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Cracks in the Profession's Monopoly Armor

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INTRODUCTION

The legal profession in the United States continues to enjoy its long-held monopoly in the nation's legal services market.[1] Historically, American courts are largely responsible for this monopoly and have relied on their "[a]ffirmative [i]nherent [p]ower . . . to regulate . . . every aspect of the practice of law."[2] For example, courts establish standards for admitting and

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1. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 824–27 (1986) (highlighting how the lawyer monopoly over much of the legal process today results from the combination of courts and lawyers controlling bar admission and state courts enforcing "common-law and statutory prohibitions against the unauthorized practice [of law]" (UPL), and noting that a "vigorous and expansive doctrine" of UPL did not occur in America until "sometime after the First World War"); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 4 (1981) ("[T]he profession has engaged in disturbingly little introspection concerning the proper scope of its monopoly.").

2. WOLFRAM, *supra* note 1, at 24; *see, e.g.*, NISHA, LLC v. TriBuilt Constr. Grp., LLC, 388 S.W.3d 444, 447 (Ark. 2012) (reversing a court ruling that a hearing's arbitrator could decide who would represent the parties and holding that the state supreme court has "exclusive authority" to regulate the practice of law); *id.* at 451 ("[A] nonlawyer's representation of a corporation in arbitration proceedings constitutes [UPL]."); Cleveland Metro. Bar Ass'n v. Davie, 977 N.E.2d 606, 616 (Ohio 2012) (holding that the state supreme court "has exclusive power to regulate, control, and define the practice of law in Ohio" and "if a statute or administrative rule purports to permit laypersons to practice law before a board or an administrative agency, this court retains the ultimate authority to determine what activities a layperson" may undertake before committing UPL); *see also* MODEL RULES OF PROF'L CONDUCT pmbl. para. 10 (2013) ("The legal profession is largely self-governing. . . . [U]ltimate authority over the legal profession is vested largely in the courts."); WOLFRAM, *supra* note 1, at 79 ("The history of the regulation of the legal profession in the United States and England is primarily that of supervision by courts."); *cf.* Brown v. Gerstein, 460 N.E.2d 1043, 1052 (Mass. App. Ct. 1984) (holding that the practice of law is a practice or trade and

disciplining lawyers,[3] and defining the unauthorized practice of law (UPL). This, in effect, excludes competition from nonlawyers[4] and charges lawyers for court activities, including the operation of lawyer and judicial regulatory and disciplinary systems.[5]

Courts often rely on bar associations for valuable input regarding these regulatory activities.[6] Most notably, bar associations propose and assist courts in adopting ethics codes establishing behavioral norms for the

thus subject to consumer protection statutes); *In re* Burson, 909 S.W.2d 768, 777 (Tenn. 1995) (deciding that the state legislature may authorize nonlawyer tax agents).

3. WOLFRAM, *supra* note 1, at 79 (noting that traditionally, "in many American jurisdictions, courts alone are authorized to discipline lawyers. And normally that power is reserved to the state's supreme court which typically delegates its exercise to a lawyer disciplinary agency" (citation omitted)); *see also* MODEL RULES OF PROF'L CONDUCT pmbl. para. 10.

