Access to Legal Services Working Group Meeting

April 26, 2023 – Texas Law Center and Zoom

Meeting Minutes

The meeting agenda is available here, and meeting materials are available here.

Recordings of Subcommittee meetings are available at the following links:

- Scope of Practice - March 20, 2023; April 14, 2023
- Non-Attorney Ownership - March 31, 2023

Meeting Participants:

Working Group Members: Lisa Bowlin Hobbs (Co-Chair), Hon. Michael Massengale (Co-Chair), Kennon Wooten (Co-Chair), Linda Acevedo, Jonathan Bates, Rose Benavidez, Hon. Royal Ferguson, Katie Fillmore, Professor Susan Fortney, Paul Furrh, Hon. Eva Guzman, Hon. Sid Harle, Craig Hopper, Professor Renee Knake Jefferson, Richard LaVallo, Ellen Lockwood, Professor Mary Spector, Hon. Polly Spencer

Guests: Hon. Brett Busby, Harriet Miers (TX ATJ Commission Chair), Dominga Titus

Staff: Grace Spulak (NCSC), Lonni Summers (NCSC)

1. **Welcome and Introductions:** Co-Chair Kennon Wooten called the meeting to order at 10:05 a.m. and introduced new NCSC liaisons, Lonni Summers and Grace Spulak, who will be assisting with this project since Katie Hennessey is no longer with NCSC.

2. **Review and Approval of January 30, 2023 Meeting Minutes**: Judge Spencer moved to approve the minutes. Jonathan Bates seconded the motion. The minutes were unanimously approved.

3. **Subcommittee Reports and Discussion**: Subcommittee Chairs made the following reports:

   a. **Non-Lawyer Ownership Subcommittee – Hon. Michael Massengale**

   Justice Massengale provided an update about the Non-Lawyer Ownership Subcommittee's work. The Subcommittee held an organizational meeting on March 31, 2023. During this meeting, the Subcommittee identified three areas of study:

   1. Examine Rule 5.04 and attorney independence. Rule 5.04 is the Texas rule that prohibits non-attorney ownership of law firms. The purpose of this rule is to ensure attorney independence. The Subcommittee will look at other states that have eliminated or

modified their versions of Rule 5.04 to see how they have addressed attorney independence.

2. Explore how modifications to Rule 5.04 may impact opportunities for delivering legal services to low-income individuals. The Subcommittee will study how this has worked in other states and communicate with people in these states who have been involved in using rule changes to provide low or no-cost services to low-income populations.

3. Examine guardrails and protections. These could come in the form of pilot programs with time limitations as well as substantive restrictions. The Subcommittee also will gather information about undesirable outcomes that could arise from a rule change to inform the study of safeguards. (For example, considering the circumstance of people with complex legal situations who need and can afford an attorney using resources that are not appropriate to their needs or situation.)

The next Non-Attorney Ownership Subcommittee Meeting is scheduled for May 3, 2023.

The Working Group discussed Justice Massengale's Subcommittee report.

Katie Fillmore asked about business structure (LLPs v. LLCs). Jonathan Bates raised a concern about private equity investors in entities that provide legal services and whether a profit motive could create concerns for consumers.

b. Paraprofessional Licensing Subcommittee – Lisa Bowlin Hobbs

Chair Lisa Bowlin Hobbs gave an overview of the Subcommittee's work. The Subcommittee will look at organizations and strategies that provide entity regulation as well as individual licensing. Because the regulatory scheme for this project will depend on the scope of work for paraprofessionals, including who is authorized to provide services and what services they are authorized to provide, the Subcommittee has waited for the Paraprofessional Scope of Practice Subcommittee to develop their work. Chair Hobbs anticipates Subcommittee members will receive a welcome email and potential meeting dates for the first Subcommittee during the second or third week of May.

c. Paraprofessional Scope of Practice Subcommittee – Kennon Wooten

Subcommittee Chair Kennon Wooten gave an update on the Subcommittee's work. The Subcommittee has held two meetings, on March 20, 2023 and on April 14, 2023. Minutes from those meetings are included in the Working Group's meeting materials, starting on page 7.

The March 20 meeting was dedicated to brainstorming about how to increase access to justice using paraprofessionals such as community justice workers, court navigators, and paralegals with licensing and board certification. The Subcommittee discussed the relationship between the type of paraprofessional and the tasks a paraprofessional might do.

After the March 20 meeting, Chair Wooten created three Subgroups to look more specifically at substantive legal areas where there was an identified need for more access: (1) Family; (2) Probate; and (3) Housing, which includes landlord-tenant issues (e.g., eviction). This was intended to be a starting point for discussion, not a definitive list of legal areas.

At the April 14 meeting, the Subgroups each made a report:

1. Family Subgroup: There was a consensus from reporting Subgroup members that paraprofessionals could handle basic uncontested family law matters, particularly when working with approved forms from the Texas Supreme Court or Texas Law Help. The reporting members generally didn't think paraprofessionals should represent people in court proceedings, except in uncontested matters. The reporting members discussed the possibility of paraprofessionals providing more assistance in Title IV-D courts. There was also discussion, but no consensus, about paraprofessionals assisting with protective orders in cases involving domestic violence. There is acknowledgment of a need to get more information about initiatives already in place in Texas in the family law space.

2. Probate Subgroup: This Subgroup identified tasks that paraprofessionals could do with supervision, those they could do without supervision, and those that would require a lawyer. They also developed a breakdown of the types of paraprofessionals that might handle various tasks in this area. The Subgroup's recommendations are outlined in a handout available on page 15 of the Working Group's meeting materials.

3. Housing Subgroup: This Subgroup was unable to meet between Subcommittee meetings. But reporting members highlighted Texas Rule of Civil Procedure 500.4, which allows, for example, authorized agents to represent landlords and tenants in eviction proceedings in Justice Courts. Available information indicates that it is more common for landlords to have representation than tenants, but this might be an area where tenant representation could increase with more education and training.

The Subcommittee also heard from Professor Sean Slack who oversees the paralegal program at Austin Community College. He addressed Community Justice Workers.

Chair Wooten identified high-level rules that might need to be modified, including State Bar Rules; Rules Governing Admission to the Bar; Rules of Civil Procedure; Texas Disciplinary Rules of Professional Conduct, including Rules 5.03 and 5.05 and possibly Rule 1.02; Texas Rules of Disciplinary Procedure; and evidence rules related to privilege.

Subcommittee members emphasized that there is no one-size-fits-all approach. Texas may need to adopt several models in different areas, because what is appropriate for one area of law might not be appropriate for another area.

Working Group members discussed Chair Wooten's Subcommittee report, including whether mediation might be an appropriate area for paraprofessional assistance, particularly in the family law context. Justice Massengale noted that mediation is not traditionally considered the practice of law so there may be opportunities for people who are not lawyers

to help resolve issues in a way that eliminates or reduces some mediation costs. It was noted that paraprofessionals can handle mediation as part of the Minnesota pilot program.

Lisa Bowlin Hobbs noted that consumer debt may also be a substantive area of need.

4. Straw Poll Discussion

The Co-Chairs provided the following questions to help guide the discussion:

- Should recommendations limit paraprofessionals to working in only certain practice areas or should paraprofessionals be allowed to provide limited legal services in any practice area with appropriate training and licensure?
- Should paraprofessionals be supervised by an attorney or not?

After discussion, the consensus was that paraprofessionals could operate under a range of supervision models. Some tasks would require attorney supervision, and some would not. The consensus was also that, rather than granting broad authorization, recommendations should focus on what makes the most sense in each area. This may mean paraprofessionals can perform different tasks in various substantive areas with various levels of supervision.

Other discussion points included:

- The Community Justice Worker model could be adapted as a pilot program in various communities.
- The recommendations should consider how to inform consumers about their rights when interacting with a paraprofessional and where to go if they have a concern or need help. Paraprofessionals should not leave people in worse situations than they would have been in if they did not seek paraprofessional help. If attorney supervision is required for paraprofessionals, the Texas rules already make attorneys liable for the work of people acting under their supervision. The Working Group will need to assess whether this is sufficient protection.
- The Working Group should consider addressing liability insurance for paraprofessionals.

5. Communication and Outreach

a. **Working Group Fact Sheet**

Justice Massengale provided an overview of the Fact Sheet located on the last page of the Working Group's meeting materials. This document, prepared by NCSC, is designed to explain the Working Group's initiative. It outlines the project mission, gives examples of what the group might consider, provides facts about the severity of the justice gap and institutional support for regulatory reform from the Conference of Chief Justices and American Bar Association, describes what the Working Group will do, and offers an email address for feedback. The Working Group Co-Chairs will make this document available to Commissioners. If the Working Group has comments, provide them today if possible.

b. **Stakeholder Input**

Lonni Summers gave an overview of stakeholder feedback initiatives related to this project.

1. **Stakeholder Survey**: Stakeholder feedback is critical to this project. The Working Group needs to hear from people who work with low-income Texans who have civil legal needs, including legal service providers, community organizations, and judges. The Working Group should also solicit input from court users and low-income individuals with civil legal needs. The Working Group will use a survey to solicit input about substantive legal areas, how organizations might work with paraprofessionals, and what services paraprofessionals may be able to provide. NCSC is working to finalize the survey questions and will work with Judge Livingston to develop a comprehensive list of stakeholders who will receive the survey.

2. **Interviews/Focus Groups**: NCSC held two focus groups in March with participants from Texas RioGrande Legal Aid. High level takeaways from these focus groups indicated that many people are turned away due to a lack of resources. The biggest needs are in family law, probate, public benefits, and housing. Participants indicated a huge uptick in eviction cases post-pandemic. Texas RioGrande Legal Aid currently uses paralegals for a variety of tasks, including witness interviews, discovery support, preparing documents, and representing tenants in JP eviction court.

6. **Next Steps:** NCSC will finalize the survey and conduct focus groups. Provide stakeholder contact information to NCSC (Lonni Summers lsummers@ncsc.org).

7. **Adjourn:** The meeting was adjourned at 12:00 p.m.

M E M O R A N D U M

TO: Access to Legal Services Working Group

FROM: Non-Attorney Ownership Subcommittee

RE: Background Information, Overview of Work, and Current State of Discussion

DATE: July 24, 2023

Introduction

The Access to Justice Crisis in Texas

According to the Legal Services Corporation, low-income Americans do not get any or enough legal help for 92% of their civil legal problems.[1] In Texas, 90% of the civil legal needs of low-income individuals are unmet.[2] According to the Texas Access to Justice Foundation, approximately 5.2 million Texans qualify for legal aid.[3] This means that approximately 4.7 million people do not get help. According to the Justice Index, Texas is ranked 46th in the nation for ensuring access to justice.[4]

While legal-aid organizations help more than 140,000 Texas families with their civil legal needs annually, there is only one legal-aid lawyer for every 7,000 Texans who qualify.[5] This significant gap in resources means that people are forced to either represent themselves or forego justice. Inability to access the legal system undermines confidence and trust in the courts.

