.

In regard to pro bono activities, while significant contributions are currently made by the private bar, it is clear that many lawyers still fall far short of the aspirational goals set forth in Model Rule 6.1, that

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20. Model Rules of Professional Conduct Rule 6.1 (1998).

many states have not adopted Model Rule 6.1, and that there is still significant opposition among the private bar to any efforts to implement either mandatory pro bono or mandatory reporting of pro bono activity. All reasonable efforts should be taken to increase the commitment of pro bono lawyers. It is also evident that new information technologies may provide effective means to address and overcome obstacles to increased pro bono contributions.

#### A. *Increasing Pro Bono Commitment*

*Background:* Model Rule 6.1<sup>21</sup> has provided aspirational goals for private practitioners to provide legal services to low-income individuals and communities. It represents a significant improvement over previous ethical rules. It has, unfortunately, only been adopted by a limited number of states around the country.

85. The states should adopt Model Rule 6.1. The ABA and other bar organizations should serve as a resource for these state efforts.

#### B. *Creating Other Incentives for Increasing Pro Bono*

*Background:* Experience shows that there are important steps that can be taken to increase the amount of pro bono work contributed by private practitioners.

86. All segments of the bar (law firms, bar associations, law schools, courts, in-house legal departments, government agencies, etc.) should take steps to create incentives and minimize disincentives to performing pro bono work, e.g., treating pro bono hours in the same manner as billable hours for the purposes of compensation and advancement, free CLE courses for pro bono attorneys, awards and recognition, reduced dues for active attorneys, “challenges” such as the Law Firm Pro Bono Challenge, etc.

#### C. *Evaluating PAI Initiatives*

*Background:* Since 1981, LSC-funded programs have been required to allocate 12.5% of their funds for private attorney involvement (“PAI”).<sup>22</sup> There are differing views regarding the effectiveness of PAI programs. On one hand, there is a recognition that the PAI requirement has contributed to a number of important developments, including improved relationships between the legal services community and private practitioners, enhanced support for legal services by the organized bar, and a significant increase in the number of private practitioners contributing services to low-income individuals and

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21. *Id.*

22. *See* 45 C.F.R. § 1614.2 (1998).

groups. On the other hand, others have expressed concerns that PAI resources are either being underutilized or could be redirected in ways that would serve more clients. No comprehensive study of the effectiveness of the PAI requirement has been conducted since 1982.

87. A comprehensive study should be undertaken to assess PAI programs including, among other things, identifying and replicating the best practices (in both LSC- and non-LSC-funded programs) and evaluating possible changes to the PAI regulations and structure that would make this program more effective. Any study should look at both the numbers of cases placed with and closed by private practitioners and the intangible benefits of PAI programs that relate to increase in bar support for legal services, building relationships between legal service advocates and private practitioners, etc.

#### D. *Increasing Private Practitioner Financial Support for Legal Services*

*Background:* Access to justice is the responsibility of every lawyer. While the private bar is making substantial contributions through individual and firm donations and through bar leadership in legislative and other initiatives to obtain more funding, more can be done. More information is needed to assess fully whether private practitioners are providing appropriate financial support for legal services for low-income individuals and communities and to explore strategies for obtaining increased financial support for legal services through the support and activities of private practitioners.

88. A study should be undertaken regarding contributions to and support of legal services, taking into account: (1) lawyer and law firm giving patterns, (2) law firm size, (3) pro bono participation, and (4) comparisons over time and with other corporate and business sectors. Potentially valuable sources of information for these studies include data compiled by various state IOLTA funds and other state organizations and fundraising efforts. The goal of these studies will be the development of strategies for increasing financial support from private practitioners for the legal service community.

#### E. *Technology*

*Background:* Emerging information technology offers many opportunities to increase collaboration among the various parts of the legal community, including private practitioners. For example, matching clients with lawyers and providing private practitioners with ready access to work product and training materials via the World Wide Web might lower the barriers to providing services to low-income clients and communities.

89. Encourage the use of technology (websites, teleconferencing, etc.) to build bridges between private practitioners and legal services organizations and other public interest law groups.
90. In any project involving the use of technology, programs should pay particular attention to using the technology to better support private practitioners who are practicing in low-income communities.

#### F. *Competence*

*Background:* In order to meet the demand for legal services, private practitioner involvement should be significantly increased. In order to do so, and to ensure that services provided meet the requirements of Model Rule 1.1,<sup>23</sup> private practitioners (especially those who do not routinely practice in low-income communities) must have the requisite knowledge and skill to provide competent legal services to low-income individuals and communities.