4. UPL is broadly defined and construed in many states. *See, e.g.*, OHIO GOV. BAR R. VII(2)(A) (providing that UPL is "[t]he rendering of [or holding out to the public that one could render] legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar unless the person" qualifies for one of several exceptions, including being a licensed legal intern or a registered foreign legal consultant). For examples of nonlawyer UPL, see Hansen v. Hansen, 7 Cal. Rptr. 3d 688, 689 (Ct. App. 2003) (holding that a personal representative of a decedent's estate who is not a licensed lawyer cannot appear "in propria persona" on behalf of the estate in matters outside the probate proceedings); Fla. Bar v. Am. Senior Citizens Alliance, 689 So. 2d 255, 259 (Fla. 1997) (finding UPL where salespersons and other employees "answered specific legal questions; determined the appropriateness of a living trust based on a customer's particular needs and circumstances; [and] assembled, drafted and executed the documents"); Toledo Bar Ass'n v. Joelson, 872 N.E.2d 1207, 1208 (Ohio 2007) (holding that a nonlawyer committed UPL when he prepared, signed, and filed documents in four lawsuits, including complaints, on behalf of Team Sports, Inc. because UPL is not limited to court appearances but includes "the preparation of papers . . . on another's behalf" concerning a lawsuit (citing Cleveland Bar Ass'n. v. Misch, 695 N.E.2d 244 (Ohio 1998))). UPL also restricts the ability of lawyers to practice law in other states unless they become licensed to practice law. Lawyers can apply to the court in a state that they are not admitted for *pro hac vice* status, permitting the lawyer to represent someone in particular litigation in that state court. The lawyer must apply for a license in the foreign jurisdiction if the lawyer intends to practice in a foreign state court on more than an occasional basis. ABA Model Rule 5.5, commonly referred to as the multijurisdictional practice (MJP) rule, permits lawyers to represent persons in a jurisdiction where they are not licensed if the representation is only on a temporary basis and does not involve the lawyer appearing before a tribunal. MODEL RULES OF PROF'L CONDUCT 5.5. For a recent and excellent discussion about the many issues and problems concerning UPL statutes and enforcement, see Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729 (2010); *see also* Rhode, *supra* note 1.

5. *See* WOLFRAM, *supra* note 1, at 24–25.

6. *See id.* at 33–34 (observing that while appellate courts exercise power and initiative in regulating the legal profession, "courts serve as the largely passive sounding boards and official approvers or disapprovers of initiatives that are taken by lawyers operating through bar associations"); *see also* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 965 (2009) ("[S]tate supreme courts were . . . the prime regulators [and] typically acting in interplay with the bar."); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009). *See generally* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 707 (1977) (contending that lawyers drafted rules to promote their own interests in a self-regulatory context).

profession and standards and processes for lawyer admission and discipline.[7]

But "the times they are a-changin'," as Bob Dylan notes in the title of his song.[8] Today, the law governing lawyers cannot be found in a single body of ethics rules, such as the American Bar Association (ABA) Model Rules of Professional Conduct, produced internally by the "traditional duo of courts and bar associations."[9] Legislators, administrators, and federal judges are no longer willing to defer to state courts or bar associations.[10] As a result, the law governing lawyers is increasingly fragmented because authorities—many of them federal and external to the profession—now regulate lawyer behavior.[11] This fragmentation has created a myriad of challenges and problems for regulators and the bar. It has prompted one expert to comment: "We are witnessing the decline of the ideal of professional self-regulation at the same time that the ideal has been almost entirely demolished in England."[12]

Although there are new regulators and related concerns, the "traditional duo of courts and bar associations" still plays a leading role in shaping the profession's behavioral norms and preserving its monopoly over the delivery of legal services.[13] This Article addresses two recent developments by the courts and bar associations that significantly affect—or create cracks in—the profession's monopoly on the delivery of legal services.

Part I considers the Conference of Chief Justices' (CCJ) recent adoption of Resolution 15, "Encouraging Adoption of Rules Regarding Admission of Attorneys Who Are Dependents of Service Members."[14] Resolution 15

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7. *See, e.g.*, *Tennessee Rules of Professional Conduct*, TENN. B. ASS'N, http://www.tba.org/info/tennessee-rules-of-professional-conduct (last visited Apr. 26, 2014) (tracing the development of the Tennessee rules).

8. BOB DYLAN, *The Times They Are a-Changin'*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964). The scope and magnitude of change buffeting all aspects of the legal profession is dramatic. *See, e.g.*, Tamar Lewin, *Task Force Backs Changes in Legal Education System*, N.Y. TIMES, Sept. 20, 2013, at A16 (reporting that the recent American Bar Association Task Force on the Future of Legal Education's draft report calls for urgent and sweeping changes in legal education, and describing "the predicament of the many recent graduates who may never get the kind of jobs they anticipated" as "'particularly compelling'").

