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Access to Justice Without Lawyers

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ACCESS TO JUSTICE WITHOUT LAWYERS

*Benjamin P. Cooper**

I.	Introduction	205
II.	Pro Se Forms and Other Assistance	209
III.	New York’s Mandatory Pro Bono Rule for Bar Applicants	214
IV.	Washington’s Limited License Legal Technician Practice Rule	217
V.	Conclusion	221

I. INTRODUCTION

Although the United States is widely considered to have the greatest justice system in the world, access to that system remains an embarrassing problem.¹ In 2011, the World Justice Project issued a Rule of Law Index that dramatically illustrates that problem: it ranked the United States twenty-first out of the sixty-six countries studied in providing access to civil justice and a woeful twentieth out of twenty-three countries in its income group.² What do those numbers mean for ordinary Americans with legal problems? At least 80 percent of the legal needs of the poor³ and two-thirds of the legal needs of middle

* Jessie D. Puckett, Jr. Lecturer and Associate Professor of Law, University of Mississippi School of Law. Professor Stephen Gillers’ discussion of “Law Without Lawyers” inspired the title. See Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953 (2012). I am grateful to Professor Jack Sahl and The Joseph G. Miller and William C. Becker Center for Professional Responsibility for inviting me to participate in this symposium.

1. Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1330-31 (2009) (“It is a shameful irony that the nation with the world’s highest concentration of lawyers has one of the least adequate systems for making legal services accessible.”).

2. Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index*, THE WORLD JUSTICE PROJECT 1, 111 (2011), http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf.

3. Legal Servs. Corp., *Documenting The Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL AID OF N.C. 14 (2005), available at

income Americans are not met.⁴ Thus, Jimmy Carter's 35-year-old observation that "90 percent of our lawyers serve 10 percent of our people"⁵ remains true today. In fact, the access-to-justice problem has grown worse since the economic crisis hit the United States in 2008: more people need free legal services,⁶ but federal and state funding for legal services has plummeted.⁷

Publicly funded legal services and pro bono lawyers provide some help but not nearly enough. As Professor Gillian Hadfield recently told the Task Force to Expand Access to Civil Legal Services in New York, "[T]here is no way to generate the kind of legal help that ordinary New Yorkers need solely through the expenditure of public money on legal aid and the provision of pro bono and other charitable assistance. No way The need for legal help — dare I say the demand for legal help — far, far outstrips what can be met only through publicly funded and charitable forms of supply."⁸ Other solutions are necessary.

http://www.legalaidnc.org/public/learn/publications/Documenting%20the%20Justice%20Gap/DocumentingtheJustice%20Gap_FINAL_Sept_30_05.pdf.

4. DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004).

5. *Quoted in* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004).

6. *See Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 5 (Sept. 2009), available at http://lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf ("The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time."). *See also* Anne Barnard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES (May 1, 2012), http://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-IN-NEW-YORK-TO-BE-REQUIRED-TO-DO-SOME-WORK-FREE.html?_r=0. In New York, for example, since the beginning of the economic downturn, requests for assistance have grown forty percent for health care issues, fifty-four percent for unemployment insurance and work-related problems, sixteen percent for domestic violence, and eight hundred percent for foreclosures. *Id.*

7. *See LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/lsc-funding> (last visited Jan. 31, 2013). Congressional funding for legal services has dropped from \$420 million in FY2010 to \$348 million in FY2012. *Id.* *See also* Press Release, Legal Servs. Corp., *Funding Cuts Expected to Result in Nearly 750 Fewer Staff Positions at LSC-funded Programs* (Aug. 15, 2012), available at <http://www.lsc.gov/media/press-releases/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc-funded>. The LSC survey shows that "local legal aid programs expect to reduce staffing by nearly 750 employees in 2012, including 350 attorneys, because of funding cuts. This represents a reduction of eight percent of full-time-equivalent (FTE) positions from the end of 2011." *Id.*

8. Gillian K. Hadfield, *Summary of Testimony Before the Task Force to Expand Access to Civil Legal Services in New York*, CNN 1, 1 (Oct. 1, 2012). *See also* Rhode, *supra* note 1, at 1330 ("the best available data indicates that the average pro bono contribution for lawyers is still less than half a dollar per day and half an hour per week."). Washington Access to Justice Board member Gregory Dallaire made a similar argument during the state's debate over the Legal Technician

Unable to afford lawyers, consumers, even middle-class individuals, are increasingly going to court without a lawyer.⁹ These individuals might benefit from a well-drafted form or the assistance of a nonlawyer professional or law student at low or no cost. Indeed, in some cases involving routine work — obtaining an uncontested divorce, drafting a simple will, filing a tax return — good forms and/or assistance from a nonlawyer professional might serve consumers just as well as a lawyer and at a lower price. After all, in many law firms, paralegals do most of the work on these kinds of mundane matters anyway. As one commentator has colorfully described the use of lawyers in such matters: “[F]or many routine [matters], retaining counsel may be tantamount to ‘hir[ing] a surgeon to pierce an ear.’”¹⁰ To date, there is simply no empirical evidence to suggest that lawyers are any better at providing certain routine services than nonlawyers.¹¹ Further, how can we deny lawyerless individuals in desperate straits — a tenant trying to halt an eviction or a victim of domestic violence seeking an order of protection — some form of nonlawyer assistance when that assistance is likely better than no assistance at all?¹²

proposal:

The problem is just too big for solution without supplemental resources born of creative thinking. Certified technicians will not, and should not, take the place of lawyers . . . But just as a combination of nurses, nurse practitioners, and EMTs augment the resources available to patients of MDs, trained, tested, and certified legal technicians can supplement the resources available to the segment of the public that falls between free legal aid and those who have the resources to retain private counsel.

