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## COLLABORATIONS BETWEEN LAWYERS AND NEW LEGAL PROFESSIONALS:

### A PATH TO INCREASE ACCESS TO JUSTICE AND PROTECT CLIENTS

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#### I. INTRODUCTION

The ongoing challenge of access to affordable legal services for civil matters will be met in new ways as a variety of innovations improve their delivery. One of the innovations that many predict will become more prevalent is the licensing of new categories of legal professionals who will be authorized to provide legal services within a limited scope of practice.<sup>1</sup> This has already happened in the State of Washington with the creation of Limited License Legal Technicians and it is likely that other states will adopt similar models in the next decade or two.<sup>2</sup>

If the delivery of legal services becomes diversified with different types of professionals, there will be a need to explore approaches for lawyers and other legal professionals to collaborate to protect consumers from unqualified practitioners while providing them with more affordable options for legal services. This essay looks at the various relationships between advanced practice registered nurses and physicians as a possible template for associations between lawyers and other legal professionals. Part II of this essay discusses the current challenges to access to justice. Part III gives an overview of the efforts a few states have made to address some of the access challenges by using nonlawyers. Part IV examines the types of legislative

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1. This idea has been advocated over many decades by many scholars. See, e.g., Deborah Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 703-04 (1996); Deborah Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

2. Several states are already starting to explore such options. See *infra* Parts IV, V.

models for collaboration and supervision between physicians and advanced practice registered nurses. Lastly, Part V uses those models for the delivery of health care services as possible templates for relationships between lawyers and nonlawyers that could increase access while addressing consumer protection concerns.

## II. ACCESS TO JUSTICE CHALLENGES

Adequate access to legal services is a concern for the general population and, in particular, for the legal profession that has dedicated much energy toward finding solutions. As of 2014, thirty-eight states have created access to justice commissions to address myriad issues that prevent access to legal services.<sup>3</sup> The legal profession has endeavored to increase pro bono services.<sup>4</sup> Law school clinics have made a contribution by serving indigent populations, albeit a limited one.<sup>5</sup> Courts have responded by providing courthouse assistants and more pro se resources.<sup>6</sup> Ethical rules around the country have been modified to allow lawyers to provide limited representation or unbundled legal services when a client cannot afford to pay the lawyer's fees for an entire matter.<sup>7</sup> The Legal Services Corporation and other organizations that provide legal services to those who cannot afford them have made efforts to maintain adequate funding, but such funding is never sufficient.<sup>8</sup> Unfortunately, the goal of significantly increasing access to legal services seems no closer despite all of these efforts over the decades. Indigent people are still underserved, as well as the working poor and those in the middle class.<sup>9</sup>

There is also reason to be concerned that access to affordable legal services will continue to get worse. By many estimates, the demand for legal

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3. *Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_for\\_access\\_to\\_justice/state\\_atj\\_commissions.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html) (last visited Apr. 19, 2015).

4. *See, e.g.*, Victor Marrero, *Pro Bono Legal Services: The Silent Majority—A Twenty-Five Year Retrospective*, 41 FORDHAM URB. L.J. 1317, 1331–32 (2014) (discussing efforts by the New York State Bar Association's efforts to increase pro bono service).

5. *See, e.g.*, Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 396 (2013).

6. *See, e.g.*, Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 94–95.

7. *See, e.g.*, Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 383 (2008).

8. *See, e.g.*, Spieler, *supra* note 5, at 369–70.

9. *See, e.g.*, C. J. Jonathan Lippman, *The State of the Judiciary 2014*, at 3 (Feb. 11 2014), available at <https://www.nycourts.gov/ctapps/soj2014.pdf>; Gillian Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 49 (2014); Tom Lininger, *Deregulating Public Interest Law*, 88 TUL. L. REV. 727, 730–31 (2014); Brooks Holland, *Washington State's Legal Technician Limited License Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 79–82 (2013), available at [mississippilawjournal.org/wp-content/uploads/2013/02/3\\_Holland\\_Final.pdf](http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf) (discussing the conclusions of a study on access to justice in Washington).

services is increasing.<sup>10</sup> This statement might seem to contradict current assertions that there is an oversupply of lawyers, as evidenced by the difficulty that new graduates are having in securing employment as an attorney.<sup>11</sup> Employment opportunities are, however, predominantly driven by a market of clients who can pay for legal services.<sup>12</sup> For purposes of this essay, the term “demand” is used to describe those who need legal services, not only those who can afford to participate in the market for legal services.<sup>13</sup> When demand is viewed through this lens, demand is increasing, particularly in areas important to ordinary Americans such as housing, family law, and consumer law.<sup>14</sup>

