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The Use of Nonlawyers

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REPORT OF THE WORKING GROUP ON THE USE OF NONLAWYERS

INTRODUCTION

THE Group¹ sought to explore how the use of nonlawyers² might expand access to justice for low-income individuals.³ The Group decided that our mission was to address the ways in which low-income individuals and their lawyers use nonlawyers and how this nonlawyer use could be changed to facilitate greater access to justice. In our definition of nonlawyer use, the group included the legal needs and activities of unrepresented people, sometimes referred to as pro se litigants.⁴

I. ISSUES

The discussion was shaped by articles written prior to the conference by the following members of our group: Derek A. Denckla,⁵ Russell Engler,⁶ Paula Galowitz,⁷ Alex J. Hurder,⁸ and Louise G.

1. Group Leader: Ann Moynihan. Author: Derek A. Denckla. Participants: Stephen G. Brooks, Russell Engler, Paula Galowitz, Jeanne P. Gray, Zona F. Hostetler, Alex J. Hurder, James M. Morrissey, Ernest Y. Sevier, Louise G. Trubek, Carol Weiss, and Lucie White. The Group is grateful to Bart H. Rubin and Craig J. Ortner for recording the Group's discussion.

2. Many members of the Group objected to the term "nonlawyer," pointing out that the legal profession is the only profession that uses this sort of negative description of the lay populace which provides legal services. By contrast, one never hears of a "non-doctor," but rather there are nurses, paramedics, orderlies, and so on. The term "nonlawyer," however, has gained general usage and acceptance among lawyers, referring broadly to any one who is not authorized to practice law. See generally Commission on Nonlawyer Practice, American Bar Ass'n, *Nonlawyer Activity in Law-Related Situations* (1995) [hereinafter *Nonlawyer Activity*]. Thus, we decided to retain this term and note its idiosyncrasy herein. For a discussion of how and why the legal profession has defined "nonlawyer practice of law," otherwise known as "unauthorized practice of law," see Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581 (1999).

3. As a result, throughout most of our discussion, the Group deemed "use of nonlawyers" to be shorthand for the "use of nonlawyers to expand access to justice for low-income people."

We noted that all of the members of our group are lawyers. However, two members of our committee brought the perspective of nonlawyers to the discussion: Paula Galowitz is a social worker as well as an attorney and prior to becoming an attorney, and Derek A. Denckla was a community organizer who helped unrepresented people solve their legal problems.

4. Although the Group adopted a broad definition of "nonlawyer," we tried not to tread on the territory that we anticipated might overlap with the Working Group on Limited Legal Assistance. See *Report of the Working Group on Limited Legal Assistance*, 67 *Fordham L. Rev.* 1819 (1999).

5. Denckla, *supra* note 2.

6. Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987 (1999).

Trubek.⁹ In addition, articles submitted to the conference by Wayne Moore¹⁰ and Margaret Martin Barry¹¹ also touched upon many of the themes of our discussion. The Group evolved with an understanding that the ABA Commission on Nonlawyer Practice (the “Commission”) had issued a report in 1995 entitled *Nonlawyer Activity in Law-Related Situations* (the “ABA Commission Report”).¹² Two members of our group—Zona Hostetler and Ernest Sevier—had been members of the Commission.¹³ We were aware of the many solid recommendations made by the report, although we felt that they were quite broad. Our group attempted to arrive at recommendations that complemented the recommendations of the ABA Commission Report by offering a less comprehensive yet more detailed approach to nonlawyer-use reforms.

The ABA Commission Report offered an explanatory definition of nonlawyer activity that we found helpful to our discussion. The report suggest breaking nonlawyer practice into four general categories:

- (1) Unrepresented Person;¹⁴
- (2) Document Preparer;
- (3) Paralegal; and
- (4) Legal Technician.

7. Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 Fordham L. Rev. 2123 (1999).

8. Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241 (1999).

9. Louise G. Trubek, *Context and Collaboration: Family Law Innovation and Professional Autonomy*, 67 Fordham L. Rev. 2533 (1999).

10. Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 Fordham L. Rev. 2397 (1999).

11. 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 (1999).