Since the need for assistance with civil legal needs is so great, and traditional legal aid is insufficient to meet that need, the legal profession must do more to address the situation. We

[1] Legal Services Corporation, The Justice Gap: The Unmet Need for Legal Aid, 2022, *available at* https://justicegap.lsc.gov/resource/executive-summary/ (last accessed June 13, 2023).
[2] Access to Justice Facts, Texas Access to Justice Foundation, *available at* https://www.teajf.org/news/statistics.aspx (last accessed June 13, 2023).
[3] Legal aid organizations primarily assist individuals and families living at or below 125% of the federal poverty guidelines. 125% of the 2023 federal poverty guidelines for a family of four is $37,500 a year and for an individual it is $18,225. U.S. Federal Poverty Guidelines for 2023, *available at* https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (last accessed Jan. 23, 2023).
[4] National Center for Access to Justice, 2022 Justice Index, *available at* https://ncaj.org/state-rankings/justice-index (last accessed June 13, 2023).
[5] *See* Texas Access to Justice Foundation, *Access to Justice Fac*, *available at* https://www.teajf.org/news/statistics.aspx (last accessed July 23, 2023).

must re-examine all barriers that prevent the low-income population from obtaining help that otherwise could be available to them through innovation.

Areas of Need

On a national level, common areas of unmet civil legal need include housing (eviction, landlord-tenant issues, and foreclosure), family law (child custody, child support, protection from intimate-partner violence, and parentage), consumer debt, public benefits, healthcare, employment-related issues, and education.[6]

Although work is still being done to gather information about areas of need specific to Texas, the Texas Access to Justice Commission's Access to Legal Services Working Group has identified the following high-priority focus areas: family law, probate, housing, and consumer debt.[7]

Supreme Court Charge

To address an expressly stated desire to remedy the civil-justice gap and expand access to justice for low-income Texans, by letter dated October 24, 2022 the Supreme Court of Texas requested that the Commission examine existing court rules and propose modifications that would:

1. allow qualified paraprofessionals to provide limited legal services directly to low-income Texans; and
2. allow non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving attorney independence.

In studying proposed modifications that would allow non-attorney economic interests, the Supreme Court also asked the Commission to consider whether rule changes should have limitations such as a pilot period or regulatory sandbox structure, and whether modifications should focus on certain services for which there is a particular need.

The Commission created the Working Group to respond to the Texas Supreme Court's request. The Working Group is composed of 27 members, who will make recommendations to the Commission about rule modifications that may help address the justice gap in Texas. The Working Group has created three subcommittees, including one to study and propose modifications to advance access to justice by allowing non-attorneys to hold equity interests in entities that provide legal services to low-income Texans

[6] Legal Services Corporation, The Justice Gap: The Unmet Need for Legal Aid, 2022, *available at* https://justicegap.lsc.gov/resource/section-3-the-prevalence-of-civil-legal-problems (last accessed June 13, 2023).
[7] Sources for this determination include data provided by the Office of Court Administration and information obtained from focus groups and from the Texas Legal Services Center (particularly its Texas Law Help website).

Progress of Subcommittee

The subcommittee has met a total of four times, with meeting recordings, minutes, and other materials available at the following links:

March 31, 2023 (organizational meeting): link
May 3, 2023: (overview of Arizona and Utah reforms; brainstorming): link
June 22, 2023 (guest speaker Noella Sudbury and initial discussion of draft working proposal document): link
July 12, 2023 (discussion of protections for attorney independence): link

Regulatory status quo

The Court's charge requests examination of existing rules, particularly the prohibition in the Texas Disciplinary Rules of Professional Conduct of non-lawyer ownership of firms that provide legal services (Rule 5.04(d)). Other rules and statutes also may be implicated. For example, there are statutory prohibitions of unauthorized practice of law by persons other than those licensed by the State Bar of Texas, and Rule 5.05(b) prohibits a lawyer from assisting a person who is not a member of the Bar in activity constituting unauthorized practice of law. There also is regulation of attorney fee splitting.

Professional independence of a lawyer: Rule 5.04

Based on ABA Model Rule 5.4,[8] and with limited exceptions that are not directly relevant to this study,[9] Rule 5.04(a) of the Texas Disciplinary Rules of Professional Conduct generally prohibits a lawyer or law firm from sharing or promising to share legal fees with a non-lawyer. Rule 5.04(b) prohibits a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. And Rule 5.04(d) prohibits a lawyer from practicing "in the form of a professional corporation or association authorized to practice law for a profit" under specified circumstances, including when ownership interests are held by a nonlawyer[10]; a

[8] For general history of Rule 5.4, see ABA/BNA Lawyers' Manual on Professional Conduct § 91:404; A. Garwin ed., *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 609-42 (2013); ABA Center for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates*, at 159-65 (1987). *See also Restatement (Third) of the Law Governing Lawyers* § 10 (2000).

[9] The exceptions provide for dealing with the death of a lawyer and for retirement plans for non-lawyer employees of a lawyer or law firm. *See* Rule 5.04(a). The comments to Rule 5.04 explain that "[t]he exceptions stated in Rule 5.04(a) involve situations where the sharing of legal fees with a nonlawyer is not likely to encourage improper solicitation or unauthorized practice of law." *Id*. cmt. 2.

[10] There is an exception for "a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration." *See* Rule 5.04(d).

"nonlawyer is a corporate director or officer thereof," or "a nonlawyer has the right to direct or control the professional judgment of a lawyer." Notably, non-profit firms already are excluded from the prohibition of Rule 5.04(d) by its express terms.[11]

The comments to Rule 5.04 characterize the prohibition on sharing fees or forming a partnership with a nonlawyer to provide legal services as a "traditional limitation" designed to "prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law." The comments further explain that the prohibition on nonlawyer ownership of firms providing legal services applies "in certain specific situations where erosion of the lawyer's professional independence may be threatened."[12]

Unauthorized practice of law

The Government Code prohibits practice of law in Texas "unless the person is a member of the state bar."[13] The Disciplinary Rules prohibit a lawyer from assisting a person who is not a member of the bar "in the performance of activity that constitutes the unauthorized practice of law."[14]

The Government Code defines the "practice of law" as follows:

> the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal

[11] The comments do address the circumstance of lawyers employed by nonprofits, noting that "[t]he danger of erosion of the lawyer's professional independence sometimes may exist when a lawyer practices with associations or organizations not covered by Rule 5.04(d)." *Id*. cmt. 6. The comment states that lawyers should not accept employment with a legal-aid office administered by a board of directors composed of lawyers and nonlawyers "unless the board sets only broad policies and does not interfere in the relationship of the lawyer and the individual client that the lawyer serves," preferably with a written agreement defining the employment relationship and protecting the lawyer's professional independence. *Id*. (citing Rule 1.13).

[12] Rule 5.04 cmt. 6; *see also Restatement (Third) of the Law Governing Lawyers* § 10 cmt. b (2000) ("Those limitations are prophylactic and are designed to safeguard the professional independence of lawyers. A person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services. The Section should be construed so as to prevent nonlawyer control over lawyers' services, *not to implement other goals such as preventing new and useful ways of providing legal services* or making sure that nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons." (emphasis supplied)).

[13] Tex. Gov't Code § 81.102. The State Bar defines a "member" as "a person licensed to practice law in Texas," Tex. State Bar Rules art. I(13), citing Tex. Gov't Code § 81.051(a), which provides: "The state bar is composed of those persons licensed to practice law in this state. Bar members are subject to this chapter and to the rules adopted by the supreme court."

[14] Rule 5.05(b).

> effect of which under the facts and conclusions involved must be carefully determined.[15]

The statutory definition excludes "design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[16] There is a separate prohibition of unauthorized practice of law in the form of charging or receiving "either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien."[17]

The statutory definition of "practice of law" is "not exclusive," and the statute expressly "does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."[18]

The Penal Code also specifies that a person other than a licensed practitioner of law commits an offence if, with intent to obtain an economic benefit, the person:

> (1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

[15] Tex. Gov't Code § 81.101(a).

[16] *Id*. § 81.101(c). "This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter." *Id*. Chapter 83 of the Government Code relates to "preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien." *Id*. § 83.001(a). Chapter 83 "does not prevent a person from completing lease or rental forms that: (1) have been prepared by an attorney licensed in this state and approved by the attorney for the particular kind of transaction involved; or (2) have been prepared by the property owner or prepared by an attorney and required by the property owner." *Id*. § 83.003.

[17] *Id*. § 83.001(a); *see also id*. § 83.006 ("A violation of this chapter constitutes the unauthorized practice of law and may be enjoined by a court of competent jurisdiction.").

[18] *Id*. § 81.101(b); *see also Unauthorized Practice Committee v. Cortez*, 692 S.W.2d 47 (Tex. 1985) (courts decide whether an activity is the practice of law; selecting and preparing immigration forms constitutes the practice of law); *Crain v. Unauthorized Practice of Law Committee*, 11 S.W.3d 328 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (preparing and filing mechanic's lien affidavits constitutes the practice of law); *Greene v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex. App.—Dallas 1994, no writ) (preparing and sending demand letters on personal injury and property damage claims and negotiating and settling the claims with insurance companies constitutes the practice of law); *Fadia v. Unauthorized Practice of Law Committee*, 830 S.W.2d 162, 165 (Tex. App.—Dallas 1992, writ denied) (selling will forms and manuals constitutes the practice of law); *Brown v. Unauthorized Practice of Law Committee*, 742 S.W.2d 34 (Tex. App.—Dallas 1987, writ denied) (contracting to represent persons with regard to personal injury and property damage claims constitutes the practice of law).

(2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;

(3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or

(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.[19]

Fee splitting

Rule 1.04(f) of the Disciplinary Rules imposes limitations on the circumstances under which lawyers who are not part of the same firm may divide a legal fee.[20]

Reform movement

In 2020, the Conference of Chief Justices encouraged states to experiment with regulatory innovations to spur new legal service delivery models that provide greater access while maintaining quality, achieving affordability, and protecting the public interests.[21] The American Bar Association also encourages jurisdictions to consider new ways to address the access to

[19] Tex. Penal Code § 38.123.
[20] Rule 1.04(f): A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is: (i) in proportion to the professional services performed by each lawyer; or (ii) made between lawyers who assume joint responsibility for the representation; and (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including (i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and (3) the aggregate fee does not violate paragraph (a). *See also* Rule 1.04 cmts. 10-15.
[21] Conference of Chief Justices, Resolution 2: Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services (2020), *available at,* https://www.ncsc.org/__data/assets/pdf_file/0010/23500/02052020-urging-consideration-regulatory-innovations.pdf (last accessed June 13, 2023).

justice crisis, including through regulatory innovations to improve "accessibility, affordability, and quality of civil legal services."[22]

Motivated at least in part to help address the justice gap, states such as Arizona, Colorado, Oregon, and Utah have modified their ethical rules to allow trained non-lawyers to provide legal advice in limited areas of the law. Some states, such as Arizona and Utah, also have modified their rules prohibiting non-lawyer ownership of entities providing legal advice, which enables legal organizations to partner with companies to help drive technological solutions to deliver legal services more efficiently to low-income individuals.[23]

Arguments for and Against Reforms Allowing Non-Attorney Ownership of Law Firms[24]

Non-attorney ownership. One way that states and national organizations are approaching regulatory reform is to permit innovative business models for law firms, such as firms that are owned or managed, in whole or in part, by non-attorneys.