While demand continues to be great, the number of attorneys might decrease over the next couple of decades.<sup>15</sup> Law school applications have dropped about forty percent nationwide since 2010.<sup>16</sup> In response to this trend, most law schools across the country have contracted the size of their incoming class by some percentage.<sup>17</sup> How long this trend will last is unknown, but there are no current signs of it ending in the near future.<sup>18</sup> This will have an impact on the number of new lawyers admitted to the practice of law in future years.<sup>19</sup>

While the number of new lawyers is contracting, a large number of those who are currently licensed are approaching retirement age.<sup>20</sup> This suggests that lawyers may retire in the next decade or two at a greater rate than new

10. See, e.g., LEGAL SERVS. CORP., 2013 ANNUAL REPORT 2, available at <http://www.lsc.gov/sites/lsc.gov/files/LSC/Publications/AnnualReport2013/LSC2013AnnualReportW.pdf> (“In the wake of the recent recession, the number of people eligible for civil legal assistance is at an all-time high, nearly 21% of Americans. When LSC was founded in 1974, that number was 12%.”).

11. See, e.g., Stephen M. Peterson, *Too Many Lawyers?...or Not Enough Clients?*, 36 WYO. LAW. 43, 43 (2013).

12. William D. Henderson, *A Blueprint for Change*, 40 PEPPERDINE L. REV. 461, 461–62 (2013) (referring to demand in the context of jobs in private practice); Peterson, *supra* note 11, at 44 (referring to demand as “billable hours”).

13. See Spieler, *supra* note 5, at 367.

14. See, e.g., LEGAL SERVS. CORP., 2013 ANNUAL REPORT 22, available at <http://www.lsc.gov/sites/lsc.gov/files/LSC/Publications/AnnualReport2013/LSC2013AnnualReportW.pdf>.

15. See Mark Hansen, *Washington State Legal Community Braces for Huge Turnover in Lawyer Population*, A.B.A. J. (Aug. 2012), available at [http://www.abajournal.com/news/article/washington\\_state\\_legal\\_community\\_braces\\_for\\_huge\\_turnover\\_in\\_lawyer\\_population/](http://www.abajournal.com/news/article/washington_state_legal_community_braces_for_huge_turnover_in_lawyer_population/).

16. Law School Admission Council, *ABA End of the Year Law School Applicant Summary*, available at <http://www.lsac.org/lscresources/data/lsc-volume-summary> (last visited Apr. 19, 2015).

17. Erica Moeser, *President’s Page*, 83 THE BAR EXAMINER 7–11 (Dec. 2014).

18. See, e.g., Dorothy A. Brown, *Law Schools are in a Death Spiral. Maybe Now They’ll Finally Change*, WASH. POST, Mar. 9, 2015, available at [http://www.washingtonpost.com/post-everything/wp/2015/03/09/law-schools-are-in-a-death-spiral-maybe-now-theyll-finally-change/?tid=sm\\_fb](http://www.washingtonpost.com/post-everything/wp/2015/03/09/law-schools-are-in-a-death-spiral-maybe-now-theyll-finally-change/?tid=sm_fb).

19. See Hansen, *supra* note 15.

20. *Id.*

lawyers will be entering the market.<sup>21</sup> Meanwhile, consensus predictions suggest that the U.S. population will continue to grow; in 2014 there were just over 318 million, and it is predicted that number will grow to just over 359 million by 2030.<sup>22</sup> Thus, the next couple of decades could potentially result in fewer lawyers available to serve a larger population.

There is some segment of the underserved population that can pay something for legal services, but they cannot pay the going rate of private attorneys. This population either represents themselves pro se or they turn to alternative service providers to try to have their legal needs met. This has been apparent since the rise of companies like Nolo Press and LegalZoom who try to fill the gap that the legal profession has been unable to serve.<sup>23</sup> Thus, there is a substantial market to be served, and it might even be a profitable market as evidenced by companies like LegalZoom,<sup>24</sup> but the legal profession has been unable to figure out how to deliver services in a manner that reaches this market segment, provides them with competent services, and results in income that constitutes a living wage for the attorney.

### III. SERVING UNMET MARKET DEMANDS AND THE RISE OF ALTERNATIVE LEGAL PROFESSIONALS

Recognizing the challenges to access, and probably responding in part to efforts of the nonlawyer marketplace to serve the unmet demand, legal regulators are starting to seriously consider the training and authorization—by licensure or otherwise—of nonlawyer legal professionals. The Washington Supreme Court has taken the most significant step in this direction by creating a new category of licensed professionals—limited licensed legal technicians (“LLLTs”)—who are authorized to engage in some activities that are the practice of law.<sup>25</sup> Other states—New York, California, and Oregon—are actively exploring the training and use of nonlawyers to address some of the access issues.<sup>26</sup>

For example, in 2014 New York launched a court navigator program.<sup>27</sup> Court navigators are college students and law students who receive two and a half hours of training and then volunteer in the courthouse to help

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21. *Id.*

22. Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, U.S. CENSUS BUREAU, at 2.

