

Equal Justice for All: Why More States Should Follow Arizona's Plan to Increase Public Access to Affordable Legal Services

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KEY TAKEAWAYS

The number of Americans compelled by economic necessity to represent themselves in court shows the need for greater access to affordable legal services.

Aside from Arizona, states have not allowed the development of service models that will enable low-income Americans to get the legal services they need.

States should permit new business models that provide much-needed civil legal assistance to millions of low-income individuals at rates they can afford.

On August 10, 1976, addressing the annual meeting of the American Bar Association (ABA), an organization he had once served as president, Associate U.S. Supreme Court Justice Lewis Powell, Jr., stated:

Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.¹

Yet every year, the legal system fails to deliver equal justice to millions of low-income Americans who are unable to afford to hire a lawyer to assist them with their legal needs in the civil justice system, in which, unlike the criminal justice system,² the right

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to counsel is not guaranteed. And while some low-income Americans can qualify for legal aid, the financial eligibility restrictions are quite stringent, resulting in millions of low- and middle-income Americans who are not quite poor enough to qualify for legal aid, but certainly not rich enough to afford an attorney.³

Navigating the complex legal system (which was primarily designed by lawyers for lawyers representing well-to-do clients) and wading through reams of archaic legal jargon are daunting tasks to say the least. Many people have no idea what their rights are, much less how to protect them. As a result, many individuals with valid claims may be unable to advance or even assert them. For those unable to afford a lawyer, the promise of equal justice under law often proves to be illusory.

Case Study: Mary

At age 20, Mary⁴ met, married, and had a child with her future husband—all within one year. Since childhood, Mary had wanted a family. When she was five, her parents were divorced; her mom “went off the deep end”; and she went to live with her grandparents. The last thing Mary expected was to end up like her parents.

But after just a few short months, Mary says that her husband quickly became controlling and abusive. She recounts, “I was hoping that having our first daughter would for sure change him, but it didn’t.” By the time Mary had given birth to her third child, she says her husband was verbally abusive and deep into addiction with “any drug he could get his hands on.”

In October 2016, Mary filed for divorce, not knowing she was starting a process that would take four years and nearly \$5,000 to complete. In October 2020, after having been married to her husband for 15 years, the divorce was finally completed, and Mary thought her worst nightmare was ending.

But she was wrong. Things could get worse—and they did.

Following the divorce, Mary remarried and was given primary custody of the children while her ex-husband was given limited visitation rights. On May 30, however, Mary’s ex-husband pulled up to her new home in Mississippi, greeted her new husband with a handshake, and loaded her three children in his car—promising to bring them back within the two weeks allotted to him by law—and then drove off.

That was the last time Mary saw her children, and the only thing she has received from her ex-husband, who is now over 500 miles away in Florida, is a text saying “the kids will not be coming back.”

Over the past few weeks, Mary has tried everything to get her children back, from spending an additional \$3,750 to file a contempt petition in Mississippi to petitioning a Florida judge to honor her custody order to paying \$350 for an emergency pick-up order, begging Florida law enforcement authorities for help. It was not enough. “I called everybody, and they were all four grand to \$5,000 to help me and they all said the same thing.... It’s all about the money. It really should be about the safety of the children,” she says. “They start school August 6th, and my court date is August 9th. I just need somebody to help me get my babies home.”

Despite spending thousands, Mary still had not received the legal help she needs. “Nobody legally wants to help,” she says. “I feel like the system has really fooled me and it cost me a lot of money.... [My children] want to come home. It’s just a mess.”

We found Mary through a Facebook group for people looking for help with their civil legal problems, ranging from child custody to eviction. If you spend a few minutes scrolling through *pro bono* pages on Facebook, you will find that Mary’s story is unique only insofar as she was able to afford trying a few legal options before running out of money. Most do not have that luxury, yet their outcome is the same as hers—no justice.

