

A Conversation with David Udell, May 25, 2015

Participants

- David Udell – Executive Director, National Center for Access to Justice, and Visiting Professor from Practice, Cardozo Law School
- Ben Hoffman – Research Analyst, The Open Philanthropy Project
- Timothy Telleen-Lawton – Research Analyst, The Open Philanthropy Project

Note: These notes were compiled by the Open Philanthropy Project and give an overview of the major points made by Mr. David Udell, of the National Center for Access to Justice at Cardozo Law School.

Summary

The Open Philanthropy Project spoke with Mr. Udell as part of a high level inquiry into occupational licensing reform in law and potential roles for nonlawyers. NCAJ works to increase access to justice. Its flagship project is the Justice Index, www.justiceindex.org, a new resource that relies on data and indexing to promote best practices for access to justice in the states. Mr. Udell and NCAJ have also supported projects that have helped to open academic and public dialogue on possible roles for nonlawyers in responding to people's otherwise unmet civil legal needs.¹

The Justice Gap

In most civil cases, including those involving basic human needs for housing, safety, health, and food, one side often proceeds without a lawyer even though the stakes are often high and even though the state court system rests on the premise that every party will have a lawyer.

A study conducted by the American Bar Association (ABA) approximately 20 years ago, and often cited, found that approximately 80% of the civil legal matters of the poor are annually unmet.

¹Mr. Udell serves on the Committee on Nonlawyers and the Justice Gap (established by Chief Judge Jonathan Lippman (NY)) where as Chair of a Subcommittee on Legislative and Regulatory Reform he helped develop the “navigators model” and the “court advocates model”. He also co-authored (with Richard Zorza) *New Roles for Nonlawyers to Increase Access to Justice*, XLI Fordham Urban Law Journal 1259 (2014), <http://www.zorza.net/non-lawyer.pdf>, and also co-authored (with members of the Access to Justice Subcommittee, which he chaired, of the NYC Bar Association Committee on Professional Responsibility) *Narrowing The “Justice Gap”: Roles for Nonlawyer Practitioners*, published by the Bar Association in June 2013, <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>. He has served as a consultant (subgrantee) to a research project examining the “navigator model” and “limited licensed legal technician model.

In *The Justice Gap*, a report issued by the federal Legal Services Corporation (LSC), www.lsc.gov, LSC found that its recipient programs, providers of legal services to low income people across the US, turn away one client for every client they help. These programs provide assistance in about 1 million cases per year. The term, “justice gap” is now often used to refer to the phenomenon in which many people do not have legal assistance in civil legal matters.

LSC is the largest single source of funding for the provision of legal assistance to people who are unable to afford a private lawyer in civil legal matters in the US. LSC recipient programs, as well as other organizations (that do not receive LSC funds) may receive funding from other sources, including federal, state, local, and private sources.

Recent research done by Prof. Rebecca Sandefur of the American Bar Foundation suggests that people have many civil legal needs, but that many people are unaware that their problems are legal in nature and unaware that they may be amenable to legal resolution.

Data from the National Center for State Courts indicate that in 2012, state courts received incoming cases in the following numbers: 23 million civil cases, 20 million criminal cases, 51 million traffic cases (as compared with just fewer than half a million cases in the federal courts), equaling almost 100 million cases. State courts are highly differentiated, the tech infrastructure is thin, and with diverse case counting protocols, there is no truly precise count of civil cases. Nor is there a count of the number of people without counsel in civil matters.

Responses to the Justice Gap – The civil legal aid movement

In response to the justice gap, the civil legal aid reform movement is working on numerous fronts to increase access to justice. Efforts to increase legal representation include:

- Fundraising for civil legal aid programs – Advocates are working to increase the congressional appropriation for LSC and its recipient programs, and to raise money from other sources (federal, state, local and private) for LSC-programs and non-LSC programs. DOJ’s Office on Access to Justice is conducting a “Legal Aid Interagency Roundtable” (LAIR) initiative that is educating federal agencies about ways to provide support to civil legal aid programs as a means of accomplishing the agencies anti-poverty goals. The American Bar Association also provides guidance and other support to stakeholders engaged in fundraising initiatives around the country.
- Providing pro bono service – Law firms, corporations, law students, college students and others are all contributing pro bono service.
- Allowing “unbundling,” or “discrete task assistance” – Communities are allowing lawyers to assist clients (for a fee or on a “pro bono” basis) in specific roles and on specific tasks, such as by providing advice, writing a letter, writing a brief, or appearing at a court hearing. This approach, which can be done on a for-profit basis or on a pro bono basis can, paradoxically, allow more people to secure help more often than might otherwise be available if an attorney were always obligated to take on an entire case.