Gregory R. Dallaire, *A Rationale for the Proposed Legal Technician Limited Practice Rule and Regulations*, 62 WASH. STATE BAR NEWS 14, 16 (July 2008).

9. Linda Klein, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts*, A.B.A. COALITION FOR JUSTICE 1, 14-15 (July 12, 2010), http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf. For an excellent summary of the data available concerning the explosion of pro se litigants, see Vincent Morris, *Navigating Justice: Self-Help Resources, Access to Justice, and Whose Job Is It Anyway?*, 82 MISS. L. J. SUPRA 161, 165-66 (2013).

10. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 88 (1981) (quoting Robert Ellickson). See also *Hulse v. Criger*, 247 S.W.2d 855, 861 (1952) (“[G]eneral warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training.”).

11. Rhode, *supra* note 10, at 85-90.

12. Professor Hadfield argues that if we can’t provide that tenant with a lawyer: and we can’t — then think about how much improved the situation would be for all concerned if these people could at least obtain low-cost assistance from people with sufficient expertise to help them navigate the process: to tell the person facing eviction for unpaid rent that if she wants to argue that the apartment has no heating and the ceiling is falling down, then she should bring some pictures and other evidence to court. To help people to understand what a form is asking for and to explain what some of the arcane

Using nonlawyers to deliver legal services is by no means a new idea. Commentators have long been calling for states to loosen their regulation of unauthorized legal practice so that nonlawyers can help fill the access-to-justice gap.¹³ Even the ABA, which has long been accused of protecting lawyers' monopoly on the practice of law, acknowledged in a 1995 report that the "gap might be partially closed by allowing nonlawyers to engage" in limited law practice.¹⁴

Although unauthorized practice of law regulations remain largely intact, there are a few chinks in that regulatory armor. This Article examines three ways in which consumers are gaining greater access to the justice system without using lawyers. First, courts around the country have adopted standardized forms in both paper and electronic form for use by pro se litigants and are adopting other technology to improve the experience of self-represented litigants. Similarly, companies such as LegalZoom are using a do-it-yourself approach (a la Turbo Tax) to help consumers obtain a wide variety of legal documents at a relatively low price.¹⁵ Second, New York recently adopted a mandatory pro bono requirement for applicants seeking admission to the bar on or after January 1, 2015, that will mobilize law students across the country to deliver legal services to the poor.¹⁶ Third, and perhaps most radical, Washington State has approved a limited-license practice rule that will permit nonlawyers to engage in limited forms of legal practice, and other states are considering similar proposals.¹⁷

In addition to describing these initiatives that seek to improve access to justice without the use of lawyers, this Article argues that we should embrace such initiatives in light of our current access-to-justice

legal language in a court order or rule means. There is much that can be done that is very helpful here that does not require deep legal experience.

Hadfield, *supra* note 8, at 5.

13. See, e.g. Rhode, *supra* note 10, at 79; Rhode, *supra* note 4, at 82; Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L. REV. 363, 363-65(1980); Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 301 (2004); Gillian Hadfield, *Lawyers, Make Room for Nonlawyers*, CNN (Nov. 25, 2012) <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession>; Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2243 (1999).

14. *NonLawyer Activity in Law-Related Situations: A Report with Recommendations*, ABA COMMISSION ON NONLAWYER PRACTICE 135 (August 1995), http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity.authcheckdam.pdf.

15. See Part II *infra*.

16. See Part III *infra*.

17. See Part IV *infra*.

crisis. While all of these approaches have shortcomings — and better ways exist to improve access to justice, starting with significant increases in legal services funding by federal and state governments — the magnitude of our access-to-justice crisis calls for experimentation. As Chief Justice Barbara Madsen of the Washington Supreme Court wrote in adopting the state’s legal technician rule, “No one has a crystal ball,” but potentially “the public will have a source of relatively affordable technical help with uncomplicated legal matters,”¹⁸ and some of these initiatives will deliver that help for free. We cannot know how these programs will work, however, without trying them. If they prove unworkable or harmful, they can always be improved, replaced, or terminated. As some of the reaction to these programs demonstrates, it is easy to be a critic, but it is much harder to propose concrete solutions. These programs are surely not perfect, but those waiting for the perfect solution to our access-to-justice crisis will never surely find it.