23. Amy Dunn Johnson, *Unbundled Legal Services: A Revolution Whose Time Has Come*, 49 ARK. LAW. 28, 30 (2014).

24. LegalZoom has estimated its “targeted legal market at \$97 billion.” Peterson, *supra* note 11, at 45.

25. For a general overview of the adoption of the limited license legal technician rule, see Holland, *supra* note 9, at 75.

26. See, e.g., Anna L. Endter, *State Activities Related to Limited License Legal Professionals* (last updated June 14, 2014 by AJ Blechner), available at <https://lib.law.washington.edu/content/guides/StateLimLicLegPro>; Lippman, *supra* note 9, at 7–9.

27. Lippman, *supra* note 9, at 8.

unrepresented litigants involved in landlord-tenant and consumer debt cases navigate the courthouse.<sup>28</sup> The navigators cannot give legal advice, but they can provide general information about the courthouse and available forms, help unrepresented litigants use the computers to fill out forms, and accompany unrepresented litigants into the courtroom for moral support.<sup>29</sup>

Creating a more expansive model, in 2012 the Washington Supreme Court adopted Admission to Practice Rule 28, which created a new category of independent licensed legal professionals—limited license legal technicians (LLLTs)—who have a scope of practice that includes some activities that traditionally have been monopolized by lawyers.<sup>30</sup> This is the most significant step that any jurisdiction has taken to authorize a new category of legal professionals.<sup>31</sup> The Washington Supreme Court established a board to develop education and training requirements, which the board initially developed for a limited license in the area of domestic relations.<sup>32</sup> Licensing requirements include 45 credit hours of coursework—akin to about one and a half years of law school—as well as 3,000 hours of law-related work experience supervised by a licensed lawyer.<sup>33</sup> Applicants for a license must also take and pass an examination.<sup>34</sup> In January 2015, the Washington Supreme Court adopted the LLLT Rules of Professional Conduct, which largely mirror the ethical rules that govern the behavior of lawyers.<sup>35</sup>

The LLLTs' scope of practice does not authorize them to appear in court in a representative capacity or to negotiate with opposing counsel,<sup>36</sup> but they are authorized to engage in many activities that have been traditionally reserved for licensed attorneys, including:

- Obtaining relevant facts, and explaining the relevancy of such information to the client;<sup>37</sup>
- Informing the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding;<sup>38</sup>

28. *Court Navigator Program: Prospective Court Navigators*, N.Y. COURTS (last updated Mar. 19, 2014), available at [http://www.courts.state.ny.us/courts/nyc/housing/rap\\_prospective.shtml](http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml) (describing a general overview of New York's court navigator program).

29. Lippman, *supra* note 9, at 8.

30. Holland, *supra* note 9, at 88–89, 111; WASH. ADMISSION TO PRACTICE R. 28.

31. Holland, *supra* note 9, at 128–29.

32. WASH. ADMISSION TO PRACTICE APP. R. 28, REGULATIONS 1-12, effective Sept. 3, 2013.

33. WASH. ADMISSION TO PRACTICE R. 28 D(3)(b) and E(2).

34. *Id.* R. 28 E(1).

35. WASH. LIMITED LICENSE LEGAL TECHNICIAN RULES OF PROF. CONDUCT Pmb1. (“The Rules of Professional Conduct for LLLTs are modeled on Washington's Rules of Professional Conduct for lawyers (Lawyer RPC).”).

36. WASH. ADMISSION TO PRACTICE R. G(3)(A).

37. *Id.* R. F(1).

38. *Id.* R. F(2).

- Informing the client of applicable procedures for proper service of process and filing of legal documents;<sup>39</sup>
- Reviewing documents or exhibits that the client has received from the opposing party, and explaining them to the client;<sup>40</sup>
- Selecting, completing, filing, and effecting service of 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 advising the client of the significance of the selected forms to the client's case;<sup>41</sup>
- Drafting legal letters and documents beyond what is permitted in the preceding paragraph, if the work is reviewed and approved by a Washington lawyer.<sup>42</sup>

This last bullet point contains the only provision in the rules that requires the involvement of a lawyer. The rules further provide that “[r]eviewed and approved by a Washington lawyer” means that a Washington lawyer has personally supervised the legal work and documented that supervision by the Washington lawyer’s signature and bar number.<sup>43</sup> Under these rules, Washington lawyers may assist a nonlawyer in providing legal services by reviewing and approving legal documents that LLLTs have prepared for their clients.