Entities permitted under these reforms often are called alternative business structures (ABSs).

[22] American Bar Association, Resolution 115: Encouraging Regulatory Innovation (2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/r115resandreport.pdf. In contrast, the ABA, in its 2022 Resolution 402, also has stated that non-attorney ownership of law firms and fee sharing are incompatible with core values of the legal profession. American Bar Association House of Delegates Resolution 402, 2022, *available at* https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/402.pdf (last accessed June 15, 2023).

[23] Other states have declined to follow the path of reform. In 2022, the Florida Supreme Court declined to move forward with a proposal to allow non-attorney ownership after concerns about attorney independence were raised by the Florida Bar. *See* Letter from Michael G. Tanner, President, The Florida Bar, to Hon. Charles T. Canady, Chief Justice, Supreme Court of Florida, Dec. 29, 2021, *available at*, https://www.floridabar.org/news/publications/publications002/special-committee-to-improve-the-delivery-of-legal-services/#reports (last accessed June 15, 2023); In re: Amendments to Rule Regulating the Florida Bar 4-5.4 (Fla. June 2, 2022), *available at* https://supremecourt.flcourts.gov/content/download/839346/opinion/sc22-607.pdf (last accessed June 15, 2023). Also in 2022, California enacted legislation that prohibits consideration of permitting corporate ownership of law firms and fee sharing, due to concerns about conflicts of interest. Cal. A.B. 2958 § 3 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2958&showamends=false (last accessed June 15, 2023). This statutory section is only effective, however, until January 1, 2025.

[24] For a general summary of arguments for and against alternative business structures, *see* Natalie Anne Knowlton, A Debate on Nonlawyer Participation, Part I: Stephen Younger Warns that Nonlawyer Ownership Is Not the Solution to the Justice Gap, Institute for the Advancement of the American Legal System, December 14, 2022, *available at* https://iaals.du.edu/blog/debate-nonlawyer-participation-part-i-stephen-younger-warns-nonlawyer-ownership-not-solution (last accessed June 13, 2023), and Natalie Anne Knowlton, A Debate on Nonlawyer Participation Part II: Ralph Baxter Explores the State Bar Obligation to Improve Access to Justice, December 19, 2022, *available at* https://iaals.du.edu/blog/debate-nonlawyer-participation-part-ii-ralph-baxter-explores-state-bar-obligation-improve (last accessed June 13, 2023); *see also* ABA/BNA Lawyers' Manual on Professional Conduct § 91:405.

Examples include organizations such as Rocket Lawyer and LegalZoom. These entities provide web-based assistance with form completion, information and guidance about court processes, and traditional legal advocacy.

Potential Benefits

- **Expanded access to justice through innovation**: Proponents contend that allowing alternative business structures will incentivize innovation in the delivery of legal services, which can result in expanding access to justice. People could gain access to civil legal services when they otherwise would be forced to represent themselves without assistance, or entirely forego civil legal remedies. Risks to consumers can be minimized through safeguards, such as ensuring protection for lawyers' professional independence, and by licensing and limiting tasks that can be undertaken by a paraprofessional. Reporting requirements, such as those in Utah, permit information gathering about the types of entities that provide quality low- or no-cost services, and consumer complaints.
- **Increasing law firm capacity**: Allowing investment from non-attorneys can increase a law firm's capacity, including firms that provide legal services to low-income populations.[25]

Potential Risks[26]

- **Compromising attorney independence**: One purpose of Model Rule 5.4 is "to prevent nonlawyers from interfering with the lawyer's independent judgment,"[27] and eliminating or limiting the rule may create conflicts between a lawyer's ethical obligations to clients and financial obligations to firm owners. There is a concern that non-attorney ownership of law firms could lead to diminished representation and harm to clients. States that permit non-attorney ownership ameliorate this risk is in different ways, including reporting based on the risk of consumer harm, designating compliance lawyers, and providing a forum for consumer complaints.[28]
- **Potential for limited effectiveness**: Opponents contend that permitting non-attorney ownership may not increase access for low-income populations since it does not lead to

[25] *See* Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, *Yale Law Journal Forum*, at 253 (Oct. 19, 2022).
[26] For general discussion of counterarguments against the risks, *see* Jessica Bednarz, A Closer Look: Three Common Arguments Against Regulatory Reform, IAALS, June 13, 2023, *available at* https://iaals.du.edu/blog/closer-look-three-common-arguments-against-regulatory-reform (last accessed June 15, 2023).
[27] See Steven Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, *The Yale Law Journal Forum*, at 267-68 (Oct. 19, 2022), *available at* https://www.yalelawjournal.org/forum/the-pitfalls-and-false-promises-of-nonlawyer-ownership-of-law-firms#_ftnref18 (last accessed June 13, 2023).
[28] See Utah's Office of Legal Services Innovation, *available at* https://utahinnovationoffice.org/ (last accessed June 14, 2023), and Arizona R. Sup. Ct. 31.1, *available at* https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/supreme-court-jurisdiction-over-the-practice-of-law/rule-311-authorized-practice-of-law (last accessed June 14, 2023).

more lawyers or entities that provide free or low-cost legal services. Steven Younger notes that in Australia, England, Wales, where non-attorney ownership is permitted, the justice gap has not closed.[29] However, here, the alternative business structures are primarily profit-based.[30] Younger makes a similar argument about the alternative business structures operating in Arizona and Utah, noting that many are private equity firms, litigation-finance companies, hedge funds, and alternative legal service providers.[31]

Reforms in other jurisdictions (UK, Australia, DC, Arizona, Utah, others)

A number of jurisdictions have eliminated or modified prohibitions on non-attorney ownership and fee-sharing both domestically and abroad. In other jurisdictions, the desire to increase access to justice has not necessarily been a primary justification for, or a limitation on, changes to traditional rules prohibiting non-lawyer ownership of law firms.

New South Wales, Australia

In 2001, New South Wales, Australia passed legislation allowing lawyers to share fees and provide legal services with nonlawyers, with provisions to ensure attorney independence, including a requirement that at least one direct be an attorney and a management structure to ensure that attorneys act within their ethical obligations to clients.[32]

United Kingdom

In the United Kingdom, the 2007 Legal Services Act permitted ABSs in England and Wales. The Act includes protections to ensure that attorneys do not compromise their professional independence, including a fitness test for non-attorneys who have an ownership interest in law firms and the appointment of someone in the firm responsible for ensuring compliance with attorney ethics obligations.[33]

[29] Steven Younger, The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms, *The Yale Law Journal Forum*, at 276 (October 19, 2022), *available at* https://www.yalelawjournal.org/forum/the-pitfalls-and-false-promises-of-nonlawyer-ownership-of-law-firms#_ftnref18 (last accessed June 13, 2023).
[30] *Id*.
[31] *Id*. at 277.
[32] *Id*. at 263.
[33] Legal Services Act 2007, c. 29 (UK), *available at* https://www.legislation.gov.uk/ukpga/2007/29 (last accessed June 13, 2023); *see also* D. Engstrom et al., *Legal Innovation After Reform: Evidence from Regulatory Change*, at 19-21 (2022), *available at* https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-

Arizona

Arizona eliminated its version of Rule 5.4 in 2020 and enacted Arizona Supreme Court Rule 31.1. This rule permits nonlawyers to have economic interests and decision-making authority in entities that provide legal services if the entity employs one person who is an active member in good standing with the Arizona State Bar; is licensed; and only permits authorized people to provide legal services. Entities must apply to the Arizona Supreme Court for licensure and are granted a 1-year renewable license.[34]

D.C.

D.C.'s Rule 5.4 permits fee-sharing with non-profits and allows non-attorney ownership of law firms if the sole purpose of the partnership or organization is to provide legal services. Everyone with a financial or managerial interest in the firm must abide by the rules of professional conduct, and attorneys with financial interest or managerial authority must take responsibility for the conduct of non-attorneys.[35]

Utah

Utah modified its version of Rule 5.4 in 2020 to allow profit-sharing and allow attorneys to practice in partnerships owned by non-attorneys if authorized by the provisions of Standing Order 15.[36] Utah Supreme Court Standing Order 15 created the Office of Legal Services Innovation, a division of the Utah Supreme Court, which regulates and monitors alternative business structures and alternative legal providers (i.e., Licensed Paralegal Practitioners). The Office of Legal Services Innovation also investigates complaints about these entities.[37] There is a reporting process for all entities authorized by the Office of Legal Services Innovation.[38] The

REPORTExecSum-9.26.pdf (last accessed June 20, 2023) (assessing existing evidence on the impact of regulatory reform in England and Wales).

[34] Arizona Code of Judicial Administration § 7-209, *available at* https://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/7-209 Amended 7_13_22.pdf?ver=U0e16ry0d6dSkHPeGBdgng%3d%3d (last accessed June 13, 2023).

[35] D.C. Rules of Pro. Conduct, Rules 5.4(a) and (b), *available at* https://www.dcbar.org/getmedia/85934036-ef28-4a1c-8bda-8e79ecfd4985/DC-Rules-of-Professional-Conduct_1220.pdf (last accessed June 13, 2023).

[36] Utah Code of Judicial Administration Rule 13-5.4, *available at* https://legacy.utcourts.gov/rules/view.php?type=ucja&rule=13-5.4 (last accessed June 13, 2023).

[37] Utah Supreme Court Standing Order No. 15 (Amended September 21, 2022) *available at* https://utahinnovationoffice.org/wp-content/uploads/2022/10/Standing-Order-No.15-Amended-9.21.22.pdf (last accessed June 13, 2022).

[38] The Office of Legal Services Innovation, https://utahinnovationoffice.org/about/what-we-do/ (last accessed June 13, 2023).