The Scope of the Problem

A 2017 study, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (“Justice Gap study”), commissioned by the Legal Services Corporation (LSC) and conducted by NORC at the University of Chicago found:

Eighty-six percent of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help. Of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1.0 to 1.2 million (62% to 72%) receive inadequate or no legal assistance.⁵

Low-Income Households. Many of the civil legal problems afflicting low-income Americans are significant, involving issues ranging from housing and public benefits to child custody and domestic violence. According to the Justice Gap study:

71% of low-income households have experienced a civil legal problem in the past year. The rate is even higher for some: households with survivors of

domestic violence or sexual assault (97%), with parents/guardians of kids under 18 (80%), and with disabled persons (80%). 1 in 4 low-income households has experienced 6+ civil legal problems in the past year, including 67% of households with survivors of domestic violence or sexual assault.... The civil legal problems these Americans face are most often related to basic needs like getting access to health care, staying in their homes, and securing safe living conditions for their families.⁶

Percentage Unrepresented. In some states and in certain types of cases, up to 80 percent or 90 percent (or more) of civil defendants are unrepresented, while the persons or entities that sued them are represented by counsel.⁷ George Washington Law School Professor Jessica Steinberg notes that over the past 30 years, “in matters that typically affect the poor—divorce, landlord/tenant, and bankruptcy—at least one party appears unrepresented in 67% to 92% of cases. This figure has climbed dramatically since the 1970s, when *pro se* representation rates ranged from the single digits to 20%.”⁸

A 2015 study by the National Center for State Courts, which examined 900,000 civil cases in a one-year period, found that at least one party was self-represented 76 percent of the time.⁹ Unrepresented individuals from vulnerable populations—such as those with a mental illness or other disability, persons from unstable families or suffering from addiction, domestic violence victims, or someone with limited English language skills—fare particularly badly.¹⁰

Moderate-Income Households. Moderate-income Americans need help too. As former New Hampshire Chief Justice John T. Broderick observed:

The self-represented are no longer just the poor, but their ranks now include more members of the middle-class and a rising number of small businesses. The vast majority of the self-represented enter our courthouses without lawyers because they can't afford one, not because they don't want one.¹¹

A report issued in 2021 by the Stanford Center on the Legal Profession entitled *The Surprising Success of Washington State's Limited License Legal Technician Program* (“Stanford Report”) stated, “Studies estimate that 40–60% of legal needs go unmet for middle-class individuals.”¹² A 2016 study found that “well over 100 million Americans [are] living with civil justice problems, many involving what the American Bar Association has termed ‘basic human needs.’”¹³

The problem has only worsened since then, especially during the pandemic. Unemployment rates are up,¹⁴ as are rates of domestic violence.¹⁵ Many low- and middle-income individuals are facing the possibility of eviction as the eviction moratorium has been extended for only a short period of time and that extension is being challenged in court.¹⁶

Disparities and Delays. Such disparities have consequences. A 2015 Washington State study found that only 24 percent of low-income individuals were able to receive any assistance for their civil legal needs. However, for those who were able to receive some assistance, 61 percent said that this assistance enabled them to partially or completely resolve the issue they faced.¹⁷ Not surprisingly, many other studies have shown that represented parties have much higher success rates than their unrepresented peers.¹⁸ Professor Steinberg notes: “Particularly in family and housing law cases, represented litigants are anywhere from two to ten times more likely to procure the relief they seek when they enjoy the benefit of full representation by counsel.”¹⁹

Although this problem primarily affects the unrepresented litigant, that is not the only cost imposed by a lack of available and affordable legal counsel in civil cases. A large percentage of unrepresented parties end up in court, while many of their claims would likely have been resolved satisfactorily prior to trial or a court hearing had they been represented by counsel.

And once in court, judges and court personnel frequently complain about having to spend inordinate amounts of time explaining procedures to *pro se* litigants—procedures that would be well known to practicing attorneys. This can lead to delays and crowded dockets and increased legal costs for the *pro se* litigant’s opponent.²⁰

Court Rules, Licensure, and the ABA

There was a time when a budding attorney, such as Abraham Lincoln, a legendary trial attorney before he became President,²¹ could be self-taught and then “read into” the practice of law through apprenticeships and the like. Those days are long gone. With only a few exceptions,²² lawyers must graduate from a three-year accredited law school and then pass a bar examination administered by the state in which they wish to practice.

Founded in 1878, the ABA, working in conjunction with law schools, the judiciary, and state bar organizations, has adopted certain standards and rules governing the professional practice of law. Every state and the District of Columbia has incorporated those rules into its law in some form or fashion. While protecting the public from unqualified practitioners, the

ABA's rules, and the court rules and state laws implementing them, prohibit lawyers who are not licensed in a particular state from practicing law in that state, or from assisting non-lawyers who might be engaging in the practice of law.