9. *See* Leubsdorf, *supra* note 6, at 959.

10. *Id.* at 961.

11. *Id.* at 961–62. For example, a host of federal agencies, like the SEC, have enacted rules governing the practice of law. *Id.* at 961 & n.6; *see also* Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005); *cf.* MODEL RULES OF PROF'L CONDUCT pmbl. para. 11 (2013) ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination.").

12. *See* Leubsdorf, *supra* note 6, at 959, 961.

13. *See id.* at 961 (asserting that most new regulators tend to be federal).

14. *Resolution 15: Encouraging Adoption of Rules Regarding Admission of Attorneys Who Are Dependents of Service Members*, CONF. CHIEF JUSTICES (July 25, 2012), http://msjdn.files.wordpress.com/2013/01/conference-of-chief-justices-resolution-15-military-spouse-admission-final.pdf [hereinafter *Resolution 15*]. Resolution 15 uses the

urges state bar admission authorities to "develop[] and implement[] rules permitting admission without examination for attorneys who are dependents" of United States service members.[15] Resolution 15 represents a significant doctrinal break with the longstanding tradition that lawyers must take an examination before being licensed to practice law in a jurisdiction unless their prior experience allows them to waive into that jurisdiction. The CCJ's new approach to regulating admission promotes competition from within the bar by facilitating the movement of lawyers from one geographic market to another.

Part II of this Article discusses the Washington Supreme Court's new Admission to Practice Rule (APR) 28, titled "Limited Practice Rule for Limited License Legal Technicians" (LLLT), and its impact on the profession's legal services monopoly.[16] The LLLT rule "allow[s] licensed legal technicians to help civil litigants navigate the court system."[17] Washington's LLLT rule promotes competition from professionals—nonlawyer technicians—who are outside the bar.

The Article concludes that both developments—Resolution 15 and Washington's LLLT rule—promise to enhance competition for the delivery of legal services, but in different ways. This Article contends that both Resolution 15 and Washington's LLLT rule will indeed enhance consumer welfare.

I. RESOLUTION 15: A DOCTRINAL BREAK FROM GEOGRAPHIC BARRIERS

In recent years, there has been significant interest in, and support for, U.S. military personnel and their families from the public and the legal profession.[18] For example, on January 24, 2011, President Barack Obama,

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phrase, "Dependents of Service Members," which includes more than just military spouse attorneys. *Id.* An earlier ABA Resolution 108, Admission by Endorsement, used the phrase "military spouse attorneys" when eliminating licensing barriers for military dependents who are lawyers. AM. BAR ASS'N, RESOLUTION OF THE HOUSE OF DELEGATES 108 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_108.doc. Most of the literature addressing the topic generally also uses the phrase "military spouse lawyers." This Article will use the latter term, in part because military spouse attorneys probably constitute the largest number of military dependents affected by the rule. Nevertheless, it is important to note that Resolution 15's use of "dependents" potentially includes nonspouse attorneys. *See* NAT'L MILITARY FAMILY ASS'N, FACT SHEET: DEFINITION OF A DEPENDENT 1 (2005), *available at* http://support.militaryfamily.org/site/DocServer/Definiton_of_a_Dependent_11-05.pdf?docID=3621 (defining the term military dependents).

15. *Resolution 15*, *supra* note 14.

16. *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-10005 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf (adopting the new Admission to Practice Rule 28: "Limited Practice Rule for Limited License Legal Technicians").

17. Debra Cassens Weiss, *In Washington State, 'Legal Technicians' Will Be Allowed To Help Civil Litigants*, A.B.A. J. (June 19, 2012, 8:36 AM), http://www.abajournal.com/news/article/in_washington_state_legal_technicians_will_be_allowed_to_help_civil_litigan/.