This relationship that Washington has authorized between lawyers and LLLTs is unique among the states because it permits a lawyer to engage in conduct that would usually be considered aiding and abetting the unauthorized practice of law. For example, under ABA Model Rule of Professional Conduct 5.5(a), a lawyer shall not assist another in practicing law in violation of the regulation of the legal profession in that jurisdiction.<sup>44</sup> Ethics opinions have also made clear that lawyers cannot assist unlicensed persons in the practice of law. For instance, a 2008 ABA ethics opinion about outsourcing legal work stated that “if the activities of a lawyer, nonlawyer, or intermediary employed in an outsourcing capacity are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).”<sup>45</sup>

39. *Id.* R. F(3).

40. *Id.* R. F(5).

41. *Id.* R. F(6).

42. *Id.* R. F(7).

43. *Id.* R. (B)(6).

44. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2013). The comments to this rule further state that “Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer’s direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.” *Id.* R. 5.5 cmt. 1.

45. ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 08-451 (2008)

Prohibitions on aiding and abetting the unauthorized practice of law have resulted in lawyers being disciplined when they performed the type of tasks that the Washington rules now authorize lawyers to perform for LLLTs. For example, lawyers have been disciplined for tasks such as reviewing trust documents drafted by nonlawyers.<sup>46</sup> Many states also have statutes that impose civil penalties for aiding and abetting the unauthorized practice of law. For instance, a New Mexico statute provides that “if the court finds that a person has aided or abetted another to engage in the unauthorized practice of law, the court may impose a civil penalty not to exceed one thousand dollars (\$1,000) for the first violation and a civil penalty not to exceed five thousand dollars (\$5,000) for each subsequent violation.”<sup>47</sup>

The Washington rules materially alter the traditional aiding and abetting prohibitions both by creating a scope of practice for LLLTs that authorizes them to practice law, and by further authorizing lawyers to assist the LLLTs for certain activities that are only within their authorized scope of practice when a licensed lawyer is involved. One can infer from these rules that the Washington Supreme Court constructed them this way to protect consumers. The regulators concluded that LLLTs will obtain enough training and education to competently perform certain limited tasks on their own.<sup>48</sup> However, when LLLTs start to draft customized legal documents, there was presumably some concern that their limited training would not provide them with the level of skill necessary to undertake such tasks competently. Instead of completely prohibiting such tasks, the Washington Supreme Court authorized them, but only if a lawyer reviews the work.

The Washington LLLT rules are a new and innovative model that creates a new category of legal professionals who may independently practice many tasks and, for the protection of clients, requires a collaborative relationship with a lawyer for other limited tasks. This essay suggests that the regulators of the legal profession need to think more expansively about other types of arrangements that combine the lower costs of independent nonlawyers with the expertise of lawyers when necessary to ensure adequate quality and client protection.

#### IV. LOOKING AT MODELS FOR ADVANCED PRACTICE REGISTERED NURSES

The health care profession may be able to give the legal profession some alternative models to consider.<sup>49</sup> In particular, the relationships legislatures

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(discussing a lawyer’s obligations when outsourcing legal and non-legal support services).

46. See, e.g., *In re Mid-America Living Trust Assoc.*, 927 S.W.2d 855, 862 (Mo. 1996).

47. N.M. STAT. ANN. § 36-2-28.2 (2011).

48. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, Order No. 25700-A-1005 (Wash. 2012).

49. I have previously written about comparisons to the health care profession as a potential model, but this article looks more specifically at supervisory and collaborative models. Rigertas, *supra* note 6, at 79–80; see also Lippman, *supra* note 9, at 8 (“Perhaps we need to take a leaf



have required between physicians and advanced practice registered nurses (“APRNs”) provide possible templates for new types of arrangements between lawyers and other legal professionals. The development of APRNs—registered nurses who have a postgraduate degree—formally began in 1965.<sup>50</sup> Over the next several decades APRNs lobbied state legislatures to authorize them to practice independently.<sup>51</sup> Today there are a variety of regulatory frameworks among the states that authorize APRNs to perform different types of services and procedures in addition to a variety of frameworks regarding the extent that they can practice independently or without direct supervision by a physician.<sup>52</sup> Those regulatory frameworks are still not settled. APRNs continue to lobby for changes to rules, particularly with respect to their independent authority to prescribe pharmaceuticals.<sup>53</sup>