Utah program is a seven-year pilot program, and the Utah Supreme Court will assess the program at the end of the pilot period.[39]

Examples of innovation enabled by reform

Some promising programs licensed in Utah and Arizona as alternative business structures include:[40]

Hello Divorce: Provides form completion and filing services, legal advice for lawyers, and financial help for clients in divorce cases.[41]

Legal Zoom: Provides form completion services and ability to consult with attorneys in the areas of family law and estate planning.[42]

Rasa Legal: Provides services in expungement cases, including web-based eligibility screening, document preparation and filing, and legal representation.[43]

Rocket Lawyer: Provides legal services through lawyers who supplement software-based completion of legal documents.[44]

Singular Law Group: Provides advice, document preparation, and legal representation in family law and immigration cases by contracting with attorneys.[45]

ZafLegal: Provides web-based assistance in personal injury cases to help with insurance negotiation and settlement outside of the contingency fee model. [46]

[39] Utah Supreme Court Standing Order No. 15 (Amended September 21, 2022) *available at* https://utahinnovationoffice.org/wp-content/uploads/2022/10/Standing-Order-No.15-Amended-9.21.22.pdf (last accessed June 13, 2022).
[40] *See also* D. Engstrom et al., *Legal Innovation After Reform: Evidence from Regulatory Change*, at 23-35 (2022), *available at* https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf (last accessed June 20, 2023) (describing and categorizing examples of innovation resulting from regulatory reform in Utah, Arizona, and England and Wales).
[41] Hello Divorce, https://hellodivorce.com/ (last accessed June 15, 2023). Note that Hello Divorce does operate in Texas in a limited capacity and might be able to expand services with reforms.
[42] Legal Zoom, https://www.legalzoom.com/personal/ (last accessed June 15, 2023).
[43] Rasa Legal, https://www.rasa-legal.com/ (last accessed June 15, 2023).
[44] Rocket Lawyer, https://www.rocketlawyer.com/ (last accessed June 20, 2023).
[45] Singular Law Group, PLLC, https://singular.law/ (last accessed June 15, 2023).
[46] ZafLegal, https://www.zaflegal.com/ (last accessed June 15, 2023).

Concept of rule exception for discussion

To satisfy the Supreme Court's charge, the Commission's proposal will need to satisfy several criteria. It must (a) enable non-attorneys to have economic interests in entities that provide legal services to low-income Texans, (b) while preserving professional independence. The proposal should (c) address the civil justice gap and expand access to justice for low-income Texans. And finally, it should (d) incorporate recommendations about (i) whether the modifications should be studied through a pilot program or regulatory sandbox, and (ii) whether the modifications should focus on services for which there is a particular need.

Rule 5.04(d) currently prohibits a lawyer from practicing "in the form of a professional corporation or association authorized to practice law for a profit" when ownership interests are held by a nonlawyer. Rule 5.04(a) generally prohibits lawyers from sharing legal fees with non-lawyers, and Rule 5.04(b) prohibits lawyer partnerships with non-lawyers to engage in the practice of law. The recommendation therefore must propose a method to establish an appropriately limited exception to Rule 5.04(a), (b), (d)(1), and (d)(2). The context of the Court's charge—both the concern for expanding access to justice, and the admonition to protect lawyer independence—invites a proposal for a limited exception that is tailored to expand access to justice while preserving protection for lawyers to fulfill their duties to clients without undue pressure from nonlawyer co-owners or managers.[47]

To maximize the potential for helpful innovation while also ensuring that the traditional Rule 5.04(d) prohibition is relaxed only to enable opportunities to expand access to justice for low-income Texans,[48] one possible approach would be to allow *approved entities* to provide legal services for a profit,[49] within criteria specified by the rule, by the approving agency, or both. The criteria for the circumstances in which the exception would apply could be articulated both positively (i.e. requiring that the entity actually provide civil legal services in areas of need to low-income Texans) and negatively (i.e. excluding specific practices or legal services as may be advisable, such as prohibiting contingent fees). The approval criteria also could be used to

[47] This is as distinguished from the possibility of abolishing Rule 5.04(d) entirely, which would have major implications for law practice that go well beyond addressing access-to-justice concerns, as well as exposing all areas of practice to concerns for preserving lawyer independence.

[48] The Utah Supreme Court's order establishing its Innovation Office states: "The overarching goal of this reform is to improve access to justice. With this goal firmly in mind, the Innovation Office will be guided by a single regulatory objective: **To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services.**" Utah Standing Order No. 15, *supra*, at 8. Notably, while the Utah order identifies access to justice as the "overarching goal," the Utah order apparently does not prioritize access to justice for the low-income community in the same way that the charge from the Supreme Court of Texas apparently does. *See also id*. at 2 ("For years, the Utah Supreme Court has made combating the access-to-justice crisis confronting Utahns *of all socioeconomic levels* a top priority." (emphasis supplied)).

[49] The Utah regulatory scheme expressly regulates entities and not individuals. *See* Utah Standing Order No. 15, *supra*, at 8.

ensure that the approved entities are operated in a way to minimize concern related to interfering with lawyer independence.

The substance of the proposal could take the following form:

> **Paragraphs (a), (b), (d)(1), and (d)(2) of Rule 5.04 do not apply to a professional corporation, association, or other entity providing legal services pursuant to certification from, and consistent with conditions imposed by, [*certifying agency*], if and only to the extent a certification process is approved by the Supreme Court of Texas. Legal services provided pursuant to this exception must provide legal services to low-income Texans [*and must/must not*] [*add additional rule-based criteria/limitations*]. To continue providing legal services under this exception, certified entities must obtain annual renewal of certification.**

This modification could be considered in the form of a pilot program designed to study the approach prior to a decision whether to amend Rule 5.04.

This proposed modification would permit two tiers of criteria for or limitations on the entities approved and certified to provide legal services under the exception. One tier would be built into the parameters establishing the pilot program (or ultimately in the rule itself). The other tier of criteria and limitations would be documented in the rules and conditions applied by the certifying authority to permit entities to obtain and maintain certification, and these rules should be more susceptible to modification over time under the ultimate supervision of the Supreme Court.

Both in the text establishing an exception to Rule 5.04 or in guidelines promulgated by the certifying authority, it should be made clear that the exception exists for the primary purpose of enabling expanded access to justice by ensuring that legal services are available to low-income Texans who otherwise would be forced to represent themselves or otherwise be deprived of assistance with civil legal matters. This essential criterion should be applied at the initial stage of approving an entity's proposed scope of services and then on an ongoing basis at the subsequent times for renewing approval, with the benefit of any data the entity would be required to report.

To the extent there are specific concerns about particular scenarios in which it may not be appropriate to permit partnership with non-lawyers, specific protections or prohibitions could be written into the language establishing the exception or the certification process.[50] For example, if it is determined that it would not be appropriate to permit non-lawyers to participate in contingent fee arrangements (or the other scenarios prohibited by Penal Code section 38.123), or that there should be some limitation on referral fees or other types of fee-

[50] *See generally* 2 G. Hazard et al., *The Law of Lawyering* § 48.03 (4th ed.) (identifying risks of participation by "lay intermediaries" as unauthorized practice of law by nonlawyer participants, lessened protection for client confidences, impairment of lawyers' independent professional judgment, improper solicitation of clients, and encroachment by professionals in other fields).

splitting such as are applicable to lawyers at different firms, those concerns can be addressed directly as part of the language establishing the exception.

The application process to obtain certification (or renewed certification) to provide legal services under the exception should require disclosure of information necessary to ensure that important civil legal services in an area of need actually would be provided to low-income Texans. Elements of the required disclosures could require:

- the scope of the proposed legal services;
- the intended client base;
- the proposed funding model, including client fee structure;
- form client engagement agreement and notification of conclusion of engagement;
- ownership and management structure, identifying the level of participation by non-lawyers;
- identification of responsible lawyers or compliance officers;
- specific written protections for lawyer independence; and
- plan for notification to clients in the event of discontinued certification of the entity or discontinuation of the certification process.

As part of the initial and renewed certification processes, approved entities should be required to undertake ongoing obligations, such as:

- adherence to rules governing the legal profession when providing legal services;
- disclosure of the fact of non-lawyer ownership or management to the public and to clients;
- disclosure of whether the entity carries malpractice insurance;
- identification of compliance officers or other responsible attorneys to ensure attorney independence (see Rule 5.04(c)) and general compliance with ethical rules, including protection of client confidences (see Rule 1.05) and non-solicitation of potential clients;
- collection and reporting of data about client demographics, legal services provided, fees collected, and objective outcomes;[51] and
- providing information to clients about how to report complaints to the certifying authority, and regular reporting of complaints received.

One item for discussion with respect to this proposed structure is where it would be desirable to base the certification authority. Potential candidates could include the Office of Court Administration, the Access to Justice Commission, the Legal Access Division of the State Bar, or an entirely new office.

[51] For example, Maryland Court Help Centers collect demographic data from clients including income brackets, gender, race/ethnicity, level of education, age, and ZIP code. *See generally Resources for the Self-Represented in the Maryland Courts* (2022), *available at* https://mdcourts.gov/sites/default/files/import/accesstojustice/pdfs/srlreportfy22.pdf.

The Court asked the Commission to consider whether the rule modifications should be enacted as a pilot program or in a "regulatory sandbox" structure.[52] One approach could be to have a specific sunset deadline.[53] Also, by making the certification process expressly subject to approval by the Supreme Court, the Court could retain to itself the effective power to end the program at any time in the future by withdrawing approval for the certification and renewal process.

The Court also asked the Commission to consider whether the modifications should be focused on "certain services for which there is a particular need." Certainly it is possible for this subcommittee, the Working Group, and the Commission to discuss areas of particular need for low-income Texans, and those services could be identified as part of the rule modification or as part of the guidance for the certification process. But because the proposal to establish an exception to Rule 5.04 is motivated at least in part to encourage and facilitate innovative new methods of providing legal services for the benefit of low-income Texans, it may be desirable to identify services or areas of particular need by way of *nonexclusive* examples, so that there will be flexibility to approve and permit an innovative service that could help low-income Texans despite it not being anticipated by this study or the drafters of the eventual procedural rules and guidance.

Finally, the subcommittee should consider the impact of Rule 5.05(b)'s prohibition of assisting nonlawyers in the unauthorized practice of law, and whether an exception to that rule also would be necessary as to implement this proposed modification. To avoid problems with Tex. Gov't Code § 81.102, should a firm certified to provide legal services under an exception to Rule 5.04 be registered as a "member" of the state bar for the limited purposes of providing the approved legal services? Should the provision of legal services pursuant to this exception be considered "authorized" practice of law?

Protection for attorney independence

There have been a number of proposals for protecting attorney independence in the context of jurisdictions that already permit non-attorney ownership of law firms, or other scenarios such as proposals to permit multidisciplinary practice.[54]

[52] The Utah regulatory sandbox was created to operate for a 7-year pilot phase. Utah Supreme Court Standing Order No. 15, at 3 (as amended Sept. 21, 2022).
[53] "At the end of [the pilot phase], the Supreme Court will carefully evaluate the program as a whole, including the Sandbox, to determine if it should continue. Indeed, unless expressly authorized by the Supreme Court, the program will expire at the conclusion of the seven-year study period." Utah Supreme Court Standing Order No. 15, at 3 (as amended Sept. 21, 2022).
[54] Past proposals to amend Model Rule 5.4 in the context of the ABA's study of interdisciplinary practice can be found in *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (Art Garwin, ed.) (hereinafter, "Garwin").