91. Lawyers and law firms, in accepting pro bono matters, should take steps to ensure that they have the knowledge and expertise necessary for the representation.
92. Programs that seek to involve private practitioners (including bar associations and legal services organizations) should ensure that support and training resources are made available. These resources include formal training programs, practice manuals, access to mentors, and the use of technology.
93. Model Rule 1.1 reflects a traditional, “full service” model of representation. There should be further study and analysis to determine whether Rule 1.1 inhibits or deters private attorney participation in alternative delivery methods such as unbundled services, brief advice, hotlines, or assisted pro se representation.

#### G. *Attorney-Client Relationship*

*Background:* In many pro bono cases, the relationship between the referring organization (a legal services volunteer lawyer program (“VLP”), public interest law group, or bar association VLP), the pro bono lawyer and the client are not well defined. This lack of clarity can give rise to ethical and professional issues in a variety of areas. The typical referral process involves three stages: (1) intake, (2) placement (referral), and (3) post-referral support and follow-up by the referring organization. There is the potential for substantial ambiguity at each of these stages regarding the nature of the relationship among these parties. For example, does the client intake process create an attorney-client relationship between the referring organization

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23. Model Rules of Professional Conduct Rule 1.1 (requiring lawyers to provide “competent” service).

and the client? Once the case is referred, does the referring organization have or continue to have a relationship with the client? If the referring organization provides support and follow-up, what are the implications for the relationship under the ethics rules?

As can be seen from these examples, these issues can be extremely fact-specific, and it is difficult to set forth any general rules. Possible questions include: (1) When does an attorney-client relationship begin? (2) What is the definition of a "firm" in the pro bono context? (3) What duty of confidentiality should apply in a pro bono context? (4) Under what circumstances can a volunteer lawyer "give back" a case that they have taken?

94. Further study of these complex issues (especially determination of when the attorney-client relationship attaches, and how organizations can structure guidelines to protect themselves, the clients, and the private practitioners) is sorely needed.
95. An organization should have an internally-consistent policy on these subjects that should be made clear to both the client and the private practitioner.
96. The Model Rules governing conflicts cannot reasonably be interpreted to treat legal services programs and private lawyers working together as a single "firm." States should conform to this interpretation to avoid creating an unnecessary barrier to private attorney involvement in pro bono matters.
97. The rules governing termination of representation of a client are clearly set forth in the Model Rules. In addition, a private firm should have the same obligation to continue representing a client after the attorney dealing with that client leaves, regardless of whether the client in question is a paying client or a pro bono client.

#### H. *Positional Conflicts*

*Background:* Positional conflicts may occur when a lawyer or law firm's advocacy of a legal argument on behalf of one client is directly contrary to or has a detrimental impact upon the position advanced by that lawyer or law firm on behalf of a second client in an unrelated case or matter. Under the Model Rules, there are only a very limited range of situations in which such a positional conflict would be ethically impermissible.<sup>24</sup> There is a concern, however, that in practice an overly broad definition of positional conflicts unduly limits pro bono resources available to address complex litigation, policy advocacy, and major transactional matters.

98. Promote education on all aspects of positional conflicts under the ethics rules. Law firms and the legal services community

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24. See *id.* Rule 1.7.

- (broadly defined) need to be educated about what is permitted under the rules.
99. Plan and implement a process whereby the legal services community (broadly defined) and law firms can enter into a dialogue about this issue, including discussions about how private firms actually deal with positional conflicts (for both paying and non-paying clients), what policies and procedures have been developed, identify the areas of greatest need that may raise questions about positional conflicts, and explore ways to minimize any barriers.
  100. Firms should attempt to treat positional conflicts in the same manner whether they involve paying or pro bono clients. They should also consider obtaining consent and waivers when they have positional conflicts with a pro bono case.
  101. Consider supplementing the existing Model Rules by adding the language of the old Model Code EC 8-1, which suggested that lawyers should seek reform "without regard to the general interests or desires of clients or former clients," and urged lawyers to "seek just laws regardless of positions that might have been previously taken when representing clients."
  102. Study how private lawyers in small or rural communities handle positional conflicts.

I. *Private Practitioners Representing Low-Income People Outside an Organized Program on a Pro Bono or Compensated Basis*

*Background:* The ABA Comprehensive Legal Needs Study found that approximately 21% of low-income people with a legal need received some service from an attorney.<sup>25</sup> Of that number, approximately two-thirds received such service from a private attorney.<sup>26</sup> While some of these attorneys participate in organized pro bono or Judicare programs, most (80% or more) do not.<sup>27</sup> While little is known about the nature of the representation provided by these attorneys, this segment of the legal profession could be better integrated into any system of delivering legal services to the poor.