- Medical Legal Partnerships – The medical legal partnership movement, <http://medical-legalpartnership.org/>, has become a part of the public health movement, and allows patients to obtain legal help in hospital and other medical settings to resolve legal problems that cause or contribute to health problems.
- Expanding a civil right to counsel – Some communities recognize a right to counsel at government expense in certain civil legal matters such as involuntary psychiatric commitment, but not in such fundamentally important areas of people’s lives as, for example, retaining a home, retaining custody of a child, assuring freedom from domestic violence, and more. The National Coalition for a Civil Right to Counsel is providing leadership and support to stakeholders seeking to establish and expand rights to counsel in matters involving basic human needs, such as shelter, safety, sustenance, health, child custody.

Reform efforts to increase access through other strategic approaches include:

- Simplifying law and procedure – Courts are working to reduce the number of steps in litigation, eliminate jargon, reduce complexity, provide clearer instruction.
- Adopting new technologies – Communities are using do-it-yourself software to allow unrepresented people to produce their own legal pleadings, and using “e-filing” so that pleadings can be filed electronically from locations outside the courthouse. Legal services programs and libraries are places where litigants are obtaining help and relying on technology to assert and protect their rights. LSC has been supporting partnerships between courts and LSC recipient programs that rely on new technologies to facilitate filing of actions and pleadings.
- Training judges and clerks to be proactive – Communities are modifying codes of judicial conduct to allow judges to help people to understand potentially dispositive legal claims and defenses, and also evidentiary needs, to help assure that civil proceedings are fair, especially when an opposing party has an attorney. Clerks are also increasingly allowed to provide informational assistance to litigants.
- Assuring language access – The U.S. Department of Justice (“DOJ”) actively investigates and brings cases against jurisdictions that do not assure adequate provision of services to interpret and translate for people with limited English proficiency. The ABA, the National Center for State Courts, the Justice Index of the National Center for Access to Justice (www.justiceindex.org), and other organizations, support increased language transparency in state justice systems.

National initiatives to increase access to justice (see also, list of national organizations) include:

- The Justice Index – The Justice Index, www.justiceindex.org, established by the National Center for Access to Justice, uses data to reveal the degree to which states are adopting (or declining to adopt) new models that constitute best

practices for increasing access to justice. The Justice Index offers a platform for advocacy to support reform to increase access to justice.

- Access to Justice Commissions – These Commissions, now in about 35 states, are guiding state and local fundraising for civil legal aid in their states. Some perform other activities to help increase access to justice, including examining unmet legal needs.
- The U.S. Department of Justice’s Office for Access to Justice – DOJ’s Office for Access to Justice is pursuing projects to increase access to justice. In May 2015, it hosted a convening of academics and activists to discuss new research initiatives focused on civil legal aid, <http://www.justice.gov/opa/blog/civil-legal-aid-research>. DOJ is also guiding the Legal Aid Interagency Roundtable (LAIR), a project that is helping federal agencies identify ways (including grantmaking) to support civil legal aid as a means of accomplishing the agencies’ anti-poverty goals.
- Voices for Civil Justice – Voices for Civil Justice, a national nonprofit entity, is guiding a public education campaign that is helping to increase public understanding of the role of civil legal aid (community based civil legal aid and court based legal aid) with the goal of increasing support for the commitment to assure the provision of meaningful legal assistance to every person with otherwise unmet civil legal needs. <http://voicesforciviljustice.org/>.
- Self Represented Litigants Movement – The Self Represented Litigants Network (SRLN) is supporting research and reform initiatives, <http://www.srln.org/>. SRLN’s activities include supporting the development of court forms, self help centers, proactive roles for judges and court officers, and the use of new technologies.
- Chief Justices & Chief Court Administrators 100% Resolution – The Council of Chief Justices and Conference of State Court Administrators [issued a resolution](#) supporting “the aspirational goal of 100 percent access to effective assistance for essential civil legal needs”. The resolution observes that new models are being adopted by courts in response to need, and also calls on leaders in the state courts to adopt models to achieve the 100% vision. The 100% idea offers a framework that can be useful in supporting many models of civil legal aid reform, including non-lawyer models.