Many policymakers view APRNs as a crucial tool in increasing access to health care. For example, in March 2014 the Federal Trade Commission (“FTC”) published a policy perspective on APRNs that stated they “play a critical role in alleviating provider shortages and expanding access to health care services for medically underserved populations.”<sup>54</sup> The FTC further discussed the growing shortage of primary care physicians in the United States and the impact that has on access to health care for many Americans, particularly the poor and those in rural communities.<sup>55</sup> The FTC’s observations are similar to conclusions in the Institute of Medicine’s 2011 report on the future of nursing, which found evidence that APRNs can help to greatly expand access to quality care.<sup>56</sup>

For these reasons, APRNs provide some parallels to use of nonlawyers to increase access to quality legal services. As discussed, providing access to quality health care, particularly for the poor, has required expanding the categories of professionals who are authorized to deliver health care services. Similarly, providing access to quality legal services, particularly for the poor and middle class, is also likely to require expanding the categories of professionals who are authorized to deliver legal services.<sup>57</sup>

There are a variety of models that states have adopted with respect to the relationships required between physicians and APRNs. The terms

from the medical profession, which has long recognized that people with health problems can be helped by a range of assistance providers with far less training than licensed physicians.”); Holland, *supra* note 9, at 124–27.

50. Rigertas, *supra* note 6, at 107.

51. *Id.*

52. FED. TRADE COMM’N, POLICY PERSPECTIVES: COMPETITION AND REGULATION OF ADVANCED PRACTICE NURSES 9–11 (2014) [hereinafter FTC POLICY PERSPECTIVES].

53. John K. Iglehard, *Expanding the Role of Advanced Nurse Practitioners—Risks and Rewards*, 368 NEW ENGLAND J. MED. 1935, 1938–39 (2013).

54. See FTC POLICY PERSPECTIVES, *supra* note 52, at 2.

55. *Id.* at 20–21.

56. *Id.* at 3.

57. See *supra* Parts II, III.

“independent,” “supervision,” and “collaboration” are frequently used to describe their relationships, but those terms are not defined consistently from state to state.<sup>58</sup> Due to the inconsistent treatment of those terms, it is more helpful to describe generally the types of relationships that states have required between physicians and APRNs that may be relevant to considering alternative ways to deliver legal services. These broad categories include having a physician approve an APRN’s protocols, requiring regular or periodic on-site physician supervision, requiring that physicians be available for consultations, and requiring physicians to review some quantum of files.

Some jurisdictions require APRNs to enter into a relationship with a physician as a condition of practice and to collaboratively develop procedures and protocols that the APRN will follow in his or her practice.<sup>59</sup> For example, a Mississippi statute provides:

. . . . Advanced practice registered nurses must practice in a collaborative/consultative relationship with a physician or dentist with an unrestricted license to practice in the state of Mississippi and advanced nursing must be performed within the framework of a standing protocol or practice guidelines, as appropriate.<sup>60</sup>

In California, one category of APRNs—nurse practitioners (NPs)—“function under ‘standardized procedures’ or protocols when performing medical functions, which are collaboratively developed and approved by the NP, physician, and administration in the organized healthcare facility.”<sup>61</sup>

Arrangements requiring the development of protocols do not necessarily require the physician to provide direct on-site supervision. Instead, the physician could be required to be physically present periodically, such as a minimum of 10% a month or at least once a quarter.<sup>62</sup> Other protocol agreements focus on the physician’s review of some of the patient charts. For example, Georgia requires a written protocol between a NP and a physician, but it also requires “periodic review of a sampling of patient records as well as a requirement for patient evaluation and exam by the delegating physician in certain circumstances.”<sup>63</sup>

Other agreements focus on physician involvement when an APRN has prescriptive authority. For example, in Indiana APRNs who want prescriptive authority must submit proof of collaboration with a physician that includes specifics about the physician’s review of the APRN’s practice “including a provision for a minimum weekly review of 5% random chart sampling.”<sup>64</sup>

58. See FTC POLICY PERSPECTIVES, *supra* note 52, at 10-11.

59. Susanne J. Phillips, *Evidence-based Practice Reforms Improve Access to APRN Care*, THE NURSE PRACTITIONER, Jan. 2013, at 23.

60. MISS. CODE ANN. §73-15-5(4) (2014).

61. Phillips, *supra* note 59, at 24.

62. *Id.* at 23 (reviewing the law in Alabama).

63. *Id.* at 27 (reviewing the law in Georgia).

64. *Id.* at 28 (reviewing the law in Indiana).