18. *See, e.g.*, Amber Nimocks, *Admission Rules Relaxed for Military Spouse-Attorneys in North Carolina*, N.C. LAW. WKLY., Sept. 9, 2013, at 9; *Illinois Supreme Court Announces*

First Lady Michelle Obama, and Dr. Jill Biden presented a document titled *Strengthening Our Military Families: Meeting America's Commitment* in response to a presidential study directive calling for a comprehensive federal approach by government agencies to improve support for military personnel and their families.[19] The document outlined forty-seven initiatives by sixteen federal agencies to improve support for military families. The First Lady and Dr. Biden promised to pursue such improvement through their Joining Forces initiative dedicated to connecting military personnel and their spouses with the necessary resources to obtain jobs.[20]

Many Americans have some sense of military families' hardships and sacrifices in serving the nation, especially given recent U.S. involvement in several international conflicts.[21] One of the many challenges confronting military families concerns military spouse lawyers. Because of frequent relocations, they often encounter serious licensure hurdles in their efforts to pursue legal careers.[22]

Military families are forced to move every two to three years in addition to temporary or extended unaccompanied deployments.[23] The impact of

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New Measures To Improve Legal Services for the Disadvantaged, ILL. LAW. NOW (June 24, 2013 10:28 AM), http://iln.isba.org/blog/2013/06/18/illinois-supreme-court-announces-new-measures-improve-legal-services-disadvantaged; *Your Turn*, SAN ANTONIO EXPRESS NEWS, Mar. 2, 2008, *available at* 2008 WLNR 4214508. Current publicity for helping military spouses includes support from Stephen Spielberg, Oprah Winfrey, and Tom Hanks. *See What We've Been Doing*, WHITE HOUSE JOINING FORCES, http://www.whitehouse.gov/joiningforces/photo-video (last visited Apr. 26, 2014).

19. U.S DEP'T OF THE TREASURY & U.S. DEP'T OF DEF., SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATE LINES 2 (2012), *available at* http://www.defense.gov/home/pdf/Occupational_Licensing_and_Military_Spouses_Report_vFINAL.PDF; *see* MARY REDING & ERIN MASSON WIRTH, REPORT TO CONFERENCE OF CHIEF JUSTICES (n.d.) (on file with *Fordham Law Review*).

20. *Support for Our Heroes*, WHITEHOUSE.GOV, http://www.whitehouse.gov/joiningforces (last visited Apr. 26, 2014) (reporting that "Joining Forces is all about coming together to support our nation's military families" and ensuring that "no veteran has to fight for a job at home after they fight for our nation overseas").

21. One hardship for military families is the difficulty faced by spouses seeking employment. This is a serious problem but is often overshadowed by other pressing problems, such as posttraumatic stress disorder or helping wounded veterans.

> Many occupations require a state license, often with state-specific conditions and processes, which can cause lengthy re-employment delays for military spouses moving between states. Because of these delays and the expense involved in re-licensure, many spouses decide not to practice in their professions. This is a difficult financial and career choice issue for military members and their spouses, potentially impacting their desire to stay in the military: more than two thirds of married service members report their spouse's inability to maintain a career impacts their decision to remain in the military by a large or moderate extent.

Issue 2, USA 4 MILITARY FAMILIES, http://www.usa4militaryfamilies.dod.mil/pls/psgprod/f?p=USA4:ISSUE:0::::P2_ISSUE:2 (last visited Apr. 26, 2014).

22. MARY B. CRANSTON, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, REPORT 3 (2012), *available at* http://lawyerist.com/lawyerist/wp-content/uploads/2012/04/ABA+108+Fnl.pdf.