More organizations, including the Legal Services Corporation and the National Legal Aid and Defenders Association, are supporting some of the preceding initiatives and other initiatives to increase funding, research, promote new models, and more. The access to justice movement in the United States is very dynamic. A list of access to justice initiatives prepared by NCAJ in 2015 is here: <http://ncforaj.org/wp-content/uploads/2015/10/The-List-10-3-15-Civil-Legal-Aid-Reform-Leading-A2J-Initiatives-in-2015.doc>.

Unauthorized practice laws (“UPLs”) and the Calls for Reform

One approach to increasing access to justice might be to authorize nonlawyers to provide civil legal aid.

As a general matter, “unauthorized practice laws” prohibit nonlawyers from providing legal assistance. UPLs penalize by criminal sanction the provision of such assistance, or the “holding out” of oneself as a lawyer.

Historically, the justifications for UPLs are that they assure the quality of the assistance provided since the law is complex, and they discourage fraud by people who might claim to be lawyers when they are in fact not trained in the law.

UPLs promote and protect law as a profession. The legal profession not only works to preserve standards of practice, but serves as a foundational element of civil society. Lawyers are trained to preserve people’s rights against one another and against government. They have a critical function in preserving the interpretive and enforcement roles of courts in holding institutions and people accountable to the rule of law.

Calls for reform

In recent decades critics have complained that people who have not received three years of legal training can be capable of performing some of the roles traditionally performed by lawyers. Some critics view the practice of law as excessively protectionist, explaining that it functions as a barrier that prevents people in need from being able to afford legal assistance that would help them. In addition to pointing to the urgency of responding to the justice gap, reformers make many arguments in support of the expansion of roles for nonlawyers, including:

- Stratification has occurred in medicine – In recognition of the new roles developed in recent decades for non-physicians (nurse practitioners, physical therapists, pharmacists, emergency medical technicians), similar roles should be developed for nonlawyers.
- Empirical studies suggest nonprofessionals develop unique expertise – Non-lawyers who specialize in certain categories of tasks may be able to develop expertise that equips them as well as, or better than, generalist lawyers to perform those particular tasks.
- Rates and salaries may be reduced – Non-lawyers may be able to perform certain tasks at lower rates than typically charged by lawyers since the legal education received by nonlawyers would presumably be less expensive than three years of law school. This argument also has implications for salary-setting by nonprofit organizations that rely on nonlawyers to deliver services.
- Not competitive with the private bar – Non-lawyers are not a threat to the private bar (i.e. to the survival of law as an essential profession) since the private bar is, for the most part, not undertaking to serve the people in greatest need who would benefit from the provision of legal assistance by nonlawyers.
- Active for diverse employers in many U.S. settings – Nonlawyers employed by for profit law firms, and by non-profit legal services organizations, and non-profit

social services agencies, are performing roles as “paralegals”, “caseworkers”, “social workers,” “mental health workers”, and other non-lawyer categories of aides and advocates in the American justice system, especially in administrative benefits adjudication.

- Active in the United Kingdom – Nonlawyers are allowed to give advice outside of the courtroom. Also, third party (i.e., nonlawyer) investment in and ownership of law practices is allowed. Certain models allow nonlawyers to be present in the courtroom, and to respond to questions from the judge.
- Easier access to law – UPLs were established at a time when education was available to few people, legal education available to fewer people, and law itself was not available. In the modern era more people have access to the core information that is necessary to understand law and to engage in advocacy. A larger class of people potentially possesses, or can acquire, the skills necessary to provide effective legal assistance.
- Decision trees and other technologies – Technology is being used to develop automated do-it-yourself pleadings that cabin the provision of legal information in ways that make it easier for nonlawyers to help people (for example, in the task of completing a court form) without requiring the nonlawyer to exercise the broad and deep discretion that might be necessary in matters more appropriate for handling by lawyers.
- Community based paralegals/peer advocates – Individuals residing in the same community as their clients may bring specific knowledge and wisdom to the task of helping their neighbors advocate for their rights, especially with respect to the powerful forces in the community. This model may provide an employment option for individuals who become advocates. It may also help vulnerable populations build fairer communities.