103. Further study is needed in the following areas:
  - (a) The nature of the representation provided by these attorneys to low-income clients, including the subject areas in which services are being provided, the scope of representation, the range of fee arrangements, incentives to increase participation, etc.

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25. Comprehensive Legal Needs Study, *supra* note 3, at 52 tbl.5-8.

26. *See id.* at 52-53 tbls.5-8 to -9.

27. Cf. Robert J. Rhody, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 Md. J. Contemp. Legal Issues 223, 241-42 (1994) (estimating that "over fifteen percent" of the licensed bar provides pro bono services to the poor in the United States).



- (b) The quality of services provided by these attorneys to low-income clients.
- (c) Incentives for increasing the delivery of legal service by private attorneys to poor people, including the expansion of court-awarded fees to include the most commonly occurring legal needs (matrimonial, landlord-tenant, etc.).
- (d) Despite confirmation in several studies, the finding that most poor people with an attorney have a private attorney is not widely accepted. Additional studies may help gain wider acceptance of this fact. Further, studies in smaller geographic areas—especially urban ghettos and very rural areas—need to be conducted to determine if results from national and state studies can be applied to sub-state planning and delivery areas.
- (e) Legal services programs, the organized bar, and law schools may wish to study whether providing training and support to these attorneys would produce more effective services.
- (f) The role of this group needs to be taken into account in the planning for, and the development of, any comprehensive delivery system.
- (g) Use of electronic communications, especially the web and emerging telecommunications technology, to support private attorneys is very promising. Developers of electronic support for legal services attorneys should take the needs of these private attorneys into account.

### J. *Demographics*

*Background:* The legal profession faces an impending demographic transformation. The number of older lawyers will increase dramatically while the number of younger lawyers will remain relatively unchanged. The increasing portion of legal services produced by firms servicing businesses and other organizations and the tendency of those firms to phase out senior lawyers suggest that there will be a vast pool of talented and experienced lawyers who might be enlisted in the legal services/public interest sector. This could involve not only a major increase in lawyers, but also the infusion of new expertise and substantive skills, and the importation of new legal technologies. To utilize this new resource most effectively, it is important to begin to develop the relevant knowledge and organizational base.

- 104. Develop reliable demographic projections.
- 105. Study the experience of legal services providers in utilizing older (late career) attorneys. What are the problems and benefits?
- 106. Survey the late career expectations and plans of lawyers, including their public service motivations and financial needs.

107. Convene a planning group to devise appropriate strategies for utilizing this new resource.

## VII. REPRESENTATION WITHIN LAW SCHOOL SETTINGS

*Theme:* The Group urges that law schools should be, and should be viewed as, a part of the solution to the current crisis in providing legal representation to low-income persons. Law schools need to reach out to others who represent low-income persons and also need to make both providers and clients feel welcome in and a part of the law schools.

### *Introduction*

A law school has two important roles to play in the provision of legal services to low-income persons. First, through their clinics, pro bono programs and other initiatives, law schools are significant providers of legal services. In this role, law schools should see themselves as part of a network of legal providers and should work together with other providers and the community in deciding what services to provide. Second, law schools, as the first socializer of law students into their professional role, have the opportunity and duty to make students aware of their professional responsibilities to serve low-income persons.

### *A. The Mission*

108. Law schools shall encourage and provide opportunities for students, faculty, and graduates to provide legal services to low-income individuals and groups and shall socialize students to their responsibility as lawyers to provide legal services to low-income persons.

### *B. Increasing Support by Other Institutions for Representation Within Law Schools*

109. The Conference endorses the CLEA proposal to amend ABA Accreditation Standard 302(e) regarding law school responsibility to encourage and provide opportunities for pro bono service to persons unable to afford legal representation. The current Standard provides that law schools “should” do so. The CLEA proposal recommends that “should” be changed to “shall.”