Likewise, Tennessee does not require supervising physicians to be on-site, but they “must personally review and sign 20% of charts within 30 days.”<sup>65</sup> Other models adjust the physician’s role depending on the type of drugs being prescribed. For example, in Massachusetts an APRN’s prescriptive authority requires an agreement with a physician that includes a review with the “supervising physician at least every three months with the exception of initial prescription of Schedule II drugs, which requires review within 96 hours.”<sup>66</sup>

Other jurisdictions require APRNs to have some period of physician mentorship.<sup>67</sup> In Vermont, APRN’s must have a collaboration agreement with a physician until they have more than 24 months and 2,400 hours of practice, at which point they may apply to the nursing board to engage in solo practice.<sup>68</sup>

Some jurisdictions have adopted rules that are responsive to the reality of health care shortages. Nebraska has a requirement that NPs have a collaborative agreement with physicians, however, if an NP is unable to secure such an agreement, the rules allow the NP to seek a waiver of that requirement.<sup>69</sup> The waiver can be granted if the NP has, among other requirements, “completed 2,000 hours under the supervision of a physician, and will practice in a geographic area where there is a shortage of health-care services.”<sup>70</sup> Similarly, in Texas the “physician must spend some time at each site with the APRN, but that time varies from one every 10 business days in a medically underserved population site to the majority of the time in a physician’s primary practice site.”<sup>71</sup>

States have fashioned a broad range of arrangements between APRNs and physicians in order to try to increase access to affordable health care. The next section of this essay will explore some ways that the delivery of legal services might benefit from exploring similar types of models.

## V. EXPLORING MODELS FOR THE DELIVERY OF LEGAL SERVICES IN LIGHT OF THE RISE OF ALTERNATIVE LEGAL PROFESSIONALS

Many scholars and commentators have opined that we will see an increase in the use of alternative legal professionals in the upcoming decades.<sup>72</sup> If these predictions are correct, and I think they are, it is important to consider what different models might be used to increase access and protect consumers. The Washington LLLT is a promising model, but it is too soon to assess its

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65. *Id.* at 39 (reviewing the law in Tennessee).

66. *Id.* at 31 (reviewing the law in Massachusetts).

67. *Id.* at 25 (reviewing the law in Colorado).

68. VT. STAT. ANN. Tit. 26, §1613 (2011).

69. Phillips, *supra* note 59, at 33 (reviewing the law in Nebraska).

70. *Id.* at 33 (reviewing the law in Nebraska).

71. *Id.* at 29 (reviewing the law in Texas).

72. See, e.g., William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 479–90 (2013).

effectiveness.<sup>73</sup> The licensing requirements are quite demanding—45 credits of coursework and 3,000 hours of supervised experience.<sup>74</sup> No LLLTs have been licensed yet, so it is too early to tell how many people will pursue this license and if the LLLTs will create less expensive options for consumers.<sup>75</sup>

Using some of the models adopted for APRNs as a template might help the legal profession to craft some innovative models. Rather than discuss these models in the abstract, applying them to some contemporary problems may help to illustrate their potential. There are two recent situations that provide an opportunity for this thought experiment. In January 2015, H&R Block launched an immigration document preparation service in Texas.<sup>76</sup> Within a couple of months every trace of the service disappeared from its website in response to pressure by the American Immigration Lawyers Association, which believed H&R Block was engaged in the unauthorized practice of law.<sup>77</sup>

Immigration is an area of law that is in high demand, but there are many people who cannot afford the services of a lawyer and there are not enough free or low cost legal services.<sup>78</sup> The limited access to legal advice in this area has created a void where consumers are vulnerable. Many people in the legal community have expressed concern about fraud, particularly by “notarios,” who some people in need of immigration services incorrectly believe are qualified to handle their legal matters.<sup>79</sup> There have been many enforcement efforts to try to combat the unauthorized practice of law in the area of immigration; H&R Block is one recent example of these enforcement efforts.

Also this year, in January 2015 the Florida Supreme Court formally adopted an advisory ethics opinion that held that nonlawyers engage in the unlicensed practice of law when they assist people with certain Medicaid planning activities prior to applying for Medicaid.<sup>80</sup> Several lawyers testified in support of the advisory opinion and provided accounts of clients who had been harmed by nonlawyers who provided advice about spending down assets to qualify for Medicaid.<sup>81</sup> Some of the nonlawyers claimed to have relationships with lawyers who would draft legal documents for the company’s clients, but the opinion concluded only an independent relationship between

73. See Holland, *supra* note 9, at 118.

74. WASH. ADMISSION TO PRACTICE APP. R 28, REGS. 3, 9 (2015).

75. It is also possible that their presence in the market will have a downward impact on the cost of attorneys, which could also lead to more affordable options. See Rigertas, *supra* note 6, at 97 n.89.

76. Richard Granat, *H&R Block Forced to Shut Down Immigrant Document Services by the Bar*, *eLawyering Blog*, ELAWYERINGREDUX.COM (Mar. 14, 2015), <http://www.clawyeringredux.com/2015/03/articles/competition/hr-block-shuts-down-immigrant-document-service/>.

77. *Id.*

78. *Id.*

79. *Id.*

80. SUPREME COURT OF FLORIDA, NO. SC14-211, THE FLORIDA BAR RE: ADVISORY OPINION—MEDICAID PLANNING ACTIVITIES BY NONLAWYERS (Jan. 15, 2015) available at <http://www.floridasupremecourt.org/decisions/2015/sc14-211.pdf>.

81. *Id.* at 10.

the lawyer and the client could resolve unauthorized practice of law problems.<sup>82</sup> The opinion further stated that the potential for consumer harm is particularly great because “nonlawyer Medicaid planners are essentially unregulated, as there are no licensing, education or advertising requirements.”<sup>83</sup>

In both the immigration and Medicaid planning situations there is a need for legal services that the legal professional is not meeting, so others tried to fill to void. In both situations, lawyers were successful in eliminating the alternative means of assistance. This is a victory to the extent that it protects consumers from harm that would have resulted from incompetent services. It is not a victory, however, if now consumers are simply left on their own to handle their matters pro se. This is the probable outcome.<sup>84</sup>

Instead, imagine there were licensed Immigration Assistants or Medicaid Assistants who were authorized to provide some assistance.<sup>85</sup> Perhaps they could be trained in six to twelve months to perform certain types of tasks and then set up an independent business. If there are concerns about consumer protection in light of the amount of training, then regulators could consider requiring the assistants to enter into a collaboration agreement with a licensed attorney who would develop protocols with the assistant about the type of forms they can prepare, the types of advice they can give, and the types of situations that should be referred to a lawyer. The collaborating attorney could be required to be available for phone consultation on a regular basis. The collaborating attorney could also be required to review a random sampling of some percentage of the work done each month. If the attorney found significant errors or harm to consumers, the attorney would be obligated to terminate the collaboration agreement, which would then prohibit the assistant from continuing his or her business. Regulators could also consider some type of a mentoring requirement like some states have for APRNs. For example, the assistant could be required to work directly for an attorney for some period of time before applying for a license for an independent practice. Regulators could also consider modifying requirements in areas that are particularly underserved, as some states have done with APRNs.

Some people will likely argue that alternative legal professionals create a second class system for legal services.<sup>86</sup> Under this system, those with money will be able to afford a real attorney and those without money will have to hire

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82. *Id.* at 17.

83. *Id.* at 21.

84. See Holland, *supra* note 9, at 127–28.

85. Federal regulations do provide for the accreditation of nonlawyer representatives to appear in immigration proceedings. There are, however, no specific training or education requirements and the representatives must be affiliated with a non-profit organization that will not charge more than a nominal fee. 8 C.F.R. §1292.2. I envision a category of professionals with some formal training and the ability to charge more than nominal fees.

86. Holland, *supra* note 9, at 123–26 (addressing similar concerns with respect to Washington’s LLLTs).

a second-rate nonlawyer assistant. This is a valid concern, but attempts to provide a lawyer for all civil needs have been unsuccessful so far. We already have a second class system, but right now those who cannot afford a lawyer or obtain free or low cost assistance are representing themselves pro se. Regulating and licensing other people to provide legal services will be an improvement, and it is not a foregone conclusion that such services have to be subpar. Specialized training for other professionals in limited areas, particularly with the collaboration of a licensed attorney, may provide consumers with high quality services in some areas.

For example, since the United Kingdom adopted the Legal Services Act of 2007 that liberalized the delivery of legal services, wills now can be drafted five ways: by “solicitors; specialist willwriters; banks; affiliate groups (such as trade unions and industry bodies); or by self-completion, using an online service or published will-writing pack.”<sup>87</sup> The Legal Service Board asked the Legal Services Consumer Panel to conduct a study to assess the quality of wills prepared by these different groups.<sup>88</sup> Part of the study included shadow shopping (similar to mystery shopping but using real consumers) at 102 “shops” that resulted in the purchase of a will.<sup>89</sup> Those wills were then assessed for quality, and the lawyers did not receive the highest scores: “[T]he highest scores for the quality of the will were achieved by banks or affiliate groups (3.30 on a five-point scale where 1 is “Poor” and 5 is “Excellent”), solicitors (3.28) and specialist will-writers (3.14); self-completion wills (paper: 2.67; online: 2.46) received considerably lower quality scores.”<sup>90</sup> Thus, it may be possible for other types of professionals to provide quality legal services.