While there are counter-arguments to these points, some of which are compelling – for example, no one knows whether rates that would ultimately be charged by nonlawyers would be low enough to be affordable to those in need; no one wants to enshrine a “two-tier system” in which people who can afford lawyers get them while people unable to afford lawyers get non-lawyers – the arguments have moved dialogue forward.

Turner v. Rogers, US Supreme Court

In *Turner v. Rogers*, the US Supreme Court took a step that has undercut the traditional justification for UPLs and further advanced dialogue on roles for non-lawyers.

The Court held in 2011 that in child support civil contempt proceedings in which prison is a possible outcome, litigants have no federal constitutional right to counsel and, in the absence of counsel, judges must use “alternative safeguards” to assure that proceedings are fair to the litigants who proceed without counsel. These alternative safeguards may include a social worker or mental health worker interviewing the litigant and assisting the litigant in completing answers on a form questionnaire.

In declining to recognize a federal right to counsel, the Court explained that some categories of cases are too simple to require a lawyer, and observed that adequate protection may be provided through the alternative safeguards.

Although the *Turner* holding does not establish that cases are too simple to need a lawyer, the Court's ruling makes it harder to justify UPLs on the ground that legal advocacy is inherently too complex to be handled by nonlawyers.

Turner accelerated dialogue about roles for non-lawyers that might be responsive to the justice gap.

To some extent discussion sometimes appears to turn on the specific details of the model under consideration. The greatest concern is generally reserved for scenarios in which nonlawyers would practice in a for profit setting, without supervision by an attorney, in courtroom proceedings. Less concern is generated by scenarios in which nonlawyers would practice in a nonprofit setting, under attorney supervision, outside the courtroom, especially if the services take the form of informational, organizational and/or psychological assistance, rather than the provision of legal advice, assistance or representation. The extent of training is also an important factor in the debate.

Steps toward reform of UPLs

A report of the NYC Bar Association in 2013 recommended adopting new models that would authorize certain nonlawyers to accompany litigants into the court room and provide moral and organizational support. (David Udell chaired a Subcommittee that had authored the report for Committee on Professional Responsibility of the NYC Bar Association).

The Task Force to Expand Access to Civil Legal Services in New York (recently re-established under the name "New York Access to Justice Commission") conducted public hearings and posted annual reports from approximately 2010 through 2015, documenting the justice gap in New York and making recommendations to close the gap. At a 2013 hearing held by the Task Force to Expand Access to Civil Legal Services in New York, Prof. Gillian Hadfield of University of Southern California School of Law, testified that under existing law it would be impossible to expand civil legal aid (including pro bono service) sufficient to respond to the Justice gap. Prof. Hadfield urged consideration of alternative models involving non-lawyers. The Task Force report of 2013 recommended examining new models that would rely on trained and supervised non-lawyers to provide legal assistance as an urgently needed response to the justice gap in New York. The report called on New York's Chief Judge Jonathan Lippman to establish a Committee to explore the issue further.

New York's Chief Judge, Jonathan Lippman, subsequently created a Committee on Nonlawyers and the Justice Gap in 2013 that he charged with responsibility to develop new models (on which Mr. Udell serves as the Chair of the Subcommittee on Legislative and Regulatory Reform).

In Washington State, the state's Supreme Court issued an opinion in 2013 establishing a rule that authorized a process to establish "limited licensed legal technicians" in the state.

Dialogue on new roles for nonlawyers has occurred alongside other initiatives to increase access to justice, include initiatives to strengthen civil legal aid programs, to expand civil rights to counsel in categories of cases involving basic human needs, and to increase access for self represented litigants.

New models involving nonlawyers

Several new models allowing certain categories of nonlawyer to provide certain types of services have been established:

New York navigator model

The Committee on Nonlawyers and the Justice Gap (NY) developed the New York “navigator” model. This model places nonlawyers in the courtroom to provide moral and organizational support and to answer questions asked by the judge. Advocacy is prohibited. This model is currently being used in housing court in Brooklyn and Manhattan, and in consumer debt collection court in the Bronx. An order issued by the Administrative Board of the New York Courts contemplates the performance of these roles by navigators while prohibiting them from engaging in advocacy. Mr. Udell is a member of the Committee and contributed to the development of the navigator model.