### *C. The Law School’s Programmatic Responsibilities*

110. In furtherance of this responsibility, law schools should consider the following options:

- (a) Encourage students to enroll in live-client clinics, externships, or other courses that provide opportunities for service to low-income clients and to do research and writing of use to providers of legal services.
- (b) Provide instruction and information to students in clinical and non-clinical courses, and in other fora, about the maldistribution of legal services and the unmet legal needs of the poor.
- (c) Sensitize students throughout the curriculum, and particularly in professional responsibility and clinical courses, to the unique ethical considerations that arise in providing legal services to low-income clients.
- (d) Create curricular offerings that will assist students planning to enter private practice to identify and design pro bono projects that they can carry out in private practice.
- (e) Provide financial assistance to students to enable them to do public service legal work, including:
  - (i) establishing loan repayment assistance programs;
  - (ii) providing grants to defray tuition;
  - (iii) funding summer public interest fellowships;
  - (iv) creating postgraduate public service fellowships;
  - (v) counseling students about loan repayment options; and
  - (vi) supporting and encouraging student fundraising efforts for public interest work.
- (f) Provide access to the law library and other research facilities to low-income individuals and their lawyers.
- (g) Provide access to law school technological resources to provide access to legal materials and explore other ways those resources could assist in providing representation to low-income persons.

D. *The Law School Role in Increasing Pro Bono Activities*

111. Law schools should encourage pro bono legal activities on behalf of low-income clients by demonstrating commitment by faculty and administration, encouraging alumni to engage in and model pro bono activities, and by providing financial and in-kind support. These activities would both increase legal representation to low-income persons and promote a professional identity that includes and values pro bono legal services.
- (a) Each law school should adopt Model Rule of Professional Responsibility 6.1 for both faculty and students. The rule sets an aspirational goal of fifty hours per year of pro bono legal service for persons or organizations that cannot afford representation.

- (b) Law schools should provide significant institutional support for student pro bono activities. That vital support should include setting up a public interest resource center or similar office, staffed by a full time pro bono coordinator. The coordinator shall develop pro bono opportunities within and without the law school, including placement opportunities, quality control, by matching students with appropriate legal work, and by supporting student-initiated projects. Work with other legal services providers shall be encouraged and facilitated. Pro bono responsibilities and opportunities shall be a part of the first-year student orientation and continue through all of law school. The law school should provide recognition and awards for pro bono activities by both students and faculty.
- (c) Law schools should actively involve alumni in the law school pro bono legal activities by providing them pro bono opportunities, encouraging consultation with law students, and supporting recent law school graduates in continuing pro bono work. Alumni can effectively model professional commitment and provide a voice for increasing public interest and pro bono representation among the practicing bar.
- (d) Faculty should support pro bono legal activities. The most significant support would be the faculty's own pro bono representation of low-income persons, which provides a powerful example to future lawyers. The faculty should also identify and consult with students on their pro bono activities, support student fundraising for pro bono legal work, and provide recommendations for and promote public interest fellowship applications and job opportunities. Faculty who are unable to provide direct pro bono representation shall financially support student efforts. Faculty who have significant financial income from outside consulting and legal work shall tithe in support of student pro bono legal work.
- (e) Courses for academic credit should satisfy a student's pro bono obligation so that students are equally encouraged to serve low-income clients in clinic, externship, or other settings awarding academic credit.

*E. Further Study of the Role of Law Students*

112. Because law students should have an obligation to provide pro bono legal representation to low-income persons, we must further examine the Rules of Professional Responsibility to determine if they adequately protect clients, lawyers,

and other students who consult with students or who supervise them.

F. *Further Study of Legal Ethics and Clinical Practice*

113. Law school clinics frequently face ethical issues in the practice of law that include circumstances that involve potential conflicts of interest or unique challenges to protecting client confidentiality, as well as student activities that may raise concerns about the unauthorized practice of law. Clinics could benefit from practice recommendations which address their particular experience. We recommend the development of such practice guidelines.

G. *State Student Practice Rules Must Protect the Law School's Educational Mission*

114. In light of the recent inappropriate intrusions into a law school's pedagogic mission, we reaffirm the principle that every state's student practice rule should assure that law schools can provide the broadest range of educational benefits to students, and should properly model the broad provision of legal services. Educational decisions should be made by law-school faculties, not legislators or judges. Every state's student-practice rules should permit students to engage in legal representation, policy advocacy, community education, or other lawyering activities on behalf of all people or groups who would otherwise be unrepresented, under-represented, or represented by public interest or public service lawyers unable to serve every client who seeks their assistance. Every state's student practice rule should be no more restrictive of the scope of student practice than the ABA Model Student Practice Rule, which permits students, with appropriate supervision, to represent any indigent person before courts and administrative tribunals and to engage in "other activities."