One type of safeguard would involve regulatory requirements designed to ensure protection of professional independence for attorneys working in firms with non-attorney owners or managers. Elements of written assurances could include:

- commitment to no direct or indirect interference with the independence of an attorney's professional judgment by the entity, any member of the entity, or any person or entity controlled by the entity;
- procedures to protect a lawyer's professional obligations to maintain proper standards of work, make decisions in the best interest of clients; maintain client confidentiality, and segregate client funds;
- requirement that members of the entity delivering or assisting in the delivery of legal services will abide by the rules of professional conduct;
- acknowledgement of the unique role of the lawyer in society as an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the administration of justice—including lawyers' special obligation to render voluntary pro bono legal service;
- process for annual review of procedures and amendment as needed to ensure effectiveness;
- annual certification of compliance, filed with the certifying agency, along with relevant information about each lawyer who is a member of the entity; and
- agreement to permit the certifying agencyto review and conduct an administrative audit of the entity (at the entity's expense), as each such regulatory authority deems appropriate, to determine and assure compliance.

These protections can be documented in writing in the terms of attorney employment agreements (or otherwise be provided to the attorneys),[55] in company policies,[56] and in applications for certification to offer legal services with non-attorney ownership or management.[57] The written undertaking could be required to be signed by the CEO (or equivalent officer) or board of directors (or similar body), and filed with a relevant regulating agency.

Another complementary method of ensuring attorney independence in the context of non-lawyer ownership or management can be found in the developing field of Proactive Management-Based Regulation or "PMBR."[58] PMBR entails an entity's self-assessment to

[55] *See, e.g.*, ABA Special Committee on Prepaid Legal Services Feb. 1983 proposed amendment to draft Rule 5.4 (*available in* Garwin, *supra*, at 611).
[56] *See, e.g.*, ABA Commission on Multidisciplinary Practice Aug. 1999 recommendation (*available in* Garwin, *supra*, at 618-19); *see also* comments 7-10 and related proposed Rule 5.8(d) making entity that fails to comply with its written undertaking subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures).
[57] *See, e.g.*, Arizona ABS Code E.2.
[58] *See generally* American Bar Ass'n, SCPR CPR PMBR Web Resource, *available at* https://www.americanbar.org/groups/professional_responsibility/scpd_cpr_pmbr_web_resource/ (last visited

determine if it has effective systems in place. If an entity reports that it is falling short in an area, a regulator can work with it to achieve compliance. This is called "education towards compliance." Through self-assessment, firms learn about what is required of them and receive support to improve operations. A self-assessment tool could be tailored to work in tandem with any rule-based changes that are promulgated. Initially developed in Australia in response to the development of non-attorney-owned law firms, study and development of PMBR has continued in various jurisdictions, and it has been implemented in Colorado[59] and Illinois.[60] Any implementation of PMBR should include consideration of evidentiary privileges which may be desirable to promote an effective self-assessment process.

July 21, 2023); Susan Saab Fortney, *Promoting Public Protection through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 The Prof'l Lawyer 16 (2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906525 (last visited July 21, 2023).

[59] *See* Lawyer Self-Assessment Program, *available at* https://coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp (last visited July 21, 2023).

[60] Ill. S. Ct. R. 756(e)(2) (requiring self-assessment for attorneys who disclose failure to obtain malpractice insurance).

M E M O R A N D U M

TO:	Access to Legal Services Working Group ("Working Group")
FROM:	Paraprofessional Scope of Practice Subcommittee ("Subcommittee")
IN RE:	Background Information, Overview of Work, and Current Recommendations
DATE:	July 24, 2023

This memorandum provides background information relating to the Subcommittee, an overview of the Subcommittee's work to date and anticipated work going forward, and the Subcommittee's current recommendations. This memorandum is intended to aid the Working Group's discussions during its next scheduled meeting—on July 27, 2023, from 11:00 a.m. to 2:00 p.m. CT (via Zoom).

A. Background Information

The Subcommittee is one of three subcommittees formed to assist the Working Group with responding to the requests in the referral letter from the Supreme Court of Texas (Attachment 1).[1] This Subcommittee has been tasked specifically with analyzing whether certain paraprofessionals should be licensed to provide limited legal services directly to low-income Texans and, if such services are authorized, (1) the potential limits on the type of work that could be done and the areas of law in which such work could be done by these licensed paraprofessionals, (2) the potential rule and statutory revisions that would be needed to authorize and define procedures for this limited practice of law by the licensed paraprofessionals, (3) eligibility criteria for clients of the licensed paraprofessionals, and (4) potential compensation sources for the licensed paraprofessionals.

[1] The other two subcommittees are the Licensing Subcommittee and the Non-Lawyer Ownership Subcommittee. The Licensing Subcommittee has been tasked with studying and making recommendations concerning the content and structure of proposed rules that would be necessary to allow the licensing for paraprofessionals and/or entities who then could provide limited legal services directly to low-income Texans. That subcommittee's study will include the scope of and entry qualifications for those regulated, the handling of complaints/discipline, and ongoing reporting requirements to monitor the success of any program established. That subcommittee's study will also include the fiscal implications of any program recommended for consideration, as well as any statutory amendments needed to implement the program. The Non-Lawyer Ownership Subcommittee, on the other hand, will examine existing rules and the potential benefits and disadvantages of modifying the rules to allow non-lawyers to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence. That subcommittee will lead the study of (1) the nationwide implementation of ABA Model Rule 5.4 and its prohibition on non-lawyers' participation in ownership of entities that provide legal services for a profit; (2) how changes to the traditional rule may create opportunities to expand access to justice and to address the "justice gap" by making legal services more affordable and accessible, including the experience in jurisdictions where the prohibition has been eliminated or relaxed to allow for innovation; (3) the consideration of appropriate need-based limits on legal practice areas, eligibility criteria for clients, and sources of funding for firms permitted to provide such legal services; and (4) the consideration of whether any proposed changes should be phased-in through a pilot program or regulatory sandbox.

When forming this Subcommittee, the Working Group Co-Chairs—Kennon Wooten, Lisa Hobbs, and Michael Massengale—attempted to (1) identify the areas of law in which the greatest access-to-justice gap exists for low-income Texans and (2) find volunteers with expertise and experience in those areas who would be willing to serve on the Subcommittee. Analysis of existing data (e.g., on the number of self-represented litigants in Texas state-court proceedings), discussions with stakeholders, and focus groups with legal aid representatives ultimately led to the identification of the following four areas of law: family, housing/landlord-tenant, probate/estate, and consumer debt. Collectively, Subcommittee members have expertise and experience in all of these areas of law. Some, but not all, of the Subcommittee members are also Working Group members. Working Group and Subcommittee rosters are included as Attachment 2 and Attachment 3, respectively.

To maximize productivity and efficiency, Subcommittee members were placed in subgroups aligning with the four areas of law referenced above. In shorthand, the subgroups are referred to herein as (1) the Family Law Subgroup, (2) the Housing Subgroup, (3) the Probate Subgroup, and (4) the Consumer-Debt Subgroup.[2] In addition, considering the success of the Community Justice Worker program in Alaska, the Subcommittee has been assessing whether and to what extent Texas paraprofessionals could function in a manner similar to the Community Justice Workers in Alaska (e.g., by working with Texas nonprofit entities that provide legal services to low-income Texans). The Subcommittee has also considered potential rule and statutory revisions needed to authorize and define procedures for the limited practice of law by licensed paraprofessionals, as well as eligibility criteria for clients of these paraprofessionals; however, as explained further below, the bulk of the Subcommittee's work to date has focused on the type of work that could be done and the areas of law in which such work could be done by paraprofessionals in Texas.

B. An Overview of the Subcommittee's Completed and Anticipated Work

The Subcommittee has met four times on the following dates: (1) March 20, 2023; (2) April 14 2023; (3) June 2, 2023; and (4) June 27, 2023. As explained further below, Subcommittee members have also worked diligently between meetings to develop content for discussion during meetings.

1. Subcommittee Meetings

a. March 20, 2023 Meeting

At the Subcommittee's initial meeting on March 20, 2023, Subcommittee Chair Kennon Wooten provided a brief overview of the Working Group's charge from the Supreme Court of Texas and of the justice gap (e.g., the inability of low-income individuals to access the legal help they need) in Texas. Chair Wooten also identified family law, landlord-tenant, probate, and public benefits as the areas of the apparent highest legal need, based on available data and preliminary feedback from legal aid entities. The Subcommittee discussed possible areas of assistance that paraprofessionals could provide to reduce the justice gap, including intake and case triage and assistance with forms.

Subcommittee members agreed to divide into subgroups focused on family law, housing/landlord-tenant law, and probate/estate law. (This was the genesis of the Family Subgroup, Housing

[2] The Subcommittee was asked to focus on consumer-debt issues several months after its formation. As a result, the Consumer-Debt Subgroup came into existence several months after the Subcommittee came into existence.

Subgroup, and Probate Subgroup that are referenced above.) These subgroups were tasked with identifying tasks in each subject area that paraprofessionals could perform with and without attorney supervision and with identifying forms that could assist these paraprofessionals in their work.

The recording of this Subcommittee meeting, an agenda, and minutes are available here.

b. April 14, 2023 Meeting

At this meeting, the subgroups reported on their progress to date, including their consideration of how paraprofessionals could use forms in various case types, how to address contested versus uncontested matters in family and probate cases, the types of tasks that would be appropriate for paraprofessionals to handle, and case types in these subject matter areas where paraprofessionals already provide assistance. The Probate Subgroup provided draft written recommendations at this meeting (which were appended to future meeting agendas). The other subgroups reported verbally.

The Subcommittee also heard a preliminary presentation by Professor Shawn Slack (the Department Chair of the Paralegal Program at Austin Community College) about the Community Justice Worker program in Alaska, which uses paraprofessionals to assist low-income individuals with legal issues. The Subcommittee considered how a program of this nature might be implemented in Texas.

Also at this meeting, Chair Wooten provided a high-level overview of potential rule amendments that would be needed to authorize the type of legal work being contemplated for paraprofessionals.

The recording of this Subcommittee meeting, an agenda, and minutes are available here.

c. June 2, 2023 Meeting

At this meeting, the Subcommittee welcomed new members to focus on consumer-debt issues and to assist with analysis of the housing/landlord-tenant issues.[3] Also at this meeting, the Subcommittee formed the fourth and final subgroup—the Consumer-Debt Subgroup—to make recommendations about potential paraprofessional work in consumer-debt cases. New members John Grieger and Paige Hoyt provided an overview of their respective professional backgrounds and presented on how paraprofessionals could be impactful in reducing the justice gap in Texas consumer-debt cases.