New York Consumer Court Advocate (CCA) and Housing Court Advocate (HCA) models

The same Committee (through its Subcommittee on Legislative and Regulatory Reform chaired by Mr. Udell) developed a separate [legislative proposal](#) that, if adopted as law, would allow trained and supervised non-lawyer “housing court advocates” and “consumer court aides” to discuss factual and legal aspects of a client’s legal matter with the judge. This model would afford these nonlawyers a greater role as advocates than is permitted to navigators. The legislation has been provided by the Committee to the NY Office of Court Administration, but has not yet been introduced formally as a bill.

Washington State LLLT model

Washington State has approved and regulated Limited License Legal Technicians (LLLT), provide certain categories of legal services outside the courtroom. The Washington State Bar Association initially opposed LLLTs, partly on the ground that the model was unlikely to help the poorest Americans who have the greatest need for legal aid (since they wouldn’t be able to afford even the lower rates charged by LLLTs). There was also concern that LLLTs might divert money away from civil legal aid. Despite these doubts, interest in this new category of legal services providers has been growing, and the first class of about 16 LLLTs graduated from the University of Washington School of Law in May 2015. The initial practice area designated for LLLTs is family law.

Pending proposals could expand the authority of LLLTs. Currently, LLLTs can perform a role in three settings: running their own for-profit business, working for existing law firms performing tasks previously beyond the scope of what paralegals do, and working for nonprofit civil legal aid programs. The main distinction between the work that LLLTs do and the work that lawyers do is that LLLTs are not allowed to appear in the courtroom.

Research is permitted, but drafting of pleadings must be done under supervision of a lawyer.

On-line legal services providers

Many companies are providing legal services on line. Some enable people to complete on-line forms to generate pleadings. Some offer a referral to a lawyer as well as access to forms. These companies serve millions of people and small businesses, and have substantial revenue.

Some of the companies have been prosecuted for unauthorized practice of law. Some have been criticized for charging fees for forms that are available for free from court systems.

Form preparers

California and Arizona have allowed nonlawyers to work as “form preparers.”

Research on new models of non-lawyers

The civil legal aid reform movement has emphasized the importance of research to determine whether the various models deliver on their promise, including: traditional legal representation, court forms, pro-active judging, public education materials. The National Science Foundation is funding research in this field. New York Community Trust funded an initial “snapshot” study of the Navigator model in New York. The Public Welfare Foundation is funding a study of the Navigator model in New York and of the Limited Licensed Legal Technician model in Washington State. The PWF study is being conducted by Rebecca Sandefur, Faculty Fellow, American Bar Foundation, and Associate Professor of Sociology and Law, University of Illinois at Urbana-Champaign, and Thomas Clarke, Vice President of Research and Technology, National Center for State Courts.

Opportunities to fund responsible reform of UPLs

For decades, UPL reform was not part of public policy dialogue. As noted above, it has become a subject of discussion and of research. Philanthropy is in a position to advance public understanding of the new roles for nonlawyers by supporting individuals and/or organizations at the national level, and in selected state and local settings, to pursue such activities as:

1. Policy Analysis and Writing – Academics and others are writing about roles for nonlawyers, but more writing would be useful on such subjects as: a) additional models, b) advantages of some models over others, c) licensing concepts, d) insurance concepts, e) the advocate-client privilege, f) roles for law schools, g) financial consequences, h) other countries’ experiences, i) models of supervision, j) roles of social workers, mental health workers, case workers, paralegals and others, k) roles of for-profit companies, l) roles that require education and training as a lawyer.
2. Public Education – Public writing and public events would help to educate people about the stakes and the possibilities. A public education campaign would

involve educating reporters and editorial boards about the strengths and weaknesses of the different models.

3. Conferences – To date, there have been very few academic gatherings on roles for nonlawyers. Fordham Law School covered the subject in a session in December 2014 as part of a conference titled, *Until Civil Gideon*. More dialogue and debate would generate more ideas, concerns, and solutions.
4. Technology – Nonlawyers may be able to perform specific roles in reliance on automated court forms, automated filing systems, interview technologies, and additional systems that help to equip individuals to carry their legal matters forward with the assistance of individuals who are not lawyers. Funding is needed to test these technologies that increase opportunities for people to be helped more effectively by non-lawyers.
5. Pilot projects and Testing – In New York and Washington, authorities have authorized the incremental development and testing of models of service provision through nonlawyers. More philanthropic support could help to build consensus to do test runs of new models in additional states.