H. *The Role of Law School Clinics*

115. Law school clinics should see themselves as a part of a broader legal provider network and should work together with the network and the community in deciding what services to provide and how to provide them. Examples of what law school clinics should do include:
- (a) taking on test cases that other offices cannot;
  - (b) working in a local legal services office or other community setting;

- (c) maximizing the benefits from the cases they do take by, for example, sharing work product with lawyers working on similar issues;
- (d) undertaking project work beyond individual casework;
- (e) considering the need of the community for a particular type of service when making representation decisions;
- (f) engaging in regular discussion with other providers about the legal need of the community and approaches to addressing relevant areas of practice; and
- (g) consulting with other law school programs that are undertaking or contemplating pro bono service.

I. *Fostering Students' Public Interest Aspirations Through Clinics*

116. One objective of law schools should be to provide educational experiences that encourage and nurture the public-interest aspirations of their students and prepare them for representing poor communities and clients. In doing so, clinical teaching should focus on how to represent clients effectively in a world of inadequate access to counsel and justice. Examples of issues clinics should address include:
- (a) coping with limits and making effective decisions in high-volume practice;
  - (b) remaining sensitive to issues of power, racial, and ethnic dynamics;
  - (c) taking the lead in developing a variety of approaches to delivering services, such as community education, limited legal service programs, and pro se clinics;
  - (d) integrating other kinds of representation into programs that primarily provide full-service representation of clients, such as adding a pro se clinic or community education component to the clinic;
  - (e) focusing on the special ethical considerations that affect the representation of low-income persons—conflict issues, confidentiality issues, financial-assistance-to-litigants rules, and unauthorized practice rules; and
  - (f) stressing the importance of situating legal work in the context of communities, both geographic and substantive.

J. *Fostering Faculty's Public Interest Aspirations by Bridging the Gap Between the Academy and Practice*

117. In the law school's role of developing knowledge, there is knowledge that comes from practice. Law faculty should be encouraged to engage in partnerships with organizations representing low-income persons. Examples include:
- (a) allowing faculty to use sabbaticals for practice;

- (b) awarding research fellowships for practitioners and encouraging collaboration between faculty and practitioners in scholarship; and
- (c) hiring practitioners for teaching visitorships.

K. *Reaching Out to Other Groups*

118. Law schools, and particularly law school clinics, are well placed to form liaisons with the community in order to use the law school's resources, including its reputation and expertise, to influence public policy with regard to issues affecting access to justice. Examples include:
- (a) improving the resources and practices in courts that predominantly address the needs of low-income persons;
  - (b) involvement in bar association committees that address these types of issues; and
  - (c) providing specialized knowledge to legislative and other bodies that are considering issues affecting low-income people.

VIII. ASSESSMENT OF SYSTEMS FOR DELIVERING LEGAL SERVICES

A. *What Is the Purpose of Assessment?*

Assessment and evaluation are necessary components of efforts to improve the ability of legal services delivery systems to fulfill the mission of achieving equal and full access to justice.

119. Assessment should address whether low-income people have access to the information and assistance they need to resolve their legal problems and to use the justice system to protect and promote their legal, economic, and social interests.
120. Assessment should promote the effectiveness and enhance the capacity of funders and providers in using their resources to achieve these goals.

B. *What Are the Goals of the Assessment?*

121. Assessment should foster the improvement of the delivery of legal services by addressing concerns related to three general areas:
- (a) National, state, and local system and program designs for serving client communities and promoting justice. Assessment in this area should:
    - (i) identify met and unmet legal needs;
    - (ii) assess whether the mission is responsive to the needs of the client community;
    - (iii) assess whether systems and programs have fulfilled their missions, met their goals and objectives, and satisfied their own standards;

- (iv) provide the ability to compare the effectiveness of traditional and innovative delivery systems and strategies;
  - (v) assess the program's responsiveness to the diversity of the community it serves;
  - (vi) evaluate the extent and effectiveness of stakeholder involvement in delivery of services;
  - (vii) explain to and document for the public the benefits of investment in legal services, including its cost-effectiveness for government and society as well as its intrinsic value in contributing to a more just society; and
  - (viii) assist in strategic planning processes.
- (b) Quality of client services. Assessment in this area should:
- (i) evaluate client satisfaction, including: ease of access to services, whether services respond to problems and needs, and clients' perception of quality;
  - (ii) evaluate outcome and impact of services on clients' lives;
  - (iii) assess quality and competence of the services provided; and
  - (iv) evaluate how the program addresses diversity in the interaction between program staff and clients.
- (c) Leadership, management, and administration. Assessment in this area should:
- (i) enhance program efficiency and productivity;
  - (ii) enhance the program's ability to raise funds and provide services;
  - (iii) assess the program's success in promoting and maintaining a diverse staff, management, and governing body;
  - (iv) enhance the program's ability to recruit, evaluate, train, retain, and supervise staff;
  - (v) enhance the program's process for setting priorities; and
  - (vi) assist the program's governing bodies in fulfilling their policymaking functions.

### C. *What Data Should Be Collected?*

122. Data should be collected and analyzed in furtherance of the goals listed above under the categories of: national, state, and local system and program designs for serving client communities and promoting justice; quality of client services; and



leadership, management, and administration. Areas in which useful data could be collected include:

- (a) administrative data, e.g., client characteristics, types of services being provided, client outcomes, funding sources, and staffing patterns;
- (b) existing government and organizational statistics, including community and court data;
- (c) surveys of clients, staff, and community, addressing issues such as client satisfaction, client understanding of information, and client outcomes;
- (d) focus groups of clients, staff, and community members;
- (e) information regarding legal, social, economic, and political contexts, such as changes in entitlements or other laws affecting clients; and
- (f) literature, such as legal needs surveys, cost-effectiveness studies, model standards, other published reports, articles, etc.

D. *Who Should Be Involved in Assessments?*

123. Assessment should involve participation from a wide range of stakeholders, including, where appropriate: clients, legal services program staff, management and governing bodies, advocacy groups, community-based organizations, social service providers, private attorneys and bar associations, courts, law schools, social scientists, and public officials.

E. *Methodology: How Should Assessment Be Undertaken?*

124. National, state, and local organizations as well as researchers and academics should formulate model data collection instruments and methods and should collect what has already been done in related fields. Law school clinics, in particular, should design and test models for assessment.
125. Local programs should be encouraged to collaborate with law schools, social science faculties, and other academic institutions, foundations, and non-profit research institutes and persons affiliated with the American Evaluation Association to set research agendas and undertake research.
126. In the interest of efficiency, programs should collect data useful for evaluation as part of the ongoing operation.

F. *Who Should Provide Funding and Resources for Data Collection and Assessment?*

127. Independent entities such as academic institutions, foundations, and non-profit research institutes should be encouraged

to conduct research on legal needs and delivery of legal services.

128. The federal government (e.g., through the U.S. Census Bureau) should track data on the need for legal assistance and the amount of assistance provided, as is done in other areas such as health, housing, and education.
129. In consultation with stakeholders, major funders should form a consortium to fund (a) the development of model assessment methodologies, and (b) a research grant program to assess the effectiveness of different approaches to the delivery of legal services.

#### *G. How Do We Share Information?*

130. Establish a national clearinghouse or repository, that, together with other national, state, and local entities, as well as law schools, gathers information about evaluation methods and findings, including assessment, evaluation, and methodology, and including research instruments. Technology should be used to ensure that information is linked and widely and readily accessible.
131. Establish a library of existing data related to delivery of legal services.
132. Standardize national, state (including IOLTA), and local basic provider data and make it available for research.
133. Encourage projects to share methodology and data collected on legal services at every opportunity, including with staff, community, other service organizations and the public, as well as at conferences and through a common forum to be created on the Internet.
134. Require sharing of official assessments with the programs' Boards of Directors and, to the extent appropriate, with staff.
135. Encourage relevant journals such as MIE and the Clinical Law Review to invite submission of papers on the assessment of legal services programs and to consider special annual issues on assessment of legal services.
136. Issue periodic national, state, and local reports on legal needs and available resources to address those needs.

#### *H. What Are the Challenges of Assessment?*

137. In undertaking assessment, programs and researchers should:
  - (a) assure that client confidentiality and the attorney-client privilege are protected;
  - (b) respect the integrity of judgments involved in local decisionmaking;

- (c) recognize that the goal of assessment should not be uniformity of delivery systems;
  - (d) avoid undervaluing what is hard to assess, such as the quality of justice;
  - (e) minimize the burden on clients and programs of data-collection;
  - (f) determine the priority to be given to assessment; and
  - (g) avoid undervaluing informal assessments.
138. Assessment should be sensitive to external factors that affect the program such as changes in funding, political culture, and the demographics of the community.
139. Goals and values used to design the assessment should be clearly stated. Assessment should not be used as a device for control and policymaking.
140. Assessment should recognize and avoid the risk of deterring creative, zealous, or controversial advocacy.