Also at this meeting, the Subcommittee considered draft written recommendations from the Family Subgroup, which form the basis of the final recommendations addressed later in this memorandum. The Housing Subgroup also reported on its plan to prepare recommendations for the Subcommittee.

Additionally, Katie Fillmore provided a preliminary report on her research relating to rules and statutes that may be pertinent to the Subcommittee's work and may need to be amended. Chair Wooten then provided a preliminary plan for next steps in regard to formalizing rule proposals.

The recording of this Subcommittee meeting, an agenda, and minutes are available here.

[3] The new members were Working Group member Robert Doggett, as well as John Grieger and Paige Hoyt.

d. June 27, 2023 Meeting

Justice Brett Busby of the Supreme Court of Texas attended and participated in this meeting.

At this meeting, Professor Slack provided an update on his inquiries about how Community Justice Workers might help in Texas. He reported on conversations with nonprofit entities providing legal services, including SAFE, American Gateways, and Casa Marianella. He noted that representatives there believed paraprofessionals could help them in various ways. He also noted that they had some questions about liability, funding, and training issues in this context. The Subcommittee engaged in a discussion about how a Community Justice Worker program might work in Texas.

Next, the Subcommittee discussed a revised version of the Family Subgroup recommendations, as well as potential additional revisions to make to the recommendations. The Subcommittee decided that, after this meeting and before the Working Group's next meeting, the Family Subgroup could finalize its recommendations and the Subcommittee could vote on the recommendations via email.

Also at this meeting, the Subcommittee discussed the Probate Subgroup's recommendations. With a minor revision agreed on during the meeting, the recommendations were unanimously approved.

Chair Wooten noted her understanding that the Housing Subgroup was scheduled to meet on July 10 and that the Housing Subgroup would provide written recommendations after that meeting. Next, the Consumer-Debt Subgroup provided an overview of their preliminary written report. They agreed to provide written recommendations for review at the Subcommittee's next meeting.

Ms. Fillmore provided an update about her research regarding Texas rules and statutes that might be impacted by the recommendations relating to paraprofessionals. She noted that she would prepare a written memorandum for the Subcommittee's and Working Group's review.

The recording of this Subcommittee meeting, an agenda, and minutes are available here.

2. Anticipated Subcommittee Work

As noted above, the Subcommittee is expected to consider written recommendations from the Housing Subgroup and the Consumer-Debt Subgroup in the near future. In addition, the Subcommittee intends to continue its analysis of the Community Justice Worker program and how it might work for paraprofessionals in Texas, perhaps in conjunction with nonprofits in Texas. Additionally, after the Subcommittee receives the Working Group's feedback on its written recommendations, the Subcommittee will prepare proposed rule revisions for the Working Group. Finally, the Subcommittee will provide recommendations on eligibility criteria for clients and will identify potential compensation sources for legal work performed by licensed paraprofessionals.

C. Current Subcommittee Work Product

The Probate Subgroup's recommendations (approved unanimously) are included as Attachment 4. The Family Subgroup's recommendations (approved 18-0 via email, with no opposing votes) are included as Attachment 5. And Ms. Fillmore's research memorandum is included as Attachment 6.

ATTACHMENT 1

October 24, 2022

Ms. Harriet Miers
Chair, Texas Access to Justice Commission
Locke Lord LLP
By email

Dear Chair Miers:

The Texas Commission to Expand Civil Legal Services recommended in its December 2016 report that a primary objective of future rulemaking projects should be to foster access to the civil justice system by Texans who cannot afford traditional legal representation. Many Texans have incomes low enough to qualify for assistance from legal aid and volunteer attorney organizations, but resource and staffing constraints allow these organizations to serve only a small fraction of qualified applicants. Often, the only option for Texans who cannot be served is to attempt to represent themselves.

To help address this civil justice gap and expand access to justice for low-income Texans, the Supreme Court requests that the Commission examine existing rules and propose modifications in the following areas:

- Modifications that would allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans. Among other things, the Commission should consider: qualifications, licensing, practice areas, and oversight of providers; eligibility criteria for clients; and whether compensation for providers should be limited to certain sources, such as government and non-profit funds.

- Modifications that would allow non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence. The Commission should consider whether to recommend that these modifications be studied through a pilot program or regulatory sandbox and whether modifications should focus on certain services for which there is a particular need.

The Court understands that the Commission will seek input from the bar and a range of other relevant constituencies in developing these proposals, which the Court would appreciate receiving by fall 2023. The Commission should work with the State Bar of Texas to provide periodic updates to bar members regarding its work on the proposals.

The Court is grateful for the Commission's service and your leadership.

Sincerely,

J. Brett Busby
Justice

cc: Access to Justice Commission Members and Staff
State Bar of Texas

ATTACHMENT 2

Working Group on Access to Legal Services

Co-Chairs: Kennon Wooten, Lisa Hobbs, Hon. Michael Massengale

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ATTACHMENT 3

Texas Access to Justice Commission
Texas Access to Legal Services Working Group
Scope of Practice Subcommittee Roster
Last updated: July 24, 2023

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*These individuals are also serving on the Working Group.

National Center of State Courts Liaisons

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ATTACHMENT 4

Probate Subgroup Recommendations

I. Resources to be used by paraprofessionals

(a) Forms approved by SCOT (almost): simple wills-single testator; single with children; married; married with children

(b) Forms pending review by SCOT: Muniment of Title application and instructions; Small Estate Affidavit and Instructions

(c) Forms being developed for consideration by SCOT: Transfer on Death Deed (TODD)

(d) Texas Law Help forms: Versions of everything listed in II. below other than the Muniment of Title application.

II. Tasks, simplest to most complex, that properly trained paraprofessionals might be able to handle without a lawyer's supervision:

(1) HIPAA Release
(2) Annual Reports of Person in Guardianship
(3) Medical Power of Attorney (MPOA)
(4) Declaration of Guardian
(5) Directive to Physicians (DTP)
(6) Declaration for Mental Health Treatment
(7) Supported Decision Making Agreements (SDMA)
(8) Statutory Durable Power of Attorney (SDPOA)
(9) Transfer on Death Deed (TODD)
(10) Small Estate Affidavit (SEA)
(11) Simple Wills (SCOT forms)
(12) Muniment of Title Application

III. Legal issues that might arise that require lawyer supervision:

(1) Fiduciary duty explanations-SDPOA, SDMA
(2) Tax issues-Wills
(3) Community Property Issues-Wills, SEA
(4) Liability issues-SEA, SDPOA

IV. Tasks perceived as simple that need lawyer representation:

(1) Probate administrations (including simple estates)
(2) Guardianship Applications
(3) Guardianship Accountings
(4) Court appearances, except in uncontested matters

V. Tasks for paralegals/others (court personnel or law student)

(1) Paralegals: muniment of title, SEA, Simple Wills, SDMA, SDPOA
(2) Other paraprofessionals: HIPAA, Annual Reports of Person in Guardianship; MPOA, Declaration of Guardian, Declaration for Mental Health Treatment, TODD

ATTACHMENT 5

ATJ FAMILY LAW SUBGROUP RECOMMENDATIONS

Recommendations in Cases under the Texas Family Code:

I. Scope limitations:

Our assignment derived from the October 24, 2022 letter from Texas Supreme Court Justice J. Brett Busby to Texas Access to Justice Chair Harriet Miers, which letter called for an examination of existing rules and proposal for modifications that would allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans.

We are concerned that, without a specific definition of who qualifies for such limited legal services, the new services created in this process may be diverted to self-represented litigants who have adequate financial resources to retain an attorney. Such diversion would, at the least, dilute the intended benefit for low-income Texans and may frustrate the benefit entirely. It should be noted that existing legal services groups have qualification mechanisms in place to conduct means testing to identify low-income Texans who are the intended beneficiaries of this process.

We recommend that a specific definition of a "low income Texan" be identified and that means testing be implemented through Legal Aid and similar legal services groups.

II. These provisions are not intended to restrict or diminish the currently utilized local practices of courts throughout Texas.

III. Licensed, properly trained paraprofessionals could be authorized to do the following tasks **with** attorney supervision in **uncontested suits affecting the parent-child relationship** (including uncontested suits under both Texas Family Code Titles I and V) that involve **only standard conservatorship provisions, standard possession schedules, and guideline child support issues**:

A. Assisting with completion and filing of Supreme Court-promulgated pro se forms;
B. Assisting with uncontested courtroom proceedings (e.g., prove-up hearings or scheduling conferences), including preparation of affidavits to prove up uncontested temporary orders and uncontested final orders;
C. In addition to the matters in A and B of this section, providing procedural information (as opposed to legal advice) to an otherwise unrepresented litigant regarding procedural steps to be taken to finalize a suit; and
D. Communicating with court staff and an attorney or paraprofessional retained by the opposing party regarding the issues described in A – C above.

IV. Licensed, properly trained paraprofessionals could be authorized to do the following tasks **without** attorney supervision in **uncontested divorce cases with limited property issues** (i.e., no third-party sale/title transfer of real estate or division/transfer of retirement benefits owned by the parties) that do not involve suits affecting the parent-child relationship:

A. Assisting with completion and filing of Supreme Court-promulgated pro se forms;
B. Assisting with uncontested courtroom proceedings (e.g., prove-up hearings or scheduling conferences), including preparation of affidavits to prove up uncontested temporary orders and uncontested divorce decrees;
C. In addition to the matters in A and B of this section, providing procedural information (as opposed to legal advice) to an otherwise unrepresented litigant regarding procedural steps to be taken to finalize a suit; and
D. Communicating with court staff and an attorney or paraprofessional retained by the opposing party regarding the issues described in A – C above.

V. Licensed, properly trained paraprofessionals could be authorized to do the following tasks **with** attorney supervision in **uncontested protective order cases**:

A. Assisting with completion and filing of Supreme Court-promulgated pro se forms;
B. Assisting with uncontested courtroom proceedings (e.g., prove-up hearings or scheduling conferences), including preparation of affidavits to prove up uncontested temporary orders and uncontested final orders;
C. In addition to the matters in A and B of this section, providing procedural information (as opposed to legal advice) to an otherwise unrepresented litigant regarding procedural steps to be taken to finalize a suit; and
D. Communicating with court staff and an attorney or paraprofessional retained by the opposing party regarding the issues described in A – C above.

VI. In these recommendations, "uncontested" refers to cases in which there is no opposition by another party to any issue before the court. Uncontested cases include no-answer default judgment cases. The filing of a general denial without a request for affirmative relief does not cause a case to be contested unless it includes a contrary position on an issue before the court. The serving of process upon a party does not cause the case to be contested.

VII. A case becomes "contested" when any party does one of the following actions:
A. Files any pleading or motion with the court which takes a contrary position on any issue before the court; or
B. Communicates with the court, in a hearing or otherwise, any contrary position on any issue before the court.