II. PRO SE FORMS AND OTHER ASSISTANCE

For some time, consumers have been able to take advantage of free forms and other assistance to help them navigate the legal system. It is not entirely precise to call these resources “nonlawyer assistance” because lawyers play an important role in developing them, but once they are in place, these resources enable consumers to address their legal problems without further assistance from a lawyer and/or with further assistance from a nonlawyer. Three distinct groups — courts, legal-aid organizations, and the private sector — provide assistance to pro se consumers. The extent of assistance available to consumers varies widely from state to state.¹⁹ For example, among courts, Maricopa County, Arizona, has been at the forefront of this movement. In 1995, the Maricopa County Superior Court established a Self-Service Center, which “familiarizes litigants with procedures by distributing simply written, court-approved forms, samples, and instructions.”²⁰ Its current

18. *Adoption of New APR 28 – Limited Practice Rule for Limited License Legal Technicians*, Order No. 25700-A-1005, 1, 1-2 (Wash., 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> [hereinafter APR 28 Decision].

19. For an excellent resource, see John M. Greacen, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of the “State of the Art,”* 3-4 (June 2011), available at <http://www.msb.org/selfhelp/GreacenReportNationalEdition.pdf>.

20. Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?* 67 *FORDHAM L. REV.* 1879, 1892 (1999).

offerings are remarkably extensive.²¹ Mississippi, on the other hand, currently has no court-approved forms, though a limited number of self-help forms are available on the Mississippi Legal Services website,²² and Mississippi consumers, like consumers across the country, can buy the services of private companies like LegalZoom.²³ As with court-approved forms, the amount of pro se assistance available from legal aid organizations and the private sector vary from state-to-state.

While consumers can obtain paper forms in many jurisdictions, most are moving toward document assembly software, such as LawHelp Interactive.²⁴ Like TurboTax, these programs, developed by lawyers, generally lead users through a set of questions. When the user is done answering the questions, the application chooses the appropriate form, inserts the information provided in the appropriate places in the form, and displays the completed documents for review and printing by the user.²⁵ The LawHelp Interactive website has more than 2,300 HotDocs templates,²⁶ and, in 2011, consumers engaged in 591,783 online interviews on LawHelp Interactive and assembled 318,846 documents.²⁷ Twenty-five states, the District of Columbia, the U.S. Virgin Islands, and Ontario, Canada currently offer legal forms through LawHelp Interactive.²⁸

Private companies provide similar services for a fee. For example, LegalZoom, Inc., which was founded in 1999 and has more than 500 employees, “provides legal document preparation and related subscription services for small businesses and consumers in the United

21. *Self Service Center*, THE JUDICIAL BRANCH OF ARIZONA, <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/forms/Index.asp>.

22. *Online Legal Forms*, MISSOURI LEGAL SERVICES, <http://www.mslegalservices.org/online-legal-forms>.

23. *How It Works*, LEGALZOOM, <http://www.legalzoom.com/about-us/how-it-works> (last visited Aug. 11, 2013).

24. LawHelp Interactive, www.lawhelpinteractive.org. Law Help Interactive is among the projects developed as a result of Technology Initiative Grants from the Legal Services Corporation. *About the Technology Initiative Grants (TIG) Program*, LEGAL SERVS. CORP., <http://www.lsc.gov/media/fact-sheets/about-technology-initiative-grants-tig-program>. This program has awarded more than 500 grants worth approximately \$40 million. *Id.* See also Greacen, *supra* note 19, at 21.

25. LawHelp Interactive, *supra* note 24.

26. Bonnie Rose Hough & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 251 (2012).

27. *Arkansas Legal Services Partnership Justice Technology Projects Report*, ARK. LEGAL SERV. P'SHIP (Feb. 23, 2012), available at <http://www.arlegalservices.org/system/files/ALSPJusticeTechnologyReport2011.pdf>.

28. LawHelp Interactive, *supra* note 24.

States.”²⁹ According to LegalZoom’s website, the company employs a three-step process³⁰ that resembles TurboTax. First, consumers log on and answer “a series of straightforward questions.”³¹ Second, “LegalZoom’s document assistants review [the consumer’s] answers for consistency and completeness” and will contact the consumer if they need “clarification or additional information.”³² Third, LegalZoom “print[s the consumer’s] legal documents . . . and deliver[s] them . . . along with simple wrap-up instructions.”³³ In some cases, LegalZoom will “file [the consumer’s] documents with the appropriate government agency.”³⁴ Again, it is imprecise to say that LegalZoom provides legal assistance without the help of lawyers because lawyers were involved in developing this process,³⁵ but LegalZoom, at least in theory, enables consumers to more easily navigate the legal system without any further assistance from a lawyer.³⁶

How effective are these forms (whether in paper or electronic form) in helping to close the access-to-justice gap? The benefits of forms are obvious: they are free or, in the case of LegalZoom, cost less than a lawyer. The extensive use of LawHelp Interactive forms³⁷ and the financial success of LegalZoom³⁸ suggest a strong demand for them. Whether these forms are effective in allowing consumers to accomplish their legal goals, however, is an empirical question that requires continued monitoring.