These court rules and laws also make it extremely difficult for non-licensed individuals to dispense legal advice or to appear in court to advocate on behalf of someone other than themselves.²³ Strangely, though, while non-lawyers, who might have a great deal of subject matter expertise, are precluded from engaging in the “unauthorized practice of law,”²⁴ once a lawyer has been admitted to the bar in a particular state, there are generally no prohibitions (other than the general admonition that lawyers should “provide competent representation to a client”²⁵) on that attorney dispensing legal advice in that state on a wide array of subjects that he or she may know little or nothing about. The only remedies against an attorney who provides shoddy representation because of a lack of knowledge about a particular subject area are: (1) a lawsuit for malpractice in the event of a bad outcome, and/or (2) filing a complaint with the state board of professional responsibility.

Such barriers to entry limit the supply of those wishing to dispense legal advice, decrease competition within the profession, and artificially inflate costs to parties in need of that advice.²⁶ While this is fine for many individuals and entities who can afford to hire highly credentialed attorneys (who are priced accordingly) or for those who have a potentially lucrative claim who can entice an attorney to accept the case on a contingency-fee basis, those barriers pose significant problems for those of more modest means in need of civil legal services. As such, those barriers do not always serve the public's best interests.

State-Level Solutions Sought

To fill this unmet need, some states have begun experimenting with permitting non-lawyer advocates, sometimes referred to as paraprofessionals, who fulfill certain requirements to provide basic legal services in certain types of cases to those who cannot afford (or do not want) to hire a licensed attorney.²⁷ They have been likened to nurse practitioners in the medical profession.²⁸

To some extent, this process began a while ago. There are now a variety of services that provide online legal forms,²⁹ and real estate professionals and tax preparers routinely provide legal advice—although they would never say that this is what they are doing—within their areas of expertise. But some states are now expanding on these models.

Washington. In June 2012, the Washington State Supreme Court authorized a limited license legal technician (LLLT) program,³⁰ becoming “the first state in the nation to allow non-lawyers to openly, independently, ethically, and legally engage in activities recognized by bar associations as the practice of law—albeit on a limited basis.”³¹ A 2017 Report issued by the American Bar Foundation and the National Center for State Courts, which was characterized as a “Preliminary Evaluation” of the program, recounts:

After several years of work to create the regulations, training, and administrative mechanisms to do so, the first [legal technician] candidates entered their practice-area education classes in 2014.... In 2015, the first [legal technicians] were licensed by the Washington Supreme Court. At the time research for this evaluation was conducted, there were fifteen (15) licensed LLLTs. Since then, that number has slowly continued to grow.³²

The report concluded that “[t]his program should be replicated in other states to improve access to justice.”³³

The 2021 Stanford Report concluded that Washington’s LLLT program “provide[s] legal services to many Washingtonians who would have otherwise proceeded without representation in their family law cases. In family law court, cost ‘is the most consistently referenced motivation for proceeding without an attorney.’”³⁴

Utah and Minnesota. A few states have followed up on Washington’s experiment. In November 2018, for instance, Utah modeled its Licensed Paralegal Practitioner program along the lines of Washington’s LLLT program. Most recently, in March 2021, Minnesota became the latest state to initiate a Legal Paraprofessional Pilot Project, allowing program participants “to provide legal services in landlord–tenant disputes and family law.”³⁵

All of these programs have limitations, however. They are restricted to certain types of cases and activities, and the licensing requirements can be quite onerous.

Resistance by the Organized Bar

Even these modest efforts have met with stiff opposition. As the ABA’s Commission on the Future of Legal Services noted in a 2016 report, “[T]here remains considerable resistance to change in many parts of the legal industry.”³⁶ The Pennsylvania and Illinois State Bars reacted when an ABA access-to-justice pilot program was beginning to show promise by threatening to secede from the ABA unless it shut down the program.³⁷

Perhaps the *coup de grâce* was the recent demise of Washington’s LLLT program at the hands of the Washington Supreme Court.³⁸ Although the program had “faced strong hostility from many lawyers from the start,” which hampered its implementation, and still imposed significant barriers to entry, which limited its reach, the 2021 Stanford Report judged it to have been a “real success”—and maintained that the reasons offered by the Washington Supreme Court for sunseting the program were “not persuasive” and “ring hollow.”³⁹ Justice Barbara Madsen, one of the dissenting Washington Supreme Court justices, lamented, “What took over a decade of toil to create, this court erased in an afternoon.”⁴⁰ She further stated her belief that ending the program was “a step backward,” and that this “is not the time for closing the doors to justice but, instead, for opening them wider.”⁴¹

Licensed attorneys’ opposition seems to stem primarily from two concerns: (1) that low-income individuals will receive inferior services if represented by non-lawyers,⁴² and (2) the potential competition. Regarding the former, given the amount of time and money invested in obtaining a legal education, this is an understandable, but still illegitimate, concern.⁴³ This fear is, for the most part, unfounded, or at least exaggerated. Qualified paraprofessionals and other subject matter experts are fully capable of providing competent services, especially in routine matters that may still be of great importance to the client.