23. *Id.* at 6 n.21 (citing DEF. MANPOWER DATA CTR., MILITARY FAMILY LIFE PROJECT (2010), *available at* conferences.cna.org/pdfs/longitudinalstudy.pdf) (reporting that active

these frequent moves is reflected in national statistics that show: (1) military spouses are more likely to be unemployed than their civilian counterparts; (2) military wives suffer a higher rate of underemployment than civilian counterparts; and (3) employed military wives earn less than civilian wives.[24] The Department of Defense Military Community and Family Office has addressed some of the licensing barriers that confront military spouses through state legislation.[25] The practice of law, however, is not regulated by the legislature, and redress must be sought from the state courts.[26]

The Military Spouse JD Network (MSJDN) reports that less than one-third of its members are employed in full-time legal positions and that approximately half are underemployed in paralegal positions or part-time work.[27] MSJDN members claim that state licensing barriers hinder their employment opportunities, because rules for admission by motion or through reciprocity are too limited.[28] For example, military spouses have difficulty in meeting the "'previous practice' requirements when: they are recently admitted; their military spouse has been assigned overseas; they have breaks in employment between duty stations; they have held non-attorney or part-time positions; or have been unable to find legal work at a duty station."[29] The consequence of not satisfying state rules regarding admission by motion is significant: the applicant will have to pass an arduous two-and-a-half- to three-and-a-half-day, written bar examination and undergo a thorough character and fitness investigation.

One report argues that these barriers create a significant cost for the public and the military families who are deprived of a spouse's income.[30] The resulting economic and related stress from this loss of spousal income exacts a significant psychological toll on the spouse and family.[31] The loss may also cause the nonlawyer spouse to leave the military.[32] The report contends that these costs warrant different licensure treatment for military spouse lawyers.[33]

The report further articulates several benefits to eliminating or minimizing licensure barriers. First, even after being transferred, military

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duty spouses thirty years old and younger move every thirty-three months on average because of change of duty station).

24. *Id.* at 5.
25. *Id.* at 7.
26. *Id.*
27. *Id.* at 8.
28. *Id.*
29. *Id.*
30. *See* ABA MODEL RULE ON ADMISSION BY MOTION (2012) (requiring applicants to have practiced for three of the five years prior to applying for admission); AM. BAR ASS'N COMM'N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d_filed_may_2012.authcheckdam.pdf (accompanying the model rule on practice pending admission).
31. *See* CRANSTON, *supra* note 22, at 7.
32. *Id.* at 4.
33. *See id.* at 1.

spouse lawyers can continue to provide legal services to their clients. From a client perspective, clients are able to retain counsel of choice, which promotes consumer preference. "As technology improves, more clients and employers want to retain military spouse attorneys who are transferred."[34] UPL rules in many states, however, prohibit military spouse attorneys from "maintain[ing] their employment and continuing to serve their clients when transferred to and residing in a new jurisdiction."[35]

Another benefit of eliminating licensure barriers for military spouse lawyers is that it furthers access to justice for military personnel and their families. Military spouse attorneys have developed unique skills that benefit their clients and possess special insights concerning the "complexities of military life and are well suited to serve clients in the military, either through paid or volunteer work."[36] Many of these military-related clients may lack adequate resources to obtain legal services. A 2010 military survey found that 27 percent of service members have more than $10,000 in debt compared to 16 percent of civilians, and that more than one-third of military families have trouble paying monthly bills.[37] Lawyers who are military spouses are uniquely positioned to possess a special sensitivity for assisting military families and veterans because their families may be similarly situated financially and may understand military culture. For example, they may understand family problems resulting from frequent redeployments. This similarity in family experiences creates a good opportunity for military spouse lawyers to provide a more holistic approach to delivering legal services that addresses all of the client's needs.[38]

Against this backdrop, the CCJ adopted Resolution 15.[39] Not surprisingly, given the nation's support for military personnel and their

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34. *Id.* at 9.

35. *Id.* at 9 n.31 (citing State Bar of Ariz., Unauthorized Practice of Law Comm., Advisory Op. 10-02 (2010), *available at* www.azbar.org/media/75280/upl10-02.pdf).