In considering the effectiveness of forms, a critical issue is what kind of assistance, if any, is offered with the forms.³⁹ As one judge

29. *Internet Software and Services: Company Overview of LegalZoom.com, Inc.*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=11677383>.

30. LegalZoom, *supra* note 23.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. As of July 2011, LegalZoom has helped nearly 2 million customers. Leena Rao, *Eying an IPO in the Next Year, LegalZoom Raises \$66M from Kleiner Perkins and IVP*, TECHCRUNCH (July 24, 2011), <http://techcrunch.com/2011/07/24/eying-an-ipo-in-the-next-year-legalzoom-raises-66m-from-kleiner-perkins-and-ivp/>.

37. See *supra* notes 26-27 and accompanying text.

38. In 2011, LegalZoom raised \$66 million in venture capital funding. *Id.* Last summer it delayed its initial public offering. Olivia Oran, *LegalZoom IPO delayed*, REUTERS (Aug 2, 2012), <http://www.reuters.com/article/2012/08/02/legalzoom-idUSL2E8J2EZF20120802>.

39. Judge Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J. SUPRA 147, 157 (2013) (describing the mistakes that pro se litigants make).

explained, “Forms without knowledge are just useless pieces of paper.”⁴⁰ John Greacen, a leading authority on the issue, argues that, “The forms must be part of a more comprehensive process that provides accessible, understandable information about topics related to the person’s legal issue, including substantive and procedural instruction that assist persons in completing the forms they need to use.”⁴¹ Among the considerations that Greacen identifies:

- What information will be provided to help a potential self-represented litigant to decide whether to pursue a legal remedy?
- Will the court or self-help program provide potential litigants with assistance in deciding whether to represent themselves? . . .
- What forms will be provided? Will the forms be limited to pleadings (complaints/petitions, answers/responses, and varieties of counter and cross claims and their responses)? . . . Will the forms include discovery and motion practice?
- What instructions will accompany each form? . . .
- What information will be provided to assist a litigant in preparing for a court hearing?⁴²

Fortunately, courts and legal-aid organizations provide a wide variety of assistance beyond the forms themselves. For example, many courts provide self-help videos and other information online.⁴³ Moreover, in many states, court staff or non-court organizations, such as legal services programs, law libraries, bar association-funded or volunteer lawyer programs, staff self-help centers where pro se litigants can obtain assistance with navigating the legal system.⁴⁴

One potential problem with these forms of assisting pro se litigants, however, is that such assistance may constitute the unauthorized practice of law. States define the practice of law extremely broadly,⁴⁵ and

40. *Id.* at 158.

41. Greacen, *supra* note 19, at 4. Instructions should include: “complete coverage of how to fill out forms correctly, what documents will be needed for completion of the form as well as proper filing in a court, necessary steps for getting before a judge, if desired, timelines, guidelines, and answers to general questions that may arise while filling out the forms.” Hough & Zorza, *supra* note 26, at 298.

42. Greacen, *supra* note 19, at 5.

43. See e.g., *Indiana Supreme Court YouTube Channel*, YOUTUBE, <http://www.youtube.com/user/incourts> (last visited Apr. 25, 2013).

44. Greacen, *supra* note 19, at 42.

45. For example, the Hawaii Supreme Court has said that the practice of law “consists,

assistance with filling out pro se forms — and possibly even the development of the forms itself — could be construed as the practice of law under these broad definitions. LegalZoom is engaged in litigation in several states over whether its services constitute the unauthorized practice of law.⁴⁶ In a recent case of first impression, a federal district court in Missouri found that LegalZoom was engaged in the unauthorized practice of law, because the company “sells more than merely a good (i.e., a kit for self-help) but also a service (i.e., preparing that legal document).”⁴⁷ In reaching this decision, the Court found several aspects of LegalZoom’s work problematic including the creation of the software itself⁴⁸ and the company’s review (by nonlawyer employees) for typos and inconsistencies.⁴⁹

among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party affecting the legal rights . . . of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy.” *Fought & Co., Inc. v. Steel Engineering and Erection, Inc.*, 951 P.2d 487, 495 (Hawaii 1998). Similarly, the Mississippi Supreme Court has said:

The practice of law includes the drafting or selection of documents, the giving of advice in regard to them, and the using of an informed or trained discretion in the drafting of documents to meet the needs of the person being served. So any exercise of intelligent choice in advising another of his legal rights and duties brings the activity within the practice of the legal profession.

Darby v. Mississippi State Board of Bar Admissions, 185 So. 2d 684, 687-88 (Miss. 1966). For a collection of state definitions of the practice of law, see *Appendix A: State Definitions of the Practice of Law*, ABA http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

46. Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 187 n.16 (2012) (citing Bill Draper, *Missouri Lawyers Challenge LegalZoom’s Service*, NEWS TRIBUNE (July 31, 2011), <http://www.newtribune.com/news/2011/jul/31/missouri-lawyers-challenge-legalzooms-service/>) (noting that LegalZoom has been challenged with complaints in North Carolina, Alabama, and Missouri).

47. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064-65 (W.D. Mo. 2011). LegalZoom subsequently settled that case by agreeing to modify its business practices in the state. Samson Habte, *Class Action Against LegalZoom Isn’t Valid Unless State High Court Finds UPL Violation*, BLOOMBERG BNA (Aug. 1, 2012), <http://www.bna.com/class-action-against-n12884910959/>.

48. The Court stated:

Furthermore, LegalZoom’s branching computer program is created by a LegalZoom employee using Missouri law. It is that human input that creates the legal document. A computer sitting at a desk in California cannot prepare a legal document without a human programming it to fill in the document using legal principles derived from Missouri law that are selected for the customer based on the information provided by the customer. There is little or no difference between this and a lawyer in Missouri asking a client a series of questions and then preparing a legal document based on the answers provided and applicable Missouri law.

Janson, 802 F. Supp. 2d at 1065.

49. The Court also stated, “LegalZoom’s legal document preparation service goes beyond

Although the court's reasoning is flawed — the practice of law is, at its core, the application of legal knowledge to facts, not proofreading — the decision casts a shadow over efforts by nonlawyers to assist in the creation and provision of forms. The good news is that pro bono efforts to provide such assistance may yield a different result. The Missouri court emphasized that LegalZoom “charges a fee for its legal document preparation service,”⁵⁰ suggesting that it would apply a different standard to pro bono organizations that provide similar services. Moreover, to date state bars have not aggressively pursued unauthorized practice of law charges against courthouse or legal aid staff who assist pro se litigants. Nevertheless, some clarity concerning the reach of unauthorized practice of law prohibitions would be helpful.

III. NEW YORK'S MANDATORY PRO BONO RULE FOR BAR APPLICANTS⁵¹

The New York Court of Appeals is mobilizing law students to address what Chief Judge Jonathan Lippman has described as the “critical need for legal services for the poor [and] the working poor.”⁵² During his May 1, 2012, Law Day speech, Chief Judge Lippman announced that New York would become the first state to require lawyers to perform pro bono service — fifty hours worth — before being admitted to practice law in the state,⁵³ and on September 19, 2012, the court revealed the details surrounding that requirement.⁵⁴ The rule is intended to be, in Chief Judge Lippman's words, “user friendly.”⁵⁵ It defines “pro bono service” broadly and allows students to meet the requirement in law school clinics, judicial chambers, legal aid clinics,

self-help because of the role played by its human employees not because of the internet medium. It is that human input that creates the legal document.” *Id.* at 1064. The Court described the work done by LegalZoom employees as “review[ing] the data file for completeness, spelling and grammatical errors, and consistency of names, addresses, and other factual information.” *Id.*

50. *Id.* at 1065.

51. I have written in favor of this new rule elsewhere. See Benjamin P. Cooper, *Mandatory Pro Bono for New York Bar Applicants: Why Not?* THE PROFESSIONAL LAWYER (Vol. 21, No. 3, 2012) and Benjamin P. Cooper, *Mandatory Pro Bono Redux*, LEGAL ETHICS, Vol. 15, No. 1, 2012: 135-139 (Guest Correspondent's Report from the United States).

52. Jonathan Lippman, Chief Judge Jonathan Lippman's Law Day 2012, 2 (May 1, 2012), available at <http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf>.

53. *Id.* at 4.

54. Joel Stashenko and Christine Simmons, *Lippman Unveils Rule Detailing Bar Admission Pro Bono Mandate*, N.Y. L.J., Sep. 20, 2012, http://www.law.com/jsp/law/article.jsp?id=1202571894656&thepage=2#Read_Comments.

55. *Id.*

government agencies, and a variety of other settings.⁵⁶ The new rule also permits applicants to perform their service anywhere in the world.⁵⁷ Finally, it exempts current third-year law students,⁵⁸ thereby addressing concerns about retroactivity or unfair notice.

How will New York bar applicants fulfill this requirement? Although the implementing regulations give law students a great deal of flexibility, the easiest and most likely place for applicants to fulfill the requirement is in law school. Law schools already provide ample pro bono opportunities for students,⁵⁹ and, since law students from all over the country take the New York Bar, schools across the country are likely to expand those opportunities to help their students meet this requirement.

In addition to providing law students with much needed practical training, the new pro bono requirement should help address, at least on the margins, our country's access-to-justice crisis. The rule is by no means a panacea, but 15,000 New York bar applicants providing fifty hours of pro bono service every year is at least a small step in the right direction. While some have scoffed at the quality of law student legal assistance, Dean Erwin Chemerinsky recently argued, law students are capable of doing excellent work, and we should not underestimate them or their contributions.⁶⁰

Another potential benefit of New York's pro bono rule is what Professor Deborah Rhode calls the "trickle up" effect: if lawyers do pro

56. 22 NYCRR § 520.16(b).