The second concern is also understandable given the stiff competition that already exists among lawyers to attract paying clients. Nonetheless, the reality is that the choice for many low- and middle-income individuals is usually between self-representation, no representation, or representation by a paraprofessional—not a choice between representation by an attorney or a paraprofessional, the former being simply unaffordable. As Scotti Hill, Associate General Counsel at the Utah State Bar, has pointed out: “The market predominantly captured by [paraprofessionals] are not those who would otherwise hire lawyers, but instead those who would opt for self-representation.”⁴⁴ And as Northern Illinois Law Professor Laurel Rigertas has observed, “Much of the public is left wandering around the self-help section of bookstores and self-help kiosks in courthouses trying to figure out how to handle matters on their own.”⁴⁵

Even though they lack the same level of skills and expertise as licensed attorneys, paraprofessionals can still provide a great public service by providing legal services at a cost they can afford to members of the public “who would have otherwise proceeded without representation.”⁴⁶ Legal help—even if limited—can make a huge difference in civil cases, giving those in need a fair chance at receiving justice, rather than being steamrolled by an

arcane legal system and by opponents represented by counsel. As the ABA's Commission on the Future of Legal Services concluded in its 2016 report, "Despite sustained efforts to expand the public access to legal services, significant unmet needs persist."⁴⁷

Closing the Gap: Arizona

In August 2020,⁴⁸ the Arizona Supreme Court unanimously approved a new rule permitting non-lawyers to co-own law firms and other hybrid legal services operations.⁴⁹ The Grand Canyon State thereby became the first state to eliminate a rule, the state counterpart to ABA Model Rule 5.4,⁵⁰ which "prohibited partnerships between lawyers and non-lawyers working together where any part of their services involved the practice of law."⁵¹

This dramatic change, which took effect at the beginning of 2021, came about after the Arizona Task Force on the Delivery of Legal Services issued a report in October 2019, declaring that the ban on non-lawyers providing legal services

was not rooted in protecting the public but in economic protectionism.... The legal profession cannot continue to pretend that lawyers operate in a vacuum, surrounded and aided only by other lawyers or that lawyers practice law in a hierarchy in which only lawyers should be owners. Nonlawyers are instrumental in helping lawyers deliver legal services, and they bring valuable skills to the table.⁵²

Debunking Concerns. While some have raised concerns that permitting non-lawyers to have an ownership stake in a firm may cause lawyers to balance the interests of a client with the interests of a for-profit owner, the reality is that the potential for such conflicting interests—and the tensions they create—already exist. For example, lawyers in traditional law firms worry (and may receive inquiries, if not direct pressure, from the firm's management team) about whether taking on certain clients or advocating certain controversial positions that may be in a client's best interests may adversely affect the reputation of the firm or eat into its bottom-line profitability.

Similarly, insurance companies routinely employ in-house lawyers who provide advice to third parties (specifically, those who purchased insurance policies from that company) and are tasked with safeguarding confidential attorney–client communications and acting in the insured's best interests—even if those interests are not in the best interests of the insurance company that employs him.

As New York University Law Professor Stephen Gillers, a noted legal ethics scholar, has trenchantly observed:

Pause here to acknowledge a remarkable fact. In a society that allows nonlawyers to occupy other positions demanding great probity, including positions of high fiduciary responsibility and public trust in government and in powerful financial institutions, suspicion of lay influence is a curious and perhaps even an impolite justification for a broad and nearly absolute prohibition. It becomes more than merely curious, however, when we acknowledge, as we must, that the prohibition can have a significant [e]ffect on the cost and availability of legal services and the efficiency with which they are distributed.⁵³

Permitting new business models should open many possibilities to address the legal needs of entities and individuals in a more efficient and cost-effective manner.

After all, many law firms, especially in Washington, DC, which liberalized its version of Rule 5.4 several years ago “to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee,”⁵⁴ currently affiliate with outside experts, investigators, and lobbying shops—and their clients are the beneficiaries of these enhanced services. Such arrangements have not compromised in any discernible way the ability of lawyers to continue to provide their best professional judgment or to maintain their ethical duties of loyalty and confidentiality to their clients. There is no reason to believe that this will change as capital infusions, new technologies, and new business models proliferate and specializations (in some cases) and standardizations (in others) develop to meet the legal needs, both simple and complex, of potential clients of more modest means. After all, innovative new technologies and business models have developed for the delivery of medical services without doctors and other licensed health care professionals having to sacrifice their professional standards and ethical obligations.

Arizona’s Alternative Business Structures. The Arizona Supreme Court also unveiled a framework to license new businesses, called “Alternative Business Structures,” that will allow “Legal Paraprofessionals” to “begin providing limited legal services, including being able to go into court with clients.”⁵⁵ As “affiliate members” of the bar, this new class of non-lawyers will be required to meet certain minimum education and testing requirements, as well as character-and-fitness standards, and will also be subject to regulation and discipline under the same rules governing attorneys—including being required to disclose whether they are covered by professional liability insurance.

These requirements should be more than sufficient to assure the public that the public will not be serviced by charlatans, and insurance disclosures should provide a measure of protection against legal malpractice committed by paraprofessionals, just as it does for malpractice committed by licensed attorneys.

No doubt word of mouth, alternative credentialing authorities, and social media sites such as Yelp or Avvo will also help separate the wheat from the chaff in terms of who is (and is not) an effective provider of legal services for low-income individuals. Competition and free-market principles, as in so many other areas, show great promise in addressing unmet needs.

As Stanford Law School Professor Deborah Rhode, a leading academic in the field of legal ethics before her death earlier this year, and Lucy Ricca observed:

In other nations that permit nonlawyers to provide legal advice and to assist with routine documents, the research available does not suggest that their performance has been inadequate. In a study comparing outcomes for low-income clients in the United Kingdom on a variety of matters such as welfare benefits, housing, and employment, nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction.... In the United States, studies of lay specialists who provide legal representation in bankruptcy and administrative agency hearings find that they generally perform as well or better than attorneys. Extensive formal training is less critical than daily experience for effective advocacy.⁵⁶

Legal Services Innovation in Other States. Other states are taking notice. During the same month that the Arizona Supreme Court amended its rules, the Utah Supreme Court “unanimously approved a slate of reforms that allow for nonlawyer ownership or investment in law firms and permit legal services providers to try new ways of serving clients during a two-year pilot period.”⁵⁷

The Court also established an Office of Legal Services Innovation, charged with evaluating and recommending whether nontraditional legal services entities should be permitted to operate within the state during the trial period by assessing the potential benefits and risks to consumers in that market.⁵⁸ It has also been reported that California is considering following Arizona’s lead, while other states and the District of Columbia are considering other reforms.⁵⁹

Although, as expected, members of the organized bar are objecting,⁶⁰ it is high time that the bar focus on the civil legal needs of others—and not its

own economic self-interests. While legal aid organizations exist and struggle for resources, and many members of the bar generously donate their time by providing *pro bono* representation to those in need, this will never be enough to close the justice gap—nor even to make a significant dent in it.

Given the lack of available resources to help low-income Americans navigate the civil legal system, any effective and sustainable solution must be centered around addressing that need—and doing so at a rate low-income litigants can afford.

Conclusion

Arizona has embarked on an experiment that shows great promise, by recognizing that paraprofessionals can meet that need as a valuable legal resource for millions of Americans and, in so doing, has begun to close the civil justice gap.

Will paraprofessionals provide the exact same level of service as licensed attorneys in the long run? Likely not, but it is certainly much better than the status quo in which low-income individuals are forced to navigate the legal system on their own. When it comes to the provision of civil legal services, we should not let the perfect be the enemy of the good.

Now is the time for the ABA to align its Model Rule of Professional Conduct 5.4 with Arizona's new rule and for other states to follow Arizona's lead and overhaul rules that prohibit partnerships between lawyers and non-lawyers or hamper the ability of licensed paraprofessionals to provide legal services. Any other state laws or court rules that stand in the way of such innovation should also be amended. This will help pave the way for millions of Americans to receive the civil legal assistance they need and the equal justice they deserve.

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3. Legal Service Corporation grantees and other legal aid organizations have very low financial eligibility requirements. For example, for LSC funds, the current limitation for a single-person household is \$16,100, and for a four-person household, the limitation is \$33,125—anywhere in the 48 contiguous states, plus the District of Columbia. See 45 CFR 1611 Appendix A, <https://www.federalregister.gov/documents/2021/01/28/2021-01815/income-level-for-individuals-eligible-for-assistance>. Obviously, there are millions of low-income Americans who are not quite poor enough to meet these standards, but who are unable to hire counsel to meet their civil legal needs.
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