Comments Regarding ATILS 16 Concept Options for Possible Regulatory Changes

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Introduction

The National Center for Access to Justice (NCAJ) is dedicated to expanding access to justice. We are a source of research and guidance on best policies for assuring access to justice for those who are most vulnerable in our society.[1] We have long supported the authorization of new roles for non-lawyers to provide critically important civil legal services to individuals, families and communities with the greatest need.[2] It is through this lens and with an eye toward these goals, that NCAJ submits these comments in response to the call by the California State Bar Task Force on Access Through Innovation of Legal Services (ATILS) for public comment on its regulatory recommendations for enhancing the delivery of, and access to, legal services.

Comments

I. America's Access to Justice Crisis

Access to justice – the meaningful opportunity to be heard – is unavailable to the majority of low income people in the United States even though it is essential to their well-being and enjoyment of their fundamental rights.[3] Access to justice can make the difference in keeping a family together, preserving the roof over one's head, having enough to eat, and securing refuge from physical and emotional harm. Access to justice is important to everyone, but it is especially elusive for the poor, people of color, and other marginalized communities.

The grim reality is that civil justice problems cost countless Americans their homes, their children, their jobs, their life savings, and even their physical and emotional safety. Each year, millions of people in America are drawn into civil proceedings without any legal representation or other assistance, and the law itself is often stacked against them. Millions more struggle with legal problems without ever reaching a court. The damage caused by these failures of justice is broad, accelerating poverty and incarceration rates, fracturing families and communities, and undermining confidence in our laws and system of government.

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Too often, low income and vulnerable people are unable to obtain the legal help they need, and are not allowed to seek that assistance from the individuals they want to help them. Services essential to people in low income and vulnerable communities are out of reach, reserved to professional attorneys who are neither in the communities that most need their services nor offering their services at rates that could ever be affordable to low-income people. The law prevents people, no matter how critical their unmet needs, from obtaining legal advice or legal representation from anyone who has not acquired a degree in law and obtained authorization by the bar to practice law. As a consequence, people have no opportunity to secure legal assistance of any kind. They are left at unnecessary risk of harm not only in legal proceedings against powerful adversaries, but also in numerous other scenarios that arise outside of courtrooms in which legal expertise, were it available, could make a difference.

Among the kinds of civil legal matters in which individuals risk unnecessary harm are high stakes disputes that include evictions; foreclosures; job terminations; determinations of child custody and child support obligations; and efforts to secure essential medical coverage, access to food, and even physical or emotional safety. These matters involve some of the most basic necessities of life, and the outcomes, when adverse, routinely turn people's lives upside down.

II. Incremental Reforms and Inadequate Progress

We know that initiatives are being pursued by many stakeholders on many fronts to better position low income and vulnerable people to respond to civil legal problems. These include, among many others:

- expanding the provision of free legal assistance and promoting the adoption of a civil right to counsel in areas of law that implicate basic human needs;
- increasing opportunities for alternative dispute resolution;
- simplifying procedural and substantive law;
- adopting innovative models of judging that allow decision-makers to be increasingly proactive in explaining legal and evidentiary issues to unrepresented people;
- training court officials and clerks to respond to the needs of disadvantaged and unrepresented people;
- improving the qualifications of interpreters;
- waiving filing fees; and
- offering clearer notices to educate people with disabilities about their rights.

Some of these approaches, and many others, are described in the NCAJ's Justice Index, an online resource that tracks states' progress, relative to each other, in adopting best policies that improve access to justice. The Index seeks to illuminate for state officials and reformers the best policies for assuring access to justice, and to encourage these stakeholders to replicate these policies in their respective states across the country.[4]

In our view, the diverse reform initiatives that are moving forward in the states to expand access to justice, despite increased attention and best efforts, are not equal to the task of ensuring meaningful access to justice for all. Even where positive steps are taken, the access to justice gap

remains something more akin to a chasm, with seemingly no agreeable solutions among members or the bar in sight.

It is with all of this in mind – the severity of the access to justice crisis and the enormity of the system's failure to resolve it – that **we recommend developing and testing new models for authorizing practice by non-lawyers.** As the California Bar has recognized, in some jurisdictions courts have already allowed experimentation with models in which certain classes of trained non-lawyers, termed "navigators," have been authorized to offer information and limited forms of assistance to people facing civil legal problems. Washington State and Utah have gone further, adopting innovative models that authorize certified individuals to offer a greater level of service than navigators in family law cases. But even these steps forward are designed to be limited in scope, and make no pretense of being equal to the task of bridging the justice gap. Much more must be done.

III. NCAJ's Support for Recommendation 2.0

The California proposal, as drafted, contemplates the development of models within attendant standards that, potentially, can expand access to justice for low-income individuals, families, and communities. The proposals, though tentative, are comprehensive, and NCAJ's comments do not, at this time, address all of them. Rather, NCAJ would like to express support for the specific provision calling for extending to non-lawyers the authorization to provide legal advice and services. Specifically, NCAJ supports the following proposal:

- 2.0 – Non-lawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

We recognize that many arguments have been advanced in public comments, and in literature on the subject, against proposals to narrow prohibitions on unauthorized practice of law. These include concerns that such reforms risk enshrining a two-tier system of justice; that litigants will suffer harm through the provision of incompetent or otherwise inadequate legal services; and that proposals tend to erode the position and societal value of the bar as a profession.

Our response to these and other concerns is twofold. First, we argue quite simply that the scale and severity of the access to justice problem weigh even more heavily than the concerns. Second, we acknowledge that these concerns *are* real, important, and often advanced in good faith. California will bear a heavy responsibility to develop models of service delivery, regulation, and oversight adequate to mitigate these concerns. We advise that the California Bar look, in particular, at the risk-based, consumer-focused model being advanced by the Utah Supreme Court. The present proposals have generated an understandable degree of alarm because they essentially leave these vital questions for another day. With all this in mind, we would urge adherence to the following principles as reform goes forward:

- *Ensure that everyone has access to the help they need at a cost they can afford* – Consideration of reform models should advance this broad idea that people have a right to receive legal assistance within a legal system that is fundamentally not designed to be

understandable and navigable by individuals without legal representation. This is an error in the design of the legal system, not a failure of those who are subject to it.

- *Ensure a match between skill of practitioners and complexity of tasks* – Many tasks involved in the practice of law can be performed as well or better by those who have experienced these issues themselves and benefit from the training needed to resolve them, but who have not attended four years of undergraduate education and an additional three years of law school. Other more complex tasks draw more heavily on formal legal training, which is where lawyers should focus their unique expertise. At the same time, too little is known about the specific types of knowledge and skills that are needed to perform certain legal tasks, in large part because regulatory restrictions on non-lawyer advocacy have prevented these models from being developed. More study is needed, however this is not a reason to fail to go forward with reform; indeed, it is a reason to encourage experimentation. Much as in medicine, the field will discover over time the tasks that individuals are competent to address, the tasks that should be carried out under supervision by lawyers (or referred to lawyers), and the tasks that can effectively be handled by non-lawyers with specific training to conduct specific tasks. The risk that nearly all low-income people face in not having their legal needs addressed is greater, we submit, than the risks that may be associated with developing trained, non-lawyer community advocates empowered to help them.

- *Ensure transparency of qualifications of those offering assistance* – Much as occurs now, the state should require all practitioners to disclose accurately and prominently the type of training and qualifications they possess. This could include degrees, training certificates and other qualified credentials to alert the consumer to their actual expertise. Individuals should not be allowed to claim they are attorneys when they are not.

- *Reduce costs and other barriers to entry* – As the California Bar has acknowledged, the regulation of legal services provision is a delicate and important matter, and while it must not be given short shrift, nor should the state err on the side of erecting unnecessary regulatory barriers that require so much education, or such great costs, as to practically prevent the provision by non-lawyers of more widely accessible legal services.

- *Do not burden nonprofit organizations with excessive new regulatory requirements that will interfere with existing services to the poor* – A top rule of reform in California should be to do no harm to the vulnerable, nor to those nonprofit entities that are providing effective service important in low income communities. In pursuit of a new framework to regulate companies that provide their services through for-profit models, the state must be vigilant to avoid imposing excessive regulatory requirements on non-profit organizations that are already effective in providing services to the poor. Indeed, the Bar should consider an expansive non-profit exemption to any rules that are intended to specifically regulate risks imposed by commercial entities, with the understanding that such non-profits would still be subject to both laws regulating their status as nonprofits as well as existing consumer protection laws.

- *Recognize a definition of access to justice to guide reform* – To assure that new models expand access to justice, the NCAJ recommends that the state of California measure the claimed merit of new models against a definition of access to justice which contains the following elements:
  - that individuals and groups
  - especially those with the fewest resources who are the most vulnerable
  - understand their rights
  - can act effectively to protect their important needs and interests (home, family, sustenance, safety, savings, health, more)
  - through a formal or informal process
  - with a neutral and non-discriminatory decision-maker (or, possibly, through a process with no decision-maker if the proceeding is informal)
  - to produce a fair resolution (where necessary, determining the facts, applying the law, shaping the law)
  - and enforce the result.

[Dated 9-23-19]

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[1] See NCAJ's organizational website, ncforaj.org, and its Justice Index, justiceindex.org.

[2] See Richard Zorza and David Udell, *New Roles For Non-Lawyers To Increase Access To Justice*, 41 Fordham Urb. L.J. 1259 (2014), available at https://ir.lawnet.fordham.edu/ulj/vol41/iss4/8; *Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners*, Committee on Professional Responsibility, Association of the Bar of the City of New York (June 2013)(David Udell, Chair, Access to Justice Sub-Committee), available at https://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf; *Press Release*, *Chief Judge Names Members of Committee Charged With Examining How Non-Lawyer Advocates Can Help Narrow New York's Justice Gap*, New York State Unified Court System (May 28, 2013), available at, http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR13_07.pdf.

[3] *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, Legal Services Corporation (June 2017), available at https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

[4] *Justice Index* (2016), justiceindex.org. See also, *Overview of Justice Index* (July 25, 2019), available at https://ncforaj.org/wp-content/uploads/2019/07/Introduction-to-the-Justice-Index-7-25-19-pdf.pdf