36. *Id.* at 9.

37. FINRA INVESTOR EDUC. FOUND., FINANCIAL CAPABILITY IN THE UNITED STATES 5, 13 (2010), *available at* http://www.finra.org/web/groups/foundation/@foundation/documents/foundation/p122257.pdf; *see also* Donna Gordon Blankinship, *Mil Fams Face Money Problems*, MILITARY.COM, http://www.military.com/spouse/military-life/military-resources/mil-fams-often-face-financial-struggles.html (last visited Apr. 26, 2014) (citing a 2010 military survey reporting that the unemployment rate among military spouses is 26 percent, and noting that a staff sergeant's annual salary is about $39,000, not much money to support a family, especially when one member is sent overseas for long periods).

38. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 46 (2d ed. 2009).

39. Resolution 15 provides:

> WHEREAS, the states' highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public; and
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> WHEREAS, the Department of Defense has recognized that military spouses face unique licensing and employment challenges as they move frequently in support of the nation's defense; and
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> WHEREAS, the American Bar Association adopted a policy in February 2012 recognizing that these short-term, compulsory moves for attorneys married to military service members result in unique problems that should be addressed by amending traditional bar admission rules; and

families, the CCJ encountered little resistance in adopting Resolution 15 on July 25, 2012.[40]

A. Resolution 15—The Assault on Territorial Restraints

Resolution 15's first provision underscores the courts' fundamental gatekeeper function concerning admission and regulation of the legal profession. It provides that the "states' highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public."[41] This opening proposition is not particularly noteworthy given state courts' long tradition of regulating the profession to protect the public's interest.

What is noteworthy however, is Resolution 15's last provision. It breaks with the longstanding notion that lawyers generally have to take a burdensome written examination before being licensed to practice law in another state. The CCJ in Resolution 15 now "urges the bar admission authorities in each state and territory to consider the development and implementation of rules *permitting admission without examination* for attorneys who are dependents of service members . . . and who have graduated from ABA accredited law schools and who are already admitted to practice in another state or territory."[42] Resolution 15's four other

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> WHEREAS, state bar admission authorities and state supreme courts remain responsible for making admission decisions and enforcing their own rules for admission; and
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> WHEREAS, issues relating to knowledge of local law can be addressed through a mandatory educational component;
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> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices *urges the bar admission authorities in each state and territory to consider the development and implementation of rules permitting admission without examination for attorneys who are dependents of service members of the United States Uniformed Services and who have graduated from ABA accredited law schools and who are already admitted to practice in another state or territory*.

Resolution 15, *supra* note 14 (emphasis added).

40. *See* Telephone Interview with Robert N. Baldwin, Exec. Vice President & Gen. Counsel, Nat'l Ctr. for State Courts (Oct. 16, 2013) (stating that Resolution 15 was adopted without any reported opposition). The CCJ adopted Resolution 15 as proposed by the CCJ Professionalism and Competence of the Bar (PCB) Committee at the 2012 Annual Meeting on July 25, 2012. *Id.* The PCB Committee had access to a "Report to the Conference of Chief Justices" submitted by Mary Reding, President and Co-Founder of the Military Spouse JD Network, and the Honorable Erin Masson Wirth, Co-Founder of the Military Spouse JD Network. *Id.* The CCJ discussed the special challenges facing military spouse lawyers and the need for a proposed resolution to eliminate licensing barriers. *Id.* The PCB materials for the meeting included a draft rule. *Id.* The lack of modification to the PCB Committee proposal may reflect broad support within the CCJ for Resolution 15. *See, e.g.*, Brad Cooper, *Military Spouse Attorneys Answer the Joining Forces Challenge*, WHITEHOUSE.GOV (June 14, 2012, 4:55 PM), http://www.whitehouse.gov/blog/2012/06/14/military-spouse-attorneys-answer-joining-forces-challenge (reporting that ABA Resolution 108, a rough counterpart to CCJ Resolution 15, was passed by the "500+ members of the ABA House of Delegates . . . without any opposition").