VIII. Paraprofessionals should not be authorized to take such actions in contested family law cases or in family law cases involving non-standard issues in suits affecting the parent-child relationship, including contested matters involving non-parent third parties. Similarly, paraprofessionals should not act as lawyers in the courtroom in contested matters. At such time as a case becomes contested, a paraprofessional should no longer

be authorized to take any action set forth above. A process should be implemented for paraprofessionals to follow in such instance.

IX. Paraprofessionals can assist courts with their uncontested low-income pro se cases, freeing up court time. They can assist low-income pro se parties in uncontested cases, ensuring these parties do not misuse Supreme Court-promulgated pro se forms, thereby causing real and often irreversible harm to themselves. In this manner, paraprofessionals can greatly augment the efforts of Legal Aid.

X. These recommendations do not address federal immigration law provisions concerning unaccompanied immigrant children. The subject matter of potential paraprofessional involvement in such matters is reserved for separate consideration as determined to be appropriate by the Scope of Practice Subcommittee and/or Working Group.

ATTACHMENT 6

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MEMORANDUM

DATE: July 21, 2023

TO: Scope of Practice Subcommittee of Texas ATJC Working Group

FROM: Katie A. Fillmore

SUBJECT: Analysis of existing law and rules based on search terms relating to legal services provided by paraprofessionals

This memo is intended to analyze existing references in Texas statutes and rules to terms relating to the paraprofessional study and scope of practice. The goal of this analysis is to identify potential limitations on the contemplated limited-scope representation by paraprofessionals.

The following terms were searched in Texas statutes, rules of court,[1] and the Texas Rule of Disciplinary Procedure: "paralegal," "paraprofessional," "authorized agent," "assisted representation," and "notario." "Assisted representation" returned no hits. The term "authorized agent" alone returned 346 results, so the search of that term was then narrowed to the Texas Rules of Civil Procedure, Texas Civil Practice and Remedies Code, and Texas Disciplinary Rules of Professional Conduct.

"Notario"

"Notario" appears only once in Texas law. Government Code § 406.017 prohibits a notary public from representing himself/herself as an "attorney licensed to practice law in this state[.]" Tex. Gov't Code § 406.017(a)(1). Additionally, the section provides that a notary public commits an offense if he/she "uses the phrase 'notario' or 'notario publico' to advertise the services of a notary public, whether by signs, pamphlets, stationery, or other written communication or by radio or television." *Id.* § 406.017(a)(4). The section also provides that a notary public commits an offense if he/she "solicits or accepts compensation to obtain relief of any kind on behalf of another from any officer, agency, or employee of this state or the United States." *Id.* § 406.017(a)(2). In addition, the section states that it is an offense to "advertise the services of a notary public in a language other than English" without coupling the advertisement with a specific statutory notice.

[1] Texas Rules of Civil Procedure, Texas Rules of Evidence, and Texas Rules of Appellate Procedure.

Id. § 406.017(a)(5); *see also id.* § 406.017(b) (setting forth the requisite notice). Importantly, however, the section also provides the following exception to prosecution: "It is an exception to prosecution under this section that, at the time of the conduct charged, the person is licensed to practice law in this state and in good standing with the State Bar of Texas." *Id.* § 406.017(c).

Although the law does not expressly use the term "notario," the DTPA also prohibits use of the word. The DTPA laundry list of "false, misleading, or deceptive acts or practices" includes "using the translation into a foreign language of a title or other word, including 'attorney,' 'immigration consultant,' 'immigration expert,' 'lawyer,' 'licensed,' 'notary,' and 'notary public,' in any written or electronic material … in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States."[2] This law was enacted to address "immigration consultants" who hold themselves out as being able to provide legal services they cannot.[3] A notario publico in many Latin American countries is an individual who has received the equivalent of a law license and who is authorized to represent others before the government. Essentially, a "notario" in Spanish speaking countries is the equivalent of a paraprofessional who is authorized to give legal advice.

If the Working Group recommends rules authorizing paraprofessionals to provide limited-scope representation to low-income Texans, that recommendation should (1) conform to the bounds of the statutes addressed above (e.g., by ensuring that any paraprofessional who provides legal services without supervision is licensed to practice law in the state and is in good standing with the State Bar of Texas) and (2) identify any statutory amendments that may be warranted to ensure that paraprofessionals can provide legal services without fear of prosecution for doing so.

"Authorized Agent"

The word "authorized agent" is used hundreds of times in Texas Statute, for purposes irrelevant to the paraprofessionals study. For example, it is used in various instances regarding a representative who is authorized to act on behalf of a governmental entity with regard to activities outside the scope of a legal action or legal representation.

The term "authorized agent" was included in this analysis because the Texas Property Code[4] and the Texas Rules of Civil Procedure[5] authorize representation in court by an "authorized agent" "who need not be an attorney" in an eviction case in justice of the peace court ("JP Court"). The Property Code takes it a step further by allowing, in *county* or *district court,* the "authorized agent" to appear on behalf of an "owner of a multifamily residential property."[6] The Rules of Civil

[2] Tex. Bus. & Comm. Code § 1746(b)(28).

[3] Using consumer law against notorious notarios. Mark E. Steiner, 22 J. Consumer & Com. L. 11, 13 (2018).

[4] Tex. Prop. Code § 24.011.

[5] Tex. R. Civ. P. 500.3(a)(2) and (b)(2).

[6] Tex. Prop. Code § 24.011(b).

Procedure also permit a JP Court to authorize, on a showing of "good case," an individual to be assisted in court by a "family member or other individual who is not being compensated (outside of just eviction cases)."[7] Neither authority defines "authorized agent," but an AG Opinion clarifies that the "authorized agent" must be an individual and not a business entity.[8]

ATJ Commissioner and JP Court Judge Nicholas Chu provided anecdotal information on how the assisted representation/authorized agent is used in his court. Judge Chu said it is used pretty frequently, usually more on the landlord side. He stated there are companies like Nationwide Eviction that utilize non-lawyers to handle the eviction filing and proceeding on behalf of landlords. On the tenant side, it is typically a tenant speaking on behalf of all tenants in the unit or a family member speaking for a tenant (such as the parent of a college student). The authorization is simply made through writing or in-person that the non-lawyer has authority to act on the party's behalf. The subsection that allows assisted representation outside of eviction cases is typically used by a parent who helps their young adult child. Judge Chu stated the eviction subgroup of the scope-of-practice subcommittee is working on two recommendations regarding these rules: (1) expanding authorized-agent representation beyond eviction cases; and (2) allowing assisted representation from a paraprofessional working at a legal aid provider (because technically they are compensated and thus arguably unable to qualify under Tex. R. Civ. P. 500.4(c)).

The term "authorized agent" is used other places in the Rules of Civil Procedure, such as agent for service of process.[9] The Texas Civil Practice and Remedies Code requires presentation of a claim for attorney's fees to be presented to "the opposing party or to a duly authorized agent."[10] These terms are also undefined. However, existing statutory and rule language indicates that the above-discussed usage with regard to paraprofessional representation has a different meaning.

"Paraprofessional"

A comment to Texas Rule of Disciplinary Procedure 5.05, addressing the unauthorized practice of law, speaks to paraprofessionals being delegated legal functions. The comment clarifies that it does not prohibit the "employing the services of paraprofessionals….[s]o long as the lawyer supervises the delegated work, retains responsibility for the work, and maintains a direct relationship with the client."[11]

"Paraprofessional" is used in various education and health services statutes, which have no relevance to this analysis.

---

[7] Tex. R. Civ. P. 500.3(c).

[8] Tex. Atty. Gen. Op., No. JM-451 (1986).

[9] Tex. R. Civ. P. 21a(a).

[10] Tex. Civ. Prac. & Rem. Code § 38.002.

[11] Tex. Disciplinary R. of Prof. Conduct § 5.05, cmt. 4.

"Paralegal"

Denton County has a local rule that prohibits attorneys from sending a legal assistant, "paralegal" or non-attorney to a pre-trial conference.[12]

Additional Considerations

Multiple statutes and rules prohibit anyone but a licensed member of the State Bar of Texas from practicing law. Any proposal of the Working Group will need to consider how to address these provisions. The term "unauthorized practice of law" appears in six chapters of Texas Code,[13] as well as in the Texas Disciplinary Rules of Professional Conduct.[14] Perhaps most significantly, the Texas Penal Code makes it a misdemeanor (or felony for subsequent offenses) for any person not "currently licensed to practice law in this state, another state, or a foreign country" or not "in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed" to contract to or provide advice relating to personal injury or property damages claims.[15]

Similarly, there are numerous laws that speak only to the involvement of an attorney as the provider of legal services. For instance, Texas Rule of Evidence 503 protecting "lawyer-client privilege," defines "client" as someone who consults with a "lawyer."[16] Also, numerous statutes allow recovery of "attorney's fees," particularly in consumer rights statutes.[17] If amendments to current law or rules are made to allow for paraprofessional practice, consideration will need to be given to expanding the privileges and rights that come from an attorney-client relationship.

KAF

[12] Denton County Rule 3.5.2.

[13] Tex. Gov't Code Ch. 81, 83, and 411; Tex. Ins. Code Ch. 4102; Tex. Ins. Code Ch. 4102; Tex. Occ. Code Ch. 1101; Tex. Penal Code Ch. 38.

[14] Tex. Disciplinary R. of Prof. Conduct § 5.05.

[15] Tex. Penal Code § 38.123.

[16] Tex. R. Evid. 503(a)(1).

[17] The term "attorney's fees" appears in 697 Chapters of Texas Code. (e.g., Tex. Bus. & Comm. Code § 17.50 (available relieve under DTPA); Tex. Bus. & Comm. Code § 27.01(e) (available relieve for fraud in real estate and stock transactions)).

MEMORANDUM

To: Working Group

From: Lisa Hobbs, Chair, Licensing Subcommittee (Subcommittee 2)

Date: July 24, 2023

Re: Licensing Subcommittee Update

The Licensing Subcommittee (Subcommittee 2)[1] has met three times:

May 17, 2023 (minutes, materials, recording available here)
June 7, 2023 (minutes, materials, recording available here)
July 13, 2023 (draft minutes, materials, recording available here)

The Subcommittee's purpose:

> to study and make recommendations concerning the content and structure of proposed rules that would be necessary to allow the licensing for qualified non-attorney paraprofessionals and/or entities who could provide limited legal services directly to low-income Texans. The study will include the scope and entry qualifications for those regulated, the handling of complaints and discipline and ongoing reporting requirements to monitor the success of any program established. The Subcommittee will also study the fiscal implications of any program together with the statutory amendments that would be needed to implement a program.

The Subcommittee has taken no straw votes on any matter studied. However, consensus has been formed on a number of critical items in our charge. This update is intended to reflect the Subcommittee's discussion on topics within its purview and to offer the Subcommittee's consensus of each topic to the extent consensus has been formed.