Organizations working on access to justice

As noted above, many organizations work to increase access to justice in a variety of ways. The following is a non-exclusive list:

- Our National Center for Access to Justice, www.ncforaj.org, is the academically affiliated national organization exclusively dedicated to policy reform that helps people obtain justice in the courts, and we are active in a number of areas, including through our work to expand the Justice Index, www.justiceindex.org.
- The American Bar Association (ABA) offers guidance to the bar and to government on policy and practice concerning the law. William Hubbard, the 2014-15 president of the ABA, created the ABA Commission on the Future of Legal Services, which is considering many issues, including the potential value of new roles for nonlawyers. The ABA also guides and supports state based Access to Justice Commissions which, in some states, are exploring for creating new roles for nonlawyers.
- Namati, www.namati.org, headed by Vivek Maru, is working to build a global movement of community based legal advocates. Namati helps to train and enable nonlawyer members of communities to help people protect other community members' rights to inherit property, obtain an education, obtain safety from domestic violence, establish identity, and more. This work is analogous to initiatives to increase certain roles for community based nonlawyers in the US.
- National Center for Medical Legal Partnership, <http://medical-legalpartnership.org/>, is developing systems to integrate legal services with the provision of health care. The executive director is Ellen Lawton.

- National Center for State Courts, www.ncsc.org, president, Mary McQueen, works to improve the administration of justice through leadership and service to state courts. NCSC has initiatives to increase access to justice and also has a court statistics project, among its many other initiatives to strengthen the courts.
- National Coalition for a Civil Right to Counsel (NCCRC), headed by John Pollock of the Public Justice Institute (Baltimore), supports local initiatives to recognize and expand civil rights to counsel in areas of the law involving basic human needs.
- National Legal Aid & Defender Association, www.nlada.org, headed by Jo-Ann Wallace, promotes the excellent delivery of legal services to people unable to afford counsel.
- Public Welfare Foundation, www.pwf.org, headed by Mary McClymont, is a private philanthropy providing support for a number of efforts nationally to bolster the civil legal aid sector by promoting innovations and building core infrastructure; and encouraging philanthropy to become involved in aiding the work.
- Responsive Law is a nonprofit that describes itself as focusing on the role of nonlawyers. <http://www.responsivelaw.org>. National associations of legal assistants and of paralegals also have a stake in the issue.
- Self Represented Litigants Network, www.srln.org, headed by Catherine Altonedar, works to ensure that the challenges of serving the self-represented are viewed as critical issues to be addressed throughout the justice system.
- Voices for Civil Justice, <http://voicesforciviljustice.org/>, headed by Martha Bergmark, raises awareness of the role civil legal aid plays to ensure fairness and justice for all.

Experts on new roles for nonlawyers and on other new models of service delivery

This is a non-exclusive list of people who are engaged in research and/or writing about the legal profession:

- Thomas Clarke – Vice President of Research and Technology, National Center for State Courts
- Jim Greiner - Professor of Law, Harvard Law School
- Gillian Hadfield – Richard L. and Antoinette Kirtland Professor of Law and Professor of Economics, University of Southern California
- Laurel A. Rigertas – Associate Professor of Law, Northern Illinois University College of Law
- Deborah Rhode – Ernest W. McFarland Professor of Law, Stanford University

- Deborah Cantrell – Associate Professor of Law and Director of Clinical Programs, University of Colorado Law School
- Renee Newman Knake – Professor of Law and Foster Swift Professor of Legal Ethics, Michigan State University College of Law
- Herbert Kritzer – Marvin J. Sonosky Chair of Law and Public Policy, University of Minnesota Law School
- Rebecca Sandefur – Faculty Fellow, American Bar Foundation, and Associate Professor of Sociology and Law, University of Illinois at Urbana-Champaign
- Richard Zorza – Founding Coordinator, Self-Represented Litigation Network

All Open Philanthropy Project conversations are available at
<http://www.givewell.org/conversations>