41. *Resolution 15*, *supra* note 14.

42. *Id.* (emphasis added). The ABA recently adopted a Model Rule on Practice Pending Admission Application (MRPPA) aimed at lessening the disruption to a lawyer's career and life by permitting a lawyer to practice for up to a year upon applying for application to the

provisions support one of these two principles—the authority of state courts to regulate the bar, including admission,[43] or the case for admission without examination.[44]

Admission without examination for lawyers is not a new concept.[45] The organized bar and state courts have long recognized the highly mobile nature of the bar and the concern that an examination complicates, if not deters, lawyer mobility.[46] Most states have addressed this concern and the corresponding need to protect the public from unqualified lawyers by adopting admission-by-motion rules.[47]

The ABA's Model Rule on Admission by Motion is the prototype for state rules.[48] It requires, in part, an applicant to be "primarily engaged in the active practice of law . . . for three of the five years immediately

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bar and notifying the state's regulatory authority. AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 30. Washington, D.C., instituted a policy of admission pending application prior to the ABA Rule. *Id.*

43. *See Resolution 15*, *supra* note 14 ("[S]tate supreme courts remain responsible for making admission decisions . . . .").

44. *See id.* ("[R]ecogniz[ing] that military spouses face unique licensing and employment challenges as they move frequently in support of the nation's defense . . . ."); *see also* REDING & WIRTH, *supra* note 19 (providing the CCJ with important information about why lawyer-spouses of military personnel should be admitted on motion).

45. Wisconsin provides perhaps the most unique and longest exception to the general rule of lawyers having to pass an examination for bar admission. Graduates of Wisconsin law schools are admitted automatically to practice law without examination. WIS. SUP. CT. R. 40.03. Wisconsin's admission without examination policy has not jeopardized the public's interest in competent and ethical legal services. *See, e.g.*, Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645; *see also* Wiesmueller v. Kosobucki, No. 07-CV-211-BBC, 2009 WL 4722197 (W.D. Wis. Dec. 4, 2009) (dismissing a recent court challenge to that rule).

46. The ABA's new MRPPA reflects the organized bar's appreciation for the increased mobility and accompanying licensure challenges of its members. AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 30. The MRPPA allows a lawyer who holds a license to practice law in another U.S. jurisdiction and who has engaged in active practice for three of the last five years, to provide legal services in a new jurisdiction without a license for no more than 365 days. The lawyer must meet other criteria too, including notifying the Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice and not being the subject of a disciplinary matter.

47. Thirty-nine states permit admission without examination if the lawyer satisfies a number of conditions. Many of these states add a reciprocity condition, namely that the state the lawyer is departing from must accord admission without examination to members of the lawyer's new state. *See* AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM., ADMISSION BY MOTION RULES (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/admission_motion_rules.authcheckdam.pdf; *see, e.g.*, ARIZ. SUP. CT. R. 34 (providing for admission by motion if certain conditions are met, including reciprocal admission rules for Arizona lawyers in the state that the lawyer is departing); Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Berch, No. CV-12-1724-PHX-BSB, 2013 WL 5297140 (D. Ariz. Sept. 19, 2013) (challenging the rule); *see also* Joan C. Rogers, *Limiting Admission on Motion to Lawyers from States with Reciprocity Is Not Illegal*, 29 Law. Man. Prof. Conduct (ABA/BNA) 610 (Sept. 23, 2013) (reporting that Arizona's reciprocity requirement in its admission by motion rule is constitutional and effectuates "the state's legitimate interest in regulating the practice of law for public protection purposes" and "encourage[s] other states to admit Arizona attorneys on similar terms" (citing *Berch*, 2013 WL 5297140)).