12. Nonlawyer Activity, *supra* note 2.

13. Carol Weiss, although not a named member of the Commission, was also involved in the preparation of the findings and report of the Commission. Interestingly, Hostetler was one of the principal authors of the majority report and Sevier was the author of the minority report that dissented. Thus, we benefited from representatives of a full range of the perspectives arising in the Commission report.

14. The ABA Commission Report refers to the “Self-Represented Person.” Nonlawyer Activity, *supra* note 2, at xvii. We chose, however, to follow Russell Engler’s suggestion that we label this type of nonlawyer as “unrepresented.” The distinction is significant yet subtle. To speak of one who represents himself or herself implies a choice in the matter of representation, for example, “I choose to represent myself rather than engage the services of counsel.” In order to address a low-income person’s own usual lack of either legal expertise and/or extensive education, that person would tend to choose to retain representation on most occasions if that option were available to them or affordable. Also, “self-representation” also implies that a person is receiving some type of representation, albeit representation by oneself. Self-advocacy, however, is a skill in which few people are truly proficient. Thus, the reality of most low-income people who are “not represented” is better explained by the term “unrepresented.” For further explanation, see Engler, *supra* note 6, binder at 8 n.28.

The Unrepresented Person, also referred to as a pro se litigant, is one who represents himself or herself in a legal matter, sometimes seeking the help of another in all or part of that matter. The Document Preparer assists another person in preparing forms and documents using information provided by a client without giving legal advice. The Paralegal provides a wide range of legal work under the supervision of a lawyer for which the lawyer is accountable. The Legal Technician, sometimes referred to as an Independent Paralegal, is essentially a Paralegal without the supervision of a lawyer for which no lawyer is accountable.

As with most of the working groups, we struggled at the outset with the meaning of "access to justice" to our discussion. Members of the group raised difficult definitional questions that impacted upon our topic. Is increasing the use of nonlawyers the best way to expand access to justice? When we speak of access to justice, should we prioritize quantity of access or quality of access? Is access to justice hinged upon access to legal services or legal representation? If so, how crucial are lawyers in the provision of this legal aid? Is the cost of a lawyer's services the primary factor undermining universal access to justice? If so, is cost-saving the chief benefit of using a nonlawyer? Depending on the answer to the foregoing question, given the limited funding resources, should we think about funding two legal assistants or one lawyer?

II. APPROACH

The Group quickly realized that that we could not possibly provide generalized answers to all of these fundamental questions within the time frame that we were allotted. Thus, the Group addressed these questions of "access to justice" through our exploration of the actual contexts in which nonlawyer use and activity occurs. As to the "quantity/quality" debate, the Group decided that all of our recommendations for the expanded use of nonlawyers were made with the understanding that the quality of the justice that low-income people receive should not be compromised.

In identifying these contexts, the Group agreed that no matter what our definition of "access to justice" might be, it should not be context-limited to mere access to the courts. Courts are only one venue for justice, albeit the most important venue for lawyers. Thus, we identified three general contexts in which nonlawyer activity impacts low-income people seeking justice: (1) courts; (2) administrative agencies; and (3) other contexts, such as community groups or non-government organizations and agencies. We decided to cabin our discussion of nonlawyers within each of these contexts. So, at least for the purposes of embarking on the theme of our discussion, we agreed to presume that increasing the use of nonlawyers would tend to expand access to justice, unless demonstrated otherwise in a specific context. The col-

lective experience of the members of the Group indicated that an increase in the use of nonlawyers would expand access to justice in some positive fashion in each of the three contexts. Thus, our first recommendation embodies this conclusion by encouraging the elimination of barriers by stating that “expansion of nonlawyer roles should be encouraged.”¹⁵

In each of the three designated contexts, the group centered the discussion around the following issues: (1) barriers to access to justice and the legal needs of the public; (2) barriers to activities of nonlawyers that might overcome the barriers to accessing justice; (3) solutions that would remove or modify the barriers identified in (2); (4) exemplary projects that have implemented or might implement these solutions; and (5) “allies,” or interested entities, that have a stake in overcoming barriers to nonlawyer use.

The Group began by discussing the barriers to accessing justice that impact the use of nonlawyers rather than searching for reasons to support the use of nonlawyers. First and most obviously, the ethical rules and codes that regulate lawyers’ conduct and state laws that prevent the unauthorized practice of law (“UPL”) present barriers to the use of nonlawyers in each of the contexts identified by the Group for discussion. Many members of the Group, however, stated that ethics and UPL were irrelevant in light of the increasing use of nonlawyers occurring almost everywhere in the United States. In the experience of some group members, UPL laws and ethics rules tend not to be enforced against lawyers and nonlawyers who provide legal services to low-income people. Others believed that ethics and UPL should be reformed regardless of that reality because of the “chilling effect” these regulations impose on people seeking to increase access to justice through the use of nonlawyers and other innovations.

The Group, however, attempted to circumvent a discussion focused primarily on states’ regulations and lawyers’ ethics aimed at curtailing UPL. The Group was well aware that no discussion of the roles of nonlawyers can be complete without some discussion of the unauthorized practice of law. The Group, however, avoided any in-depth investigation into a reform platform for altering Canon 3 and Disciplinary Rules 3-101 through 3-103 of the ABA Model Code of Professional Responsibility¹⁶ and Model Rules 5.5 and 5.6 of the ABA Model Rules of Professional Conduct.¹⁷

The Group agreed that for the past thirty years or so, the debate over the use of nonlawyers has been dominated by a discussion of the

15. *Recommendations of the Conference on the Delivery of Legal Services to Low-Income People*, 67 *Fordham L. Rev.* 1751, Recommendation 25, at 1759 (1999).

16. See Model Code of Professional Responsibility Canon 3, DR 3-101, 3-102, 3-103 (1980).

17. See Model Rules of Professional Conduct Rules 5.5, 5.6 (1983).

pros and cons of reforming the unauthorized practice rules.¹⁸ The Group generally agreed that the ABA and other bar associations could not be expected to expand the use of nonlawyers, particularly via broad or modest ethics reforms. If anything, group members reported that, nationally, there seemed to be a “backwards movement” among bar associations intended to increase enforcement of the unauthorized practice of law. Further, in the past, the bar has proven slow to change unauthorized practice rules until there has been some prompting from political and social forces outside the bar.¹⁹ For instance, the ABA Commission Report failed to tackle succinctly the problems posed by lawyers’ ethics. Furthermore, in light of the fine scholarship that exists on this topic, especially found in the on-going work of Professor Deborah L. Rhode,²⁰ we sought a slightly different approach, a modestly new way to look at the problem. In particular, we sought a few practical solutions that could be attempted immediately at a local level to expand access to justice through increased non-lawyer use.

In addition to identifying barriers to the use of nonlawyers, the group sought to identify groups who might have a stake in expanding the use of nonlawyers, nicknamed potential “allies.” For each context, we drafted an non-exhaustive list of potential “allies” that includes: paralegals and their organizations, legal assistants, judges, mediators, arbitrators, court clerks, law schools, clients and client advocacy groups, legislative bodies, advocates for an effective workforce, economists, non-profit social service agencies, think tanks, advocacy groups, media outlets, other professionals and their organizations, and, of course, lawyers themselves. The Group framed the discussion and crafted the recommendations for an audience that consisted of one or more of these potential “allies.”

18. There has been a great deal of interest in reforming the unauthorized-practice-of-law (“UPL”) rules over the last thirty years from inside the organized bar. For example, see Joaquin G. Avila, *Legal Paraprofessionals and Unauthorized Practice*, 8 Harv. C.R.-C.L. L. Rev. 104 (1973); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?* 1980 Am. B. Found. Res. J. 159; Edward V. Sparer et al., *The Lay Advocate*, 43 U. Det. L.J. 493 (1966); and William P. Statsky, *Paraprofessionals: Expanding the Legal Service Delivery Team*, 24 J. Legal Educ. 397 (1972).

19. See generally Hurder, *supra* note 8 (noting that groups outside the bar often have more permissive rules regarding representation by nonlawyers).

20. See Deborah L. Rhode, *Delivery of Legal Services by Non-Lawyers*, 4 Geo. J. Legal Ethics 209 (1990); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1981); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. Rev. L. & Soc. Change 701 (1996); see also Ralph C. Cavanagh & Deborah L. Rhode, Note, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 Yale L.J. 104 (1976) (discussing the bar’s response to pro se divorce).

Notes & Observations