[1] A Subcommittee 2 roster is available here.

Overview of Other Programs and Analogous Programs

The Subcommittee has the benefit of many existing studies and programs in the United States, as well as analogous programs here in Texas. All of these studies and programs have greatly informed the subcommittee's work.

IAALS Report

In June 2023, the Institute for the Advancement of the American Legal System (IAALS) published a report to serve as a national model for what they refer to as "allied legal professionals"—what the WG has referred to as "paraprofessionals"—based on best practices and research, from which states can draw when implementing similar programs. The report includes 18 high-level recommendations for states, 7 of which pertain directly to the Subcommittee's work:

> Recommendation 10: Use of the same or similar character and fitness application process that is applied to attorneys is appropriate for ALPs given the overlap in services.
>
> Recommendation 11: States implementing an ALP program should ensure the education and training requirements are not overly burdensome on potential providers.
>
> Recommendation 12: Clinics and in-class assignments provide an opportunity for ALPs to fulfill required training hours without creating overly burdensome post-education requirements.
>
> Recommendation 13: Applicants with varying levels of prior education and experience should not be subject to one-size-fits-all requirements. States should provide different avenues to licensure for people with different levels of education and experience.
>
> Recommendation 14: In developing licensure for ALPs, states should first determine what is needed for minimum competency and then determine how best to measure that, rather than merely replicating the bar exam.
>
> Recommendation 15: States interested in a portfolio approach should partner with professional educators who are familiar with measuring competence through portfolios. As part of this exploration, states should consider how feasible it will be for licensing bodies to assess portfolios when there is a large volume of applicants

Recommendation 17: If states decide to impose similar regulatory requirements on ALPs as they do on attorneys, these requirements should not exceed attorney regulations. Data does not support a need for increased protection, and these requirements can be cost-prohibitive.

Other American Programs

The NCSC provided the subcommittee an overview of nationwide paraprofessional licensing requirements. There are two levels of paraprofessionals:

(1) Supervised by an attorney - Alaska, Delaware, Minnesota, and New Hampshire, and

(2) Unsupervised - Arizona, Colorado, Oregon, Utah, and Washington (no new licenses after July 31, 2023).

Entry requirements, including levels of education, training, and experience vary by state. In some states, training and experience is obtained by the supervisory agency, while in others, individuals obtain training and experience on their own.

The slides of that presentation are available here: https://nationalcenterforstatecourts.app.box.com/file/1216325006774.

NCSC has also prepared a helpful overview of the regulatory reform landscape, which is here: https://nationalcenterforstatecourts.app.box.com/file/1216359557123.

Current Regulation in Texas of Non-Attorney Individuals within Judicial System

Texas already has experience regulating non-attorneys within its judicial system. Paralegals are voluntarily regulated through two means: (1) the Paralegal Division of the State Bar of Texas (Paralegal Division); and (2) the Texas Board of Legal Specialization (TBLS). The Paralegal Division has (tiered) membership requirements, ongoing CLE requirements, as well as a process for accepting and acting on complaints against paralegals. TBLS also certifies paralegals by subject matter. Currently there are 399 certified paralegals. The specialty area with the greatest number is family, then civil trial.

Other non-attorney participants within the Texas judicial system are regulated through the Judicial Branch Certification Commission (JCBB). The JCBB regulates court

reporters, guardians, process servers, and court interpreters. There are different requirements for each of the four covered areas, though most require an application with a fee, passing an exam, and standards for license renewal. The regulated professionals must take continuing education, follow a code of ethics, and each area has a disciplinary and complaints process, which includes licensing revocation. Reciprocity is offered to professionals from other states.

Regulation of guardians is particularly analogous to the Subcommittee's work, given their heavy involvement in the judicial process. Texas requires individual and entity licensing for guardians. Guardians are individually licensed, and guardianship programs must register with the JCBB. Guardians must pass an examination to enter the program, obtain a criminal background check, meet initial and ongoing training requirements, and be over 21 years old with a high school diploma or equivalent. There are three qualifiers (1) 2 years of experience, (2) a college degree, or (3) 1 year of experience plus training. A license is valid for two years, with annual certification. The JCBB approves ongoing education, including providers of such courses. An outline of the JCBB's regulation is available here: https://www.txcourts.gov/jbcc/.

Update by Topic Area

Qualifications

Consensus is building that the qualifications to apply for a paraprofessional license will include a combination of education and experience and will additionally require subject-matter specific training and experience. The current Qualifications draft is based on the State Bar of Texas Paralegal Division's Active Member requirements and would provide general criteria as follows:

> (1) be a Board Certified Paralegal through the Texas Board of Legal Specialization and have been employed as a paralegal for at least one year;
>
> (2) be a Certified Legal Assistant or Certified Paralegal through the National Association of Legal Assistants and have been employed as a paralegal for at least one year;
>
> (3) be a Registered Paralegal through National Federation of Paralegal Associations and have been employed as a paralegal for at least one year;
>
> (4) be licensed as a legal paraprofessional in another state;

(5) have received a bachelor's or higher degree in a field other than legal studies and have been employed as a paralegal for at least one year;

(6) have completed an ABA approved paralegal program/college and have been employed as a paralegal for at least one year;

(7) have completed a paralegal program/college that consists of a minimum of sixty (60) semester credit hours (or equivalent quarter hours) of which fifteen (15) are substantive legal courses and have been employed as a paralegal for at least one year;

(8) have completed a paralegal program/college that consists of fifteen (15) semester credit hours of substantive legal courses and have been employed as a paralegal for at least two years;

(9) have completed a paralegal program that requires a bachelor's degree, associate's degree or higher AND consists of a minimum of 15 semester credit hours or a minimum of 100 clock hours and have been employed as a paralegal for at least two years; or

(10) have been employed as a paralegal for at least four consecutive years performing at least 80% substantive legal work under direct supervision of an attorney.

The next task for the Subcommittee will be to incorporate subject matter training and expertise into these general qualifications. The Subcommittee will likely draw from the TBLS standards for this task. Those standards are available here.

The Subcommittee discussed whether to include opportunities for graduates of ABA-approved law schools who "nearly passed" the Texas Bar Exam to act as paraprofessionals. The consensus seemed to be to allow this, but to exclude attorneys who had been disbarred in Texas or elsewhere.

The Subcommittee also discussed whether to have a residency or age requirement in these rules. There is no consensus yet on this topic.

The Subcommittee has briefly discussed reciprocity for paraprofessionals in other states. If allowed, this would only include reciprocity with certain states that have similar programs/standards.

Background/Character and Fitness

The Subcommittee anticipates a criminal background check for paraprofessionals. They have generally discussed character and fitness criteria. This may be modeled after the character and fitness process for lawyers, as recommended by the IAALS report. A more fulsome discussion of character and fitness will be included on the next Subcommittee agenda. The TBLE application is available here.

Exam/Portfolios

The Subcommittee has discussed whether an entry level exam is needed for minimum competency of paraprofessionals but has not reached a consensus on the issue. This discussion has recognized that many paralegals reach qualification for Paralegal Division membership through obtaining a national certification, which already includes an exam. Likewise, there are board-certified paralegals in Texas who have passed an exam in their specific practice area.

The IAALS report seems skeptical of a general competency exam. Instead, it encourages states to follow the lead of Oregon, which includes the combination of portfolios and a written examination. The examination—currently under development—will focus on legal ethics and scope-of-practice issues. The portfolio will likely include sample work product that demonstrates competency to work in designated areas of the law or verification of the completion of specific assessments, such as ethics.

Guardians in Texas are required to take an exam. The exam is developed by a JCBB advisory board. The passage rate for the guardianship examination is about 60-70%. A person must get 75% to pass. The examination is automatically graded through Blackboard, and if someone is within 5% of passing, then it is manually graded.

Ongoing CLE/Annual Reporting

The Subcommittee anticipates annual reporting to the paraprofessional licensing body. This would include reporting of annual CLE requirements, voluntary reporting of grievances/sanctions, and data collection. The precise nature of the annual reporting has not been determined. Currently, Arizona and Colorado require legal paraprofessionals to pay annual dues similar to attorneys.

The Subcommittee anticipates annual CLE requirements, similar to attorneys. The State Bar of Texas requires attorneys to complete 15 credits, including 3 credits of legal ethics/professional responsibility, every year. The Paralegal Division requires members to complete six (6) hours of substantive continuing legal education, at least one (1) hour of which must be legal ethics, from approved CLE providers. The Subcommittee has not discussed the precise hours of CLE requirements for paraprofessionals but we anticipate that it would include a combination of ethics, general CLE, and license-specific CLE.

Code of Ethics/Client Disclosures

The Subcommittee anticipates a governing Code of Ethics. The Paralegal Division adopted canon of ethics for paralegals that may serve as the basis for the Paraprofessional Code of Ethics. The paralegal canons are available here. The Paralegal Division also has a "Handbook," published by Thomson Reuters, that offers practical information about the paralegal canons.

Consistent with IAALS recommendations, the Subcommittee believes the Code of Ethics will include a client disclosure. The following draft language is taken from the Arizona Code of Judicial Administration 7-210 (J)(5)(e):

> A legal paraprofessional shall inform the client in writing that a legal paraprofessional is not a lawyer and cannot provide any kind of advice, opinion or recommendation to a client about possible legal rights, remedies, defenses, options, or strategies beyond what the LP is specifically licensed to provide authorized services for.

The Subcommittee anticipates that this disclosure will be modified to include more precise information about the scope of the paraprofessional's license—perhaps an approved brochure written in plan-language with references to the adopted rules and information about filing a complaint.

Discipline

The Subcommittee is currently looking at the Judicial Branch Certification Commission disciplinary process as a model, including the JBCC's administrative dismissal policy. These rules cover complaint initiation and review; administrative dismissal of improper

complaints; settlement; hearing and appeals; and sanctions. Some processes may need to be changed depending on how the oversight of paraprofessionals is structured.

A working draft of disciplinary rules has been circulated to the Subcommittee, but that draft has not been substantively discussed. A copy of the draft is available here.

Liability Insurance

The Subcommittee has only briefly discussed the issue of liability insurance. Some states do require either obtaining insurance or, at minimum, client disclosure about whether insurance coverage is available. These requirements appear to track attorney requirements for those particular states.

In Texas, attorneys are not required to obtain liability insurance, nor are they required to disclose to clients whether they have coverage. Past initiatives to change these rules have all failed.

Regulation of Law Firms with Non-Attorney Owners

In addition to making recommendations to the Working Group on a framework for regulating paraprofessionals, the Subcommittee anticipates providing a framework for, at minimum, the registration for law firms with non-attorney owners. This topic has not yet been broached within our Subcommittee, and it is anticipated that a joint meeting with Subcommittee 3 will be held in the near future, dedicated solely to this topic.