48. MODEL RULE ON ADMISSION BY MOTION (as amended Aug. 6, 2012).

preceding" the date of application, to be in good standing in all jurisdictions where the lawyer is currently licensed and not currently subject to lawyer discipline or the subject of a pending discipline matter, and to demonstrate the requisite fitness and good character to practice law.[49] These requirements advance the ABA's goal of protecting the public from unqualified lawyers while facilitating lawyer mobility. Essentially the courts, bar, and the public have a three-year track record of legal work to assess the lawyer's competency, ethics, and professionalism.[50] In addition, the admission-without-examination rule assumes that the newly admitted lawyer will not harm clients or the courts by failing to learn local law and practice—a frequently cited justification for requiring an examination before bar admission.[51]

Not all lawyers can meet state requirements for admission by motion. For example, many lawyers, including military spouses, have difficulty in meeting the "previous practice" requirements.[52]

The CCJ followed the customary track of considering bar input before adopting Resolution 15 and its policy changes regarding bar admission and discipline.[53] This is poignantly illustrated by the CCJ's explicit reference to the ABA House of Delegates' recent adoption of ABA Resolution 108, or the Admission by Endorsement (ABE) Resolution.[54] Although the CCJ did not adopt all of the ABE recommendations in Resolution 15, the similarity in language between ABE and Resolution 15 further evidences the bar's influence on the CCJ's adoption of Resolution 15.[55] A review of the ABE Resolution is helpful to better understand the CCJ's Resolution 15.

The ABE Resolution most notably "urges state and territorial bar admission authorities to adopt rules . . . and procedures," including admission by endorsement to "accommodate the unique needs of military spouse attorneys."[56] The ABE's "admission by endorsement" phrase means the same thing as Resolution 15's phrase, "admission without examination."

The ABE Resolution requires attorney-spouses to satisfy several other criteria before gaining bar admission. The additional criteria include a

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49. *Id.*

50. Another condition for admission by motion in many states is reciprocity—that two states accord each other's bar members similar admission by motion benefits. The ABA discourages reciprocity as a requirement for admission by motion. AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 30 (accompanying the model rule for admission by motion).

51. *See, e.g.*, 22 N.Y. CT. APP. R. 520.10 (requiring an attorney to obtain a certificate of legal education from the New York State Board of Law Examiners as part of admission by motion).

52. CRANSTON, *supra* note 22, at 8.

53. *See* Leubsdorf, *supra* note 6, at 965.

54. AM. BAR ASS'N, *supra* note 14.

55. ABE recommendations not in Resolution 15 include: reviewing current bar application and admission procedures to minimize any burdens on military spouses and to promptly handle their applications; encouraging mentoring programs to better integrate military spouse attorneys with the bar; and offering reduced bar application and admission fees in the lawyer's new and old jurisdictions. *Id.*

56. *Id.*

requirement that the attorney-spouse demonstrate a presence in the jurisdiction because of his or her military spouse's service.[57] The attorney-spouse must also establish that the attorney is not currently subject to lawyer discipline or the subject of a pending disciplinary matter, pay client protection fund assessments, and comply "with all other ethical, legal and continuing legal education obligations."[58] The ABE Resolution further recommends that state admission authorities review bar application standards and procedures in the hope of facilitating the licensure of military spouse attorneys.[59]

The additional ABE criteria, such as the applicant showing that he or she is not currently subject to lawyer discipline, seem reasonable in light of the profession's substantial, if not overriding, interest in protecting the public from problem lawyers. Interestingly, Resolution 15 does not expressly incorporate these additional criteria.

One possible explanation for the absence of the additional ABE criteria is that the CCJ thought it a better strategy to let the states choose which, if any, additional criteria are appropriate to protect the public's interest given the CCJ's landmark recommendation eliminating examinations for admission for military spouses. This approach allows state courts to tinker with the details of Resolution 15's major doctrinal change, making Resolution 15 politically more palatable to the states, in part, by appearing less intrusive in state court regulation. Two broad provisions in Resolution 15 support this explