

Agenda

Utah Judicial Council's Standing Committee on Resources for Self-represented Parties

December 6, 2019

12:00-2:00 p.m.

Large Conference Room A (first floor, inside jury room)

Scott M. Matheson Courthouse

450 South State Street

Salt Lake City, UT 84111

Welcome and approval of minutes	Tab 1	Judge Barry Lawrence, Chair
Chairman's report		Judge Barry Lawrence
Discussion about sealing civil eviction records	Tab 2	Marty Blaustein
Discussion about VAWA grant	Tab 3	Amy Hernandez
Subcommittee reports <ul style="list-style-type: none">• Education• Outreach• Rural Services• Self-Help Center/Non-lawyer Assistance/Court Updates Subcommittee	Tab 4	<ul style="list-style-type: none">• Judge Lawrence to update on legal outreach• Sue Crismon or designee to update on community outreach efforts• Susan Griffith or designee to update on local/virtual clinics• Nathanael Player, Jessica Van Buren, and Nancy Sylvester to update on court initiatives and rules
Discussion about A2J Commission		Judge Barry Lawrence, Nathanael Player, Rob Jepson
Discussion about Regulatory Reform Initiative		Judge Barry Lawrence
Other Business		All
Fond farewell and introduction		Judge Richard Mrazik, Judge Barry Lawrence

2020 Meeting Schedule: Matheson Courthouse, 12:00 to 2:00 p.m. unless otherwise stated: March 13, 2020 and other dates TBD.

Tab 1

**Utah Judicial Council's Standing Committee on
Resources for Self-Represented Parties Meeting Minutes**

Matheson Courthouse
Education Room
September 6, 2019
12:00 PM – 2 PM

Members	In attendance	Excused	Via phone conference
Judge Suchada Bazzelle	X		
Sue Crismon	X		
Monica Fjeldsted			X
Leslie Francis		X	
Nicole Gray	X		
Susan Griffith			X
Carl Hernandez	X		
Judge Catherine Hoskins			
Jacob Kent		X	
Judge Barry Lawrence - Chair	X		
Shawn Newell		X	
Nathanael Player	X		
Charles Stormont	X		
Peter Strand			
Virginia Sudbury		X	
Judge Doug Thomas		X	
Janet Thorpe			X
Jessica Van Buren	X		
Guests	In attendance	Excused	Via phone conference
Ashley Mendoza (U of U Law)	X		
Amy Hernandez (Domestic Violence Program Coordinator)	X		
Rob Jepson (Access to Justice Commission)	X		
Kara Mann (Language Access Program Coordinator)	X		
Justice Christine Durham (Access to Justice Commission)	X		
Judge Richard Mrazik	X		
Staff	In attendance	Excused	Via phone conference
Nancy Sylvester	X		

(1) Welcome and approval of minutes

Judge Lawrence welcomed the committee members and guests to the meeting and had everyone introduce themselves. Judge Lawrence then asked for a motion on the minutes. A motion was made and seconded and the minutes were approved.

(2) Discussion of Dress Code Resolution and Draft Rule

Judge Lawrence and Nancy Sylvester addressed this item. Judge Lawrence gave some background on the request for a resolution to the Judicial Council. The Policy and Planning Committee is trying to come up with a dress code in rule. Judge Lawrence highlighted that the devil is in the details. The dress code rule will go on to the Policy and Planning Committee with a recommendation of adoption from this committee. Ms. Sylvester made one small edit (adding halter tops) to the rule based on the discussions.

(3) Update from the Utah State Bar's Access to Justice Commission and Demonstration of New Online Resource

Justice Durham and Rob Jepson addressed this item.

The Access to Justice Summit will take place Oct 22 from 8:00-1:30.

Rob Jepson, Nathanael Player, Sue Crismon, and someone from ULS will explore the template used by Minnesota to create lawhelpmn.org in conjunction with what Mr. Jepson already created and demonstrated at the meeting. The MN website was created with a grant from LSC, which means it's for use by other LSC-funded groups like ULS. The committee expressed interest in having a page like that as a one-stop landing page for all of the available legal resources statewide. The landing page would contain links to the utcourts.gov website, licensedlawyer.org, etc. Using the template rather than linking through licensedlawyer.org would mean we own the content and have the ability to make changes.

(4) Discussion of COSCA Resolution 3 Regarding Cell Phones

Amy Hernandez and Nancy Sylvester addressed this item. Ms. Sylvester said she would draft and circulate a proposal regarding cell phones in the courtroom based on the discussions. But in reviewing the rule the courts already have, she proposed that this is more of an education issue for the bench than a rule change issue. See Rule 4-401.02(3)(B)(i).

(5) Discussion of COSCA Resolution 5 and Court Navigators

Nathanael Player and Nancy Sylvester addressed this item. Carl Hernandez, Ashley Mendoza, Leslie Francis, and Nathanael Player will explore options for undergrads being involved as court navigators. Jessica Van Buren also mentioned using a Hinckley Institute intern for this purpose. She said they could potentially launch a pilot project next semester. Rob Jepson mentioned his connections at Utah State as a potential opportunity, too, once the program is up and going, and Justice Durham mentioned that the Utah Center for Legal Inclusion would be interested in this project. Funding for coordinators could eventually come from the Utah Bar Foundation (in partnership with the A2J Commission).

(6) Subcommittee updates

a. Education:

Judge Lawrence addressed this item and spoke about a proposed required form summons that has warning language about failing to respond along with resources listed. Judge Lawrence and Mr. Player will send a memo and rule to the Civil Rules Committee.

Judge Lawrence asked Professor Hernandez and Ashley Mendoza about presenting to the law students on pro bono. Susan Griffith said she is doing 6 different pro bono events with BYU law students. She will send 4 dates to Judge Lawrence and Professor Hernandez.

b. Outreach:

Sue Crismon addressed this item. She said Shawn Newell has a long list of places to reach out to this fall. Elizabeth Bevington has also helped. Partners in the Park, involves outreach to Spanish-speaking communities. New communities being reached include the Muslim community.

c. Rural Services:

Susan Griffith addressed this item. She said Timpanogos Legal Center is doing a lot on the rural end of things. Clinics are happening throughout the rural areas of the state and they also have remote access. They use Zoom technology.

d. Self-Help Center/Non-lawyer Assistance/Court Updates Subcommittee

Nancy Sylvester, Nathanael Player, and Jessica Van Buren addressed this item.

The Self-Help Center is funded full-time until June 30, 2020. The Judicial Council prioritized one additional staff attorney. Funding for permanent full-time attorneys has gone to a newly formed budget committee.

Ms. Van Buren went over the new LPP forms.

Ms. Sylvester addressed the Regulatory Reform Report and the Probate Subcommittee's work.

Mr. Player addressed the pro se domestic calendars and early intervention. Whenever there is an answer filed, Commissioner Sagers puts it on the pro se calendar for early case resolution. He said we should let Judge Kouris know that we support Com. Sagers's efforts.

Also discussed was one-stop shopping for attorneys to sign up for pro bono work through their Bar portal.

(7) Adjourn:

With no additional items to report, the meeting adjourned at 1:59 pm. The next meeting will be held on November 1, 2019.

DRAFT

Tab 2



UTAH LEGAL SERVICES



Committed to Equal Justice

205 NORTH 400 WEST, SALT LAKE CITY, UTAH 84103 * 801-328-8891 * FAX: 801-328-8898 * WWW.UTAHLEGALSERVICES.ORG

October 3, 2019

The Honorable Matthew B. Durrant, Chief Justice
Utah Supreme Court
450 South State Street
P.O. Box 140210
Salt Lake City, UT 84114-0210

RE: Sealing of certain eviction records

Dear Chief Justice Durrant:

As you know, Utah Legal Services provides civil legal help to low-income Utahns. Among other types of service, we assist tenants facing eviction. While the courts' involvement often terminates once a judgment is entered or the case is dismissed, the consequences to tenants do not end there. We seek your leadership to eliminate the ongoing stigma of eviction actions already dismissed by a district court either before any Order of Restitution or monetary judgment is entered or because the plaintiff has requested dismissal. Our preliminary tally of XChange data suggests this is about one-quarter of all eviction actions filed in Utah.

When someone applies to rent an apartment, most landlords do background checks. Background checking has become more prevalent since the advent of "good landlord" programs (GLL) around the State. GLLs typically reduce an owner's licensing fee in exchange for compliance with some rules. One of the principal enumerated reasons for GLLs is to reduce calls to law enforcement agencies responding to disturbances of the peace and other unlawful activity. GLLs send increasingly strident letters to landlords requiring compliance with the rules or loss of the reduced licensing fee. (In Salt Lake City, a GLL participant pays \$20 per rental unit per year. The standard fee for a non-participating landlord is \$342 per rental unit per year.)

Ogden
298 24th St., #110
84401
801-394-9431
Fax: 801-394-0430

Salt Lake City
205 N. 400 W.
84103
801-328-8891
Fax: 801-328-8898

Provo
455 N. University #100
84601
801-374-6766
Fax: 801-374-0960

St. George
229 E. St. George Blvd. #103
84770
435-628-1604
Fax: 435-628-1693



Toll Free (outside of Salt Lake County): 1-800-662-4245

Most GLLs only encourage but do not require background checks. But most landlords do so. Landlords perform those checks for various reasons. Determining a prospective tenant's viability is primary. Background checks include a search of public records for bankruptcies, outstanding judgment debts, credit scores. And records of eviction.

Especially in a tight rental market, landlords become proactive. They refuse to rent to households with dubious ability to pay the monthly rent or those who've been evicted in the past. Landlords often make this decision based solely upon the result of a background check. Many landlords just refuse to rent to an applicant with an EV in the civil record. These landlords do not delve into the specifics of each case. They do not discover that a prior landlord failed to serve the tenant within 120 days of filing the case. Or that the landlord failed to seek a default judgment within 60 days after it became available. Or that after an Answer was filed, the parties failed to respond to an Order to Show Cause why the case should not be dismissed for inactivity (failure to prosecute). Or the plaintiff requested dismissal.

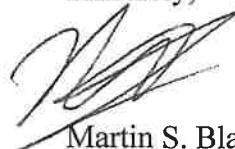
During the week of June 1, 2018 through June 7, 2018 (inclusive), we count 78 EV actions filed statewide. Of those, 20 were dismissed by a district court judge prior to any order or judgment being entered for one of the reasons noted above. Moreover, four of these 78 cases are duplicates insofar as the court in which the original complaint was filed transferred these cases to another location in the same district. But in each such case, a new civil number was attached to the transferred case. Absent some intervention, this results in two EVs appearing in a defendant's civil records. One of the four transferred cases resulted in a dismissal for inactivity.

We have analyzed several weeks worth of EVs filed statewide and the conclusion is the same: about a quarter of all eviction actions were dismissed before any order or judgment had been entered. We believe that the civil record of eviction actions terminated pre-judgment should never affect a tenant's ability to find a home. Otherwise, the principle of innocence until guilt is proven stands on its head; an arrest record, irrespective of convictions, is damning. Past dismissed evictions thwart the defendant's search for housing just because they are part of the civil record.

As you might imagine, Utah Legal Services' housing advocates are asked to seal civil EV records with great frequency. But we lack the staff to assist everyone who seeks that help. For our low-income clients, having an unjustified eviction on the record is just another humiliation of poverty. We seek your governance to eliminate this blight.

On behalf of the housing advocates at Utah Legal Services and Utah's renters, thank you for considering our request.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Blaustein', written over a horizontal line.

Martin S. Blaustein
Attorney at Law
Chair, ULS Housing Task Force

Tab 3



Nancy Sylvester <nancyjs@utcourts.gov>

Fwd: [VAW_POCS] OVW Justice for Families solicitation- applications due January 8, 2020

1 message

Amy Hernandez <amymh@utcourts.gov>
To: Nancy Sylvester <nancyjs@utcourts.gov>

Mon, Dec 2, 2019 at 3:06 PM

Here is the grant I was talking about; it says it can provide funds for pro se victim assistance programs. Please let me know what you think; thank you.

----- Forwarded message -----

From: **Keilitz, Susan** <skeilitz@ncsc.org>
Date: Thu, Nov 21, 2019 at 1:53 PM
Subject: [VAW_POCS] OVW Justice for Families solicitation- applications due January 8, 2020
To: <VAW_POCS@listserv.ncsconline.org>

Greetings. You may have already seen this solicitation. I've included a description below.

<https://www.justice.gov/ovw/page/file/1217066/download>

Webinar January 6, 2020, 2 to 4 pm EST. <https://www.vawamei.org/training/webinar-justice-for-families-program/>

The Grants to Support Families in the Justice System program (referred to as the Justice for Families Program) was authorized in the VAWA of 2013 to improve the response of the civil and criminal justice system to families with a history of domestic violence, dating violence, sexual assault, and stalking, or in cases involving allegations of child sexual abuse. The program supports the following activities for improving the capacity of courts and communities to respond to families affected by the targeted crimes: court-based and court-related programs; supervised visitation and safe exchange by and between parents; training for people who work with families in the court system; civil legal services; and the provision of resources in juvenile court matters. For additional information about this program, see <https://www.justice.gov/ovw/grant-programs> and <https://www.vawamei.org/grant-program/justice-for-families-jff-program>

Susan Keilitz, JD | Principal Court Research Consultant

National Center for State Courts | 300 Newport Avenue | Williamsburg, VA 23185
t 757.259.1855 | skeilitz@ncsc.org | www.ncsc.org

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Amy Hernandez
Domestic Violence Program Coordinator
Justice Court Program Coordinator
Administrative Office of the Courts
[450 S State Street](#)
PO Box 140241
Salt Lake City, UT 84114-0241

12/4/2019

Utah State Courts Mail - Fwd: [VAW_POCS] OVW Justice for Families solicitation- applications due January 8, 2020

E-mail: amymh@utcourts.gov

Phone: 801-578-3809

Tab 4

AMERICAN BAR ASSOCIATION
CENTER FOR INNOVATION
STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL REGULATION
STANDING COMMITTEE ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association encourages U.S. jurisdictions to
2 consider innovative approaches to the access to justice crisis in order to help the more
3 than 80% of people below the poverty line and the majority of middle-income Americans
4 who lack meaningful access to legal services when facing critical civil legal issues, such
5 as child custody, debt collection, eviction, and foreclosure.

6
7 FURTHER RESOLVED, That the American Bar Association encourages U.S.
8 jurisdictions to consider regulatory innovations that have the potential to improve the
9 accessibility, affordability, and quality of civil legal services, while also ensuring
10 necessary and appropriate protections that best serve the public.

11
12 FURTHER RESOLVED, That the American Bar Association encourages U.S.
13 jurisdictions to consider regulatory innovations that have been adopted or are under
14 review in a growing number of state supreme courts and that are also under study by
15 state and local bar associations, such as the authorization and regulation of new
16 categories of legal services providers, the reexamination of Rule 5.4 of a jurisdiction's
17 rules of professional conduct, and the reexamination of provisions related to the
18 unauthorized practice of law.

19
20 FURTHER RESOLVED, That the American Bar Association encourages U.S.
21 jurisdictions to collect and assess data regarding regulatory innovations both before and
22 after the adoption of any innovations to ensure that changes are effective in increasing
23 access to legal services and are in the public interest.

REPORT

I. Introduction

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people below the poverty line and a majority of middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.¹ Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.² Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs.³ As a result of these and related problems, the United States ranks 103rd out of 126 countries in terms of the accessibility and affordability of civil legal services.⁴

Traditional solutions to fixing this “access to justice” crisis are not enough. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil *Gideon* rights that would afford people a right to a lawyer in matters involving essential civil legal needs (06A112A).⁵ These efforts are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.⁶

The legal profession cannot solve these problems alone. The public needs innovative models for delivering competent legal services, and such models require the knowledge and expertise of other kinds of professionals, such as technologists and experts in the design of efficient and user-friendly services.⁷ The existing regulatory structure for the legal profession, however, increasingly acts as a barrier to the involvement of other professionals, both within and outside of law firms. Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, have recognized this problem and are working to address it by proposing or adopting substantial regulatory innovations.⁸ More U.S. jurisdictions are

¹ LEGAL SERVS. CORP., JUSTICE GAP REPORT: MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

² NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

³ Jack Karp, *No Country For Old Lawyers: Rural U.S. Faces A Legal Desert*, LAW360 (Jan. 27, 2019), <https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert>.

⁴ WORLD JUSTICE PROJECT, RULE OF LAW INDEX: CURRENT AND HISTORICAL DATA (2019), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/current-historical-data> (rankings are available in the downloadable spreadsheet).

⁵ AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 06A112A https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_06A112A.authcheckdam.pdf.

⁶ See, e.g., Anna E. Carpenter, et al., *Studying the “New” Civil Judges*, 2018 Wisc. L. Rev. 249, 284 (2018) (noting that “[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se”).

⁷ See generally STANFORD LEGAL DESIGN LAB, <http://www.legaltechdesign.com/> (last visited Nov. 4, 2019).

⁸ See, e.g., ARIZ. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REPORT AND RECOMMENDATIONS (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=>

considering doing the same. In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise, rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery that improve the quality of justice, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with consumer protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA model rules, such as the Model Rules of Professional Conduct. The ABA should nevertheless play a leadership role by adopting policies that encourage more state-based regulatory innovations, collecting and analyzing the data from those innovations, and using the resulting data to shape future reform efforts, including appropriate changes to or adoption of new ABA model rules and policies.

II. The Need for Regulatory Innovation

The Resolution calls for U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while retaining necessary and appropriate client and public protections.⁹ This Resolution is consistent with one of the recommendations of the ABA Commission on the Future of Legal Services (Commission), which recommended that “[c]ourts ... consider regulatory innovations in the area of legal services delivery.”¹⁰

[2019-10-07-084849-750](https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf); THE UTAH WORKGROUP ON REGULATORY REFORM, NARROWING THE ACCESS-TO- JUSTICE GAP BY REIMAGINING REGULATION (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>; Press Release, N.M. Admin. Office of the Courts, Supreme Court Work Group to Consider Non-attorney Option for Providing Civil Legal Servs. (May 21, 2019), https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71caea83/News_Release_Working_Group_to_Consider_Licensed_Legal_Technicians.pdf; *Task Force on Access Through Innovation of Legal Services*, CAL. BAR ASS'N, <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services> (last visited Nov. 4, 2019); *Special Committee on Technologies Affecting the Practice of Law*, FLA. BAR, <https://www.floridabar.org/about/cmtes/cmte-me104/> (last visited Nov. 4, 2019).

⁹ See, e.g., AM. BAR ASS'N MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES (2016) (identifying public protections that should be considered when exploring regulatory changes, such as the independence of professional judgment, the protection of privileged and confidential information, and the accessibility of civil remedies for negligence and breach of other duties owed). Innovations must include necessary and appropriate protections for the public. Depending on the type of innovation and services provided, the traditional legal requirements of informed consent, client confidentiality, avoidance of certain conflicts and disclosure of other conflicts and fiduciary obligations may be appropriate but not necessary, while in other situations certain core requirements of professional ethics will be both necessary and appropriate.

¹⁰ AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERV., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf (Recommendation 2).

As noted above, the evidence is clear that existing solutions to the access to justice crisis are insufficient and that we need new ideas, such as regulatory reforms to unlock new delivery models. Although the need for change is compelling, the evidence does not yet support any particular regulatory innovation. For this reason, the resolution encourages U.S. jurisdictions to consider a few general categories of reform without endorsing any specific changes.

III. Categories of Regulatory Innovation

In general, states are currently considering three broad areas of regulatory reform as part of their efforts to improve the affordability, accessibility, and quality of civil legal services and civil justice.

A. Authorizing and Regulating New Categories of Legal Services Providers

Just as healthcare providers other than doctors can provide services to patients and reduce healthcare costs, legal service providers other than lawyers can do the same. Two major ABA reports recently reached a similar conclusion, recommending that U.S. jurisdictions consider authorizing and appropriately regulating new categories of legal services providers.

In 2014, the ABA Task Force on the Future of Legal Education concluded that a broader array of professionals should be permitted to deliver legal services:

Broader Delivery of Legal and Related Services: The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.¹¹

More recently, in its final report, the ABA Commission on the Future of Legal Services concluded that it “supports efforts by state supreme courts to examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services

¹¹ ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf [hereinafter LEGAL EDUCATION REPORT].

providers (LSPs).”¹² The Commission offered several examples of these efforts:

Examples of such LSPs include federally authorized legal services providers [such as those who have long represented individuals before the Social Security Administration] and other authorized providers at the state level, such as courthouse navigators and housing and consumer court advocates in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; courthouse advocates in New Hampshire; and document preparers in Arizona, California, and Nevada. In some jurisdictions, where courts have authorized these types of LSPs, these individuals are required to work under the supervision of a lawyer; in other instances, courts, in the exercise of their discretion, have authorized these LSPs to work independently. In each instance, the LSPs were created and authorized to facilitate greater access to legal services and the justice system, with steps implemented to protect the public through training, exams, certification, or similar mechanisms.¹³

There is not yet sufficient evidence to endorse any particular LSP model, so the Commission merely called for U.S. jurisdictions to consider authorizing new categories of legal services providers:

The Commission does not endorse the authorization of LSPs in any particular situation or any particular category of these LSPs. Jurisdictions examining the creation of a new LSP program might consider ways to harmonize their approaches with other jurisdictions that already have adopted similar types of LSPs to assure greater uniformity among jurisdictions as to how they approach LSPs. Jurisdictions also should look to others to learn from their experiences, particularly in light of the lack of robust data readily available in some states on the effectiveness of judicially-authorized-and-regulated LSPs in closing the access to legal services or justice gap. The Commission urges that the ABA Model Regulatory Objectives guide any judicial examination of this subject.

The Resolution takes a similar approach and merely encourages U.S. jurisdictions to consider this kind of regulatory reform.

B. Experimenting with Variations to Rule 5.4

Rule 5.4 of the Model Rules of Professional Conduct generally prohibits lawyers from partnering and sharing fees with anyone who is not a lawyer. This prohibition impedes the development of innovative legal service delivery models,¹⁴ especially those

¹² AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), *supra* at 40-41.

¹³ *Id.* Since the Commission's report was written, Utah has created Licensed Paralegal Practitioners starting in 2019 and New Mexico is considering the creation of Limited Licensed Legal Technicians that are similar to those in Washington state.

¹⁴ WILLIAM HENDERSON, STATE BAR OF CAL., LEGAL SERVICES LANDSCAPE REPORT (2018), <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf>.

that require the active involvement of other kinds of professionals, such as technologists, or that need substantial outside capital to succeed. Modifying Rule 5.4 in ways that do not sacrifice client and consumer protection and that permit other professionals to participate more fully in the development of impactful solutions is another tool that can be available for those who wish to use it.

The growing experience around the world with such arrangements – often called alternative business structures (ABS) – suggests that there is a great deal to gain by experimentation in this area.¹⁵ For this reason, several states recently adopted or are proposing significant liberalization of their versions of Model Rule 5.4.¹⁶

The ABA Commission on the Future of Legal Services called for this kind of review. In its final report, the Commission recommended “continued exploration” of reforms in this area so that “evidence and data regarding the risks and benefits associated with” ABS can be developed and assessed.

The benefits from such reforms are compellingly stated in a recent book by United States Supreme Court Justice Neil Gorsuch:

All else being equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local “superstores.” Yet Rule 5.4 of the ABA’s Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining “any interest” in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can’t secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels....

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007. In the first two years of the program, 386 so-called “alternative business structures” (ABSs) were established. Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50

¹⁵ *Id.*

¹⁶ See ABA CTR. FOR INNOVATION, LEGAL INNOVATION REGULATORY SURVEY, <http://legalinnovationregulatorysurvey.info/> (last visited Nov. 4, 2019).

percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it's no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.¹⁷

On several occasions, the ABA has considered and rejected amendments to Model Rule 5.4 that would have permitted some form of ABS. The primary argument against such changes was that they would have jeopardized a lawyer's professional independence. These concerns, however, fail to recognize that lawyers already exercise professional independence in conceptually similar situations.¹⁸

Another reason to be skeptical of the concern about professional independence is that there is no evidence of public harm in the increasing number of the countries that now permit lawyers to practice in some form of ABS.¹⁹ The ABA Commission on the Future of Legal Services made a similar observation in its final report:

The Commission's views [calling for continued exploration of reforms in this area] were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers' ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised." Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS.²⁰

Despite the limited risks associated with liberalizing Rule 5.4 to allow lawyers to practice in settings outside the traditional law firm or to seek equity funding from the capital markets and the potential innovations that might accompany it, it is also clear that there is not yet enough data to know what the "model" approach to this subject should be or

¹⁷ NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 258-60 (2019).

¹⁸ Justice Gorsuch explains:

For example, we permit third parties (e.g., insurance companies) to pay for an insured's legal services but restrict their ability to interfere with the attorney-client relationship. We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals. And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client. Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden while here, by contrast, they may stand to lose financially. But surely it shouldn't be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when it's in our financial interest.

Id. at 260.

¹⁹ ABA COMM'N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER REGARDING ALTERNATIVE BUSINESS STRUCTURES 11 (2016),

https://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf; LEGAL SERVS. BD., TECHNOLOGY AND INNOVATION IN LEGAL SERVICES 2018,

<https://www.legalservicesboard.org.uk/research/technology-and-innovation-in-legal-services-2018> (last visited Nov. 4, 2019).

²⁰ See LEGAL EDUCATION REPORT, *supra* note 11, at 42.

what effect ABS will have on addressing the access to justice crisis. For this reason, the resolution does not propose a specific change to Model Rule 5.4 and instead merely encourages jurisdictions to try new approaches so that we can learn from them and assess their impact.

C. New Approaches to the Unauthorized Practice of Law

The resolution also encourages U.S. jurisdictions to develop more permissive approaches to the unauthorized practice of law (UPL). U.S. jurisdictions often define UPL broadly or in such an ambiguous way that prospective innovators do not want to risk developing new services and face allegations that they are engaging in UPL. Appropriate and careful liberalization of UPL provisions can change this dynamic and encourage more innovation.

With appropriate re-regulation, the risks from more permissive UPL rules are small. For example, in the United Kingdom, rather than trying to define the practice of law, the Legal Services Act of 2007 provides that anyone can perform law-related activities unless those activities are specifically “reserved” for authorized professionals. That is, the UK approach relative to the much more restrictive approach in the U.S., where the definition of UPL tends to be so vague that it covers a range of services that could be safely performed by professionals other than lawyers.²¹

Recognizing the problems with existing approaches to UPL and the low risks from careful step-by-step liberalization of existing policies, several U.S. jurisdictions have begun to experiment in this area. For example, Utah has developed a so-called “regulatory sandbox” that will allow new kinds of legal services providers to operate on a pilot basis without concerns that they will be accused of UPL.²² Other jurisdictions are seeking to expressly recognize that online legal document providers are not engaged in the unauthorized practice of law in exchange for modest regulation or registration requirements.²³

These developments are still in their infancy in the U.S., so as with other regulatory reforms, it is not possible to identify a model approach. (Indeed, such efforts in the UPL particular context may raise antitrust concerns.)²⁴ The point of the resolution is to encourage U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while preserving core

²¹ Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S. C. L. REV. 429, 431-33 (2016).

²² Press Release, *Utah Courts, Utah Supreme Court Adopts Groundbreaking Changes to Legal Serv. Regulation* (August 29, 2019), <https://www.utcourts.gov/utc/news/2019/08/29/utah-supreme-court-adopts-groundbreaking-changes-to-legal-service-regulation/>.

²³ Jim Ash, *Board Recommends Voluntary Registration Program for Online Legal Service Providers*, FLA. BAR NEWS (Sept. 25, 2019), <https://www.floridabar.org/the-florida-bar-news/board-recommends-voluntary-registration-program-for-online-legal-service-providers/>.

²⁴ ABA CTR. FOR PROF'L RESPONSIBILITY, *FTC Letter Opinions on the Unlicensed Practice of Law* (June 23, 2016), https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/ftc/.

protections.²⁵

IV. Data Should be Collected and Analyzed

The final part of the resolution calls for the collection and assessment of data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public. The collection of such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public's growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, provide continuing and necessary protections for those in need of legal services, and best serve the public interest.

V. Conclusion

Justice Louis Brandeis once wrote that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁶ The resolution calls for precisely this kind of courageous experimentation. In light of the severe access to justice crisis in the United States, the continued reliance on existing regulatory approaches is not a viable or responsible option.

Respectfully submitted,

Daniel B. Rodriguez
Chair, Center for Innovation
February 2020

²⁵ See *supra* note 9.

²⁶ *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Center for Innovation

Submitted By: Daniel B. Rodriguez, Harold Washington Professor of Law, Northwestern Pritzker School of Law, Chair, American Bar Association Center for Innovation

1. Summary of the Resolution(s).

Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, are proposing or adopting substantial regulatory innovations in order to address the increasingly dire access to justice crisis in the United States. More U.S. jurisdictions are considering doing the same.

The resolution acknowledges this trend and encourages more U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services, while retaining necessary and appropriate client and public protections.

The resolution also encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public.

2. Approval by Submitting Entity.

On November 15, 2019, the Center for Innovation's council voted unanimously (with one abstention) to file this resolution for debate by the American Bar Association's House of Delegates.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The American Bar Association currently has a policy against lawyers partnering and sharing fees with anyone who is not a lawyer in the course of practicing law. This policy is reflected in Rule 5.4 of the Model Rules of Professional Conduct as well as in resolutions passed by the House of Delegates, including Resolution 10F (00A10F) stating that, "the sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession." Although the present resolution does not alter Model Rule 5.4, the resolution does have the effect of encouraging U.S. jurisdictions to consider alternatives to Model Rule 5.4. In this sense, the resolution has the effect of changing the ABA policy reflected in Resolution 10F (00A10F).

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

ABA entities (e.g., the ABA Center for Innovation and the Standing Committees of the ABA Center for Professional Responsibility) could offer guidance to jurisdictions seeking input on possible regulatory innovations.

8. Cost to the Association. (Both direct and indirect costs)

There are no material implementation costs unless the American Bar Association decides to assist U.S. jurisdictions with the collection and analysis of data associated with any regulatory innovations.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Administrative Law Division

Contact: Linda D. Jellum

Date: Week of 10/21

Status: Under Review

Business Law Section

Contact: Partrick Thomas Clendenen

Date: Week of 11/11

Status: Under Review

Chicago Bar Association

Contact: Jayne Reardon / Lynn Grayson

Date: Week of 11/4

Status: Supporter

Commission on Interest on Lawyers' Trust Accounts

Contact: David S. Houghton

Date: Week of 10/21

Status: Under Review

Coordinating Council for the Center for Professional Responsibility
Contact: Frederic Stephen Ury
Date: Week of 10/21

Ethics and Professional Responsibility, Judges Advisory Committee
Contact: Margaret Kuroda Masunaga
Date: Week of 10/21
Status: Under Review

Judicial Division
Contact: Elizabeth A. Lang Miers
Date: Week of 10/21
Status: Under Review

Law Practice Division
Contact: Thomas C. Grella
Date: Week of 10/21
Status: Under Review

Oregon State Bar
Contact: John Grant
Date: Week of 11/18
Status: Under Review

Section of Litigation
Contact: Barbara J. Dawson
Date: Week of 10/21
Status: Under Review

Standing Committee on the Delivery of Legal Services
Contact: Charles F. Garcia
Date: Week of 10/21
Status: Cosponsor

Standing Committee on Ethics and Professional Responsibility
Contact: Barbara S. Gillers
Date: Week of 10/21
Status: Cosponsor

Standing Committee on Legal Aid and Indigent Defendants
Contact: Theodore A. Howard
Date: Week of 10/21
Status: Under Review

Standing Committee on Professionalism
Contact: Josh Camson
Date: Week of 10/21
Status: Under Review

Standing Committee on Professional Regulation
Contact: Dolores Dorsainvil
Date: Week of 10/21
Status: Cosponsor

Standing Committee on Lawyers' Professional Liability
Contact: Richard A. Simpson
Date: Week of 10/21
Status: Under Review

Standing Committee on Public Protection in the Provision of Legal Services
Contact: Alecia Michelle Ruswinckel
Date: Week of 10/21
Status: Cosponsor

State Bar of Arizona
Contact: Brian Furuya
Date: Week of 10/21
Status: Under Review

Utah State Bar
Contact: Herm Olsen
Date: Week of 10/21
Status: Under Review

Young Lawyers Division
Contact: Joseph Logan Murphy
Date: Week of 11/4
Status: Under Review

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Name: Daniel B. Rodriguez
Phone: 619-871-6990
Email: daniel.rodriguez@law.northwestern.edu

12. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Name: Daniel B. Rodriguez
Phone: 619-871-6990
Email: daniel.rodriguez@law.northwestern.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution.

Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, are proposing or adopting substantial regulatory innovations in order to address the increasingly dire access to justice crisis in the United States. More U.S. jurisdictions are considering doing the same.

The resolution acknowledges this trend and encourages more U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services, while retaining necessary and appropriate client and public protections.

The resolution also encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public.

2. Summary of the issue that the resolution addresses.

Traditional efforts to address the access to justice crisis have proven to be inadequate. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil *Gideon* rights that would afford people a right to a lawyer in matters involving essential civil legal needs. These solutions are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.

3. Please explain how the proposed policy position will address the issue.

With necessary and appropriate public protections, regulatory innovations may help to unlock promising new solutions to the access to justice crisis. Because we do not yet know which specific changes to the Model Rules of Professional Conduct or other ABA model policies will prove to be desirable, the resolution does not propose any such changes. Rather, it encourages U.S. jurisdictions to try new approaches and to collect data about those efforts. The data can then be analyzed and used to shape future reform proposals, including appropriate changes to or adoption of new ABA model rules and policies.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

To date, the Center for Innovation has not heard of any opposition to this resolution. Given the new subject matter of the resolution, however, we expect there will be opposition. We are working diligently to answer any concerns or questions that may arise.