Another concern that may arise is the risk of anti-competitive behavior exercised under the guise of consumer protection. The FTC has been concerned about the anti-competitive effect of many of the physician collaboration restrictions that legislatures impose on APRNs. It issued a March 2014 policy perspective which stated, in part:

While state legislators and policymakers addressing health care issues are rightly concerned with patient health and safety, an important goal of competition law and policy is to foster quality competition, which also furthers health and safety objectives. Likewise, to ignore competitive concerns in health policy can impede quality competition, raise prices, or diminish access to health care—all of which carry their own health and safety risks. . . . [E]ven well intentioned laws and regulations may impose unnecessary, unintended, or overbroad restrictions on competition, thereby depriving health care consumers the benefits of vigorous

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87. IFF RESEARCH, RESEARCH REPORT: UNDERSTANDING THE CONSUMER EXPERIENCE OF WILL-WRITING SERVICES 5 (2011).

88. *Id.*

89. *Id.*

90. *Id.* at 9.

competition.<sup>91</sup>

In light of the FTC's concerns in the health care field, there may be similar concerns about exploring collaborative relationships between lawyers and other legal professionals. In other words, once nonlawyers are authorized to perform some legal tasks, requiring the involvement of lawyers may be viewed as merely protecting their guild. In some cases this may be true, but there are differences between the practice of law and the practice of medicine that may justify more collaboration with lawyers.

One key difference that may justify collaborative or supervisory relationships in the delivery of legal services is the amount of training those in the legal profession receive as compared to those in the medical profession. Physicians have approximately eleven to twelve years of training and APRNs have about six years of training, or about fifty percent the amount of training.<sup>92</sup> The length of training that APRNs have warrants more freedom to practice independently. As the FTC wrote: "Based on substantial evidence and experience, expert bodies have concluded that APRNs are safe and effective as independent providers of many health care services within the scope of their training, licensure, certification and current practice. Therefore, new or extended layers of mandatory physician supervision may not be justified."<sup>93</sup>

Lawyers, on the other hand, have only three years of training. The Washington LLLTs have the equivalent of about half that amount of training, which is proportionally similar to the difference in training between APRNs and doctors—about fifty percent.<sup>94</sup> The amount of training that LLLTs receive may justify no attorney oversight for their practice area. However, the training for LLLTs is rather significant and time will tell how many people will undertake the training and whether LLLTs will be able to offer more affordable services. As the Washington Supreme Court wrote when it created LLLTs:

No one has a crystal ball. It may be that stand-alone limited license legal technicians will not find the practice lucrative and that the cost of establishing and maintaining a practice under this rule will require them to charge rates close to those of attorneys. On the other hand, it may be that economies can be achieved that will allow these very limited services to be offered at a market rate substantially below those of attorneys. There is simply no way to know the answer to this

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91. FTC POLICY PERSPECTIVES, *supra* note 52, at 1.

92. HEALTH AFFAIRS, NURSE PRACTITIONERS AND PRIMARY CARE (2012), *available at* [http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief\\_id=79](http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=79).

93. FTC POLICY PERSPECTIVES, *supra* note 52, at 2.

94. The LLLT program requires 45 hours of coursework. *Supra* note 33 and accompanying text. The American Bar Association requires a minimum of 83 credits to graduate with a Juris Doctorate. AM. BAR ASS'N Accreditation Standard 311(b), *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf).

question without trying it.<sup>95</sup>

Regulators, however, may want to create other types of alternative legal professionals who can offer limited services with less training—perhaps only several months of training or even less. In those situations, increased attorney involvement through some type of collaborative or supervisory arrangement may be a valid way to protect consumers. There are many types of models that could be explored, as evidenced by the health care field, which the regulators of legal services have not experimented with yet. In light of the unmet needs, the time has arrived to start exploring alternatives.

## VI. CONCLUSION

Meeting the demand for affordable legal services is an ongoing problem. It is likely that more states will follow Washington's lead and create new categories of legal professionals. As regulators explore these options, it may be helpful to look at some of the models in the health care profession as possible templates. There may be innovative ways to combine the expertise of lawyers with the lower cost of nonlawyers in ways that can increase affordable access while ensuring an adequate level of competence to protect consumers.

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95. *In re* Adoption of New APR 28—Ltd. Practice Rule for Ltd. License Legal Technicians, No. 25700-1-1005, slip op. at 8–9 (Wash. June 15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releascas/25700-A-1005.pdf>.