57. 22 NYCRR § 520.16(d).

58. 22 NYCRR § 520.16(a) (requirement applies to applicants admitted on or after Jan. 1, 2015).

59. See AMERICAN BAR ASSOCIATION, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 16 (Catherine L. Carpenter ed.), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf (stating that more than 85 percent of law schools now "regularly offer in-house live-client clinical opportunities,") and about the same number (176 law schools out of approximately 200) have a formal pro bono program. ABA, *Chart of Law School Pro Bono Programs*, Directory of Law School Public Interest and Pro Bono Programs, Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, ABA (June 24, 2011), http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html.

60. Erwin Chemerinsky & Catherine Fisk, Comment to *Rethinking Pro Bono*, N.Y. TIMES, May 30, 2012, <http://www.nytimes.com/2012/06/03/opinion/sunday/sunday-dialogue-public-service-for-lawyers.html?pagewanted=all> (discussing work of Cal-Irvine students). See also Liz Tobin Tyler & David S. Udell, *Is the New York 50 Hour Requirement Changing the Future of Law Student Pro Bono?*, BLOOMBERG LAW, <http://about.bloomberglaw.com/practitioner-contributions/is-the-new-york-50-hour-requirement-changing-the-future-of-law-student-pro-bono/> (stating that, "Law student pro bono assistance helps to fill this enormous gap by offering the time, skills and passion of students in the form of actual service to otherwise unrepresented clients and communities.").

bono work in law school, they may be more likely to do pro bono work as lawyers. “In surveys at several schools with required programs, most students report that participation has increased their willingness to provide pro bono contributions after graduation.”⁶¹ Further, lawyers who do pro bono work in law school will be more prepared to do pro bono work once they are in practice. Imagine a junior associate in the corporate department of a large New York firm. He may want to represent a tenant in a dispute with a landlord or help a battered woman get a temporary restraining order to protect her from her husband, but if he has not been exposed to that kind of work in law school, it is unlikely that he will know how to do it. As a result, the junior associate may not do a very good job on the case, or he may not take the case at all.

Finally, New York’s bold initiative may also serve as an inspiration for others states. A California task force has unveiled a draft report recommending, among other things, a requirement that California lawyers perform fifty hours of pro bono in law school or during their first year of practice.⁶² Other states, including New Jersey and Connecticut, have created task forces to study the idea.⁶³ As Chief Judge Lippmann said, “If every state in the country were to join us in taking up this mantle, that would mean at least two and a half million hours of additional pro bono work — what a positive impact on persons of limited means, communities, and organizations that would gain from this infusion of pro bono work.”⁶⁴

New York’s mandatory pro bono rule has been the subject of scorn⁶⁵ and derision,⁶⁶ and while some of the criticisms are justified — I agree that if pro bono is mandatory for law students it should also be

61. Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 43 (2000). Chief Judge Lippmann seems to hope that the requirement will have a “trickle up” effect: “To me, this is the best guarantee against mandatory pro bono because you are instilling that culture in a new generation of lawyers. They will have it from Day One.” *Id.*

62. Karen Sloan, *Pro Bono Mandate Gains Steam*, NATIONAL LAW JOURNAL (Apr. 22, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202596770850&Pro_Bono_Mandate_Gains_Steam).

63. *Id.*

64. Lippman, *supra* note 52, at 4.

65. Susan Cartier Liebel, *NY’s New Lawyer Mandatory Pro Bono Is Indentured Servitude*, SOLO PRACTICE U. BLOG (May 12, 2012), <http://solopracticeuniversity.com/2012/05/02/nys-new-lawYER-MANDATORY-PRO-BONO-IS-INDENTURED-SERVITUDE> (describing mandatory pro bono as “indentured servitude”).

66. Paul Campos, *Clueless Baby Boomer Judge Orders Poor Lawyers to Subsidize Rich Ones*, INSIDE THE LAW SCHOOL SCAM BLOG (May 2, 2012, 7:46 AM), <http://insidethelaw-schoolscam.blogspot.com/2012/05/clueless-baby-boomer-judge-orders-poor.html> (describing Chief Judge Lippmann as “clueless”).

mandatory for professors⁶⁷ — the new rule is worth a try in light of our access-to-justice crisis. New York’s new rule should impose relatively little burden on anybody while providing at least some benefit to the poor and to students seeking practical opportunities in law school. We can hope, moreover, that the experience of doing pro bono work in law school will “trickle up” and increase pro bono service by lawyers in practice.

IV. WASHINGTON’S LIMITED LICENSE LEGAL TECHNICIAN PRACTICE RULE

Washington State has approved an even more controversial plan for using nonlawyers to address the access-to-justice gap. On June 15, 2012, after a lengthy and heated debate in the Washington legal community, the Washington State Supreme Court voted six-to-three to allow nonlawyers — dubbed Limited License Legal Technicians — to engage in limited forms of law practice.⁶⁸ In passing this controversial rule, the Court was motivated primarily by two concerns. First and foremost, the Court recognized that low income people with legal problems “seek but cannot obtain help from an overtaxed, underfunded civil legal aid system,” while “moderate income people” with legal problems find the “existing market rates for legal services . . . cost-prohibitive.”⁶⁹ Although “court managers, legal aid programs and others have embraced a range of strategies to provide greater levels of assistance to these unrepresented litigants,” there are “significant limitations in these services and large gaps in the type of services for pro se litigants.”⁷⁰ The Court hopes that the Legal Technicians will provide “the public [with] a source of relatively affordable technical legal help with uncomplicated legal matters.”⁷¹

Second, the Court aims to protect the public from “the unregulated activities of many untrained, unsupervised legal practitioners who daily do harm to ‘clients’ and to the public’s interest in having high quality

67. Douglas R. Richmond, *A New York State of Mind*, 21 THE PROFESSIONAL LAWYER 6, 7 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tpl_21_3_20121105.authcheckdam.pdf.

68. APR 28 Decision, *supra* note 19, at 1; Professor Brooks Holland has written an excellent article describing the events that led up to the Washington State Supreme Court’s historic vote. See Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L. J. SUPRA 75 (2013).

69. APR 28 Decision, *supra* note 18, at 4.

70. *Id.* at 4-5.

71. *Id.* at 9.

civil legal services provided by qualified practitioners.”⁷² Significantly, then, the Court found that the rule it was adopting, “includes appropriate training, financial responsibility, regulatory oversight and accountability systems, and incorporates ethical and other requirements designed to ensure competency within the narrow spectrum of the services that [the technicians] will be allowed to provide.”⁷³

With the Court’s blessing, the new Washington Admission to Practice Rule (APR) 28 will allow trained and authorized Limited License Legal Technicians to engage in limited practice.⁷⁴ New York and California are also examining this concept.⁷⁵ Washington’s Legal Technicians will be able to, among other things, fill out legal forms, review and explain pleadings, and apprise clients of procedures and timelines.⁷⁶ The new rule explicitly prohibits Legal Technicians from engaging in a variety of other activities, however, including

72. *Id.* at 2.

73. *Id.* at 1-2.

74. *Id.* at 2.

75. Laura Ernde, *State Bar to Look at Limited-Practice Licensing Program*, CALIFORNIA BAR JOURNAL (February 2013), <http://www.calbarjournal.com/February2013/TopHeadlines/TH1.aspx>.

76. APR 28(f) provides that:

The LLLT may undertake the following:

- (1) Obtain relevant facts, and explain the relevancy of such information to the client;
- (2) Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding;
- (3) Inform the client of applicable procedures for proper service of process and filing of legal documents;
- (4) Provide the client with self-help materials prepared by a Washington lawyer or approved by the Board, which contain information about relevant legal requirements, case law basis for the client’s claim, and venue and jurisdiction requirements;
- (5) Review documents or exhibits that the client has received from the opposing side, and explain them to the client;
- (6) Select and complete forms that have been approved by the State of Washington, either through a governmental agency or by the Administrative Office of the Courts or the content of which is specified by statute; federal forms; forms prepared by a Washington lawyer; or forms approved by the Board; and advise the client of the significance of the selected forms to the client’s case;
- (7) Perform legal research and draft legal letters and documents beyond what is permitted in the previous paragraph, if the work is reviewed and approved by a Washington lawyer;
- (8) Advise a client as to other documents that may be necessary to the client’s case (such as exhibits, witness declarations, or party declarations), and explain how such additional documents or pleadings may affect the client’s case;
- (9) Assist the client in obtaining necessary documents, such as birth, death, or marriage certificates.

2014]

JUSTICE WITHOUT LAWYERS

219

“[r]epresent[ing] a client in court proceedings, formal administrative adjudicative proceedings, or other formal dispute resolution process,” “[n]egotiat[ing] the client’s legal rights or responsibilities, or communicat[ing] with another person the client’s position or convey[ing] to the client the position of another party”⁷⁷

The Rule also imposes licensure requirements. Applicants must have a college degree in “paralegal/legal assistant studies” and a “minimum of two years’ experience as a paralegal/legal assistant doing substantive law-related work under the supervision of a lawyer” or a “post-baccalaureate certificate program in paralegal/legal assistant studies” and “three years’ experience as a paralegal/legal assistant doing substantive law-related work under the supervision of a lawyer”⁷⁸ Like lawyers, they also must pass a competency exam and will be subject to continuing education requirements.⁷⁹ Limited License Legal Technicians will also be held to the “standard of care of a Washington lawyer,” and “ethical standards” that will be created for them. In addition, the “Washington law of attorney-client privilege and law of a lawyer’s fiduciary responsibility to the client shall apply to the Limited License Legal Technician-client relationship to the same extent as it would apply to an attorney-client relationship.”⁸⁰

Many of the details of this novel program need to be determined, and the new rule created a thirteen-member Limited License Legal Technician Board to do that work.⁸¹ The Board will, among other things, determine practice areas for Limited License Legal Technicians,⁸² create and administer a legal-technician examination, establish examination and licensing fees, and propose rules and regulations for grievance and disciplinary procedures.⁸³

As with the other efforts to improve access to justice without the use of lawyers, Washington’s novel plan deserves a chance. These Legal Technicians could be a great source of high quality, low cost legal work on routine matters. One concern is that Legal Technicians will

77. Wash. APR 28(H).

78. Wash. APR 28(D)(3).

79. Wash. APR 28(E), 28(I).

80. Wash. APR 28(K).

81. Wash. APR 28(C).

82. The Board began its work in January 2013 and, as one of its first actions, recommended to the Supreme Court that family law be one of those practice areas. In March 2013, the Supreme Court approved this recommendation. *Limited License Legal Technician (LLLT) Board*, WASHINGTON STATE BAR ASSOCIATION, <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Legal-Technician-Board>.

83. Wash. APR 28(C).

offer clients access to justice, but not access to *equal* justice: “a legal technician, for all his or her ability to assist clients, is not the same in function or perception as a lawyer authorized to practice law in all areas and venues.”⁸⁴ In theory, Washington could be creating two levels of access to justice: high-quality lawyers for those who can afford them and Legal Technicians for everybody else. In practice, however, Legal Technicians may prove more effective than the average junior attorney. For instance, if the Board requires Legal Technicians to be trained in the specific areas in which they will practice, they will likely be, on average, more prepared to practice in those areas than newly minted lawyers who often come out of law school without similar training.⁸⁵

Although the medical field is certainly different from the legal field in many ways, the excellent work of nurse practitioners offers hope. Nurse practitioners provide excellent care — by some measures, they deliver care that is as good, if not better than doctors⁸⁶ — at a lower price. As Professor Brooks Holland has argued, “With time, well-trained and regulated legal technicians may prove the same in their limited-practice areas, thus minimizing, if not eliminating, equal justice concerns.”⁸⁷

Even more promising is the success of a similar program in Ontario, Canada. Since 2007, licensed paralegals have been assisting clients there with small-claims matters, traffic offenses, landlord-tenant disputes, administrative matters, and minor criminal offenses.⁸⁸ In its five-year review of the program, the Law Society of Upper Canada, Ontario’s regulatory body for the legal profession, which administers the

84. Holland, *supra* note 68, at 122 (rejecting this concern).

85. That many new law school graduates are unequipped to perform routine work for clients is a stinging — and mostly accurate — indictment of legal education. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov.19, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0.

86. An example includes:

Data has shown that nurse practitioners provide good health care. A review of 118 published studies over 18 years comparing health outcomes and patient satisfaction at doctor-led and nurse practitioner-led clinics found the two groups to be equivalent on most outcomes. The nurses did better at controlling blood glucose and lipid levels, and on many aspects of birthing. There were no measures on which the nurses did worse.

Tina Rosenberg, *The Family Doctor, Minus the M.D.*, N.Y. TIMES OPINIONATOR BLOG (Oct. 24, 2012), <http://opinionator.blogs.nytimes.com/2012/10/24/the-family-doctor-minus-the-m-d/>.

87. Holland, *supra* note 68, at 126.

88. *Report to the Attorney General of Ontario Pursuant to Section 63.1 of the Law Society Act*, THE LAW SOC’Y OF UPPER CAN. 1, 2 (2012), available at <http://www.lsuc.com/WorkArea/DownloadAsset.aspx?id=2147488010> [hereinafter *Report to the Attorney General*].

2014]

JUSTICE WITHOUT LAWYERS

221

program, concluded that its “regulation of paralegals has been successful.”⁸⁹ Of particular note, the Law Society reported that “[c]onsumer protection has been balanced with maintaining access to justice and the public interest has thereby been protected.”⁹⁰

V. CONCLUSION

Our country has a vexing access-to-justice crisis. Nobody denies this. The question is what we are going to do about it. In an ideal world, every consumer with a legal problem could have access to a lawyer, but that is not our world. Lawyers are too expensive for the poor and working class. Publicly funded legal services and pro bono lawyers provide some help, but not nearly enough. The seriousness of the problem calls for experimentation.

This Article has described three ways in which consumers are gaining greater access to the justice system without using lawyers. Although we need to continue to push for increases in legal services’ funding by federal and state governments and increased pro bono involvement by the bar, in the meantime, we need to embrace these experiments. After all, nonlawyer assistance “remains superior to the real-world alternative of nothing.”⁹¹

89. *Id.* at 3; *see also id.* at 5 (reporting that the Standing Committee on Paralegals “regards the implementation of paralegal regulation in Ontario as a success, providing consumer protection while maintaining access to justice”); News Release, The Law Society of Upper Canada, Success of Paralegal Program Highlighted in Report to Attorney General (June 28, 2012), *available at* <http://www.marketwire.com/press-release/success-of-paralegal-regulation-highlighted-in-report-to-attorney-general-1675172.htm>.

90. *Report to the Attorney General*, *supra* note 88, at 3.

91. Holland, *supra* note 68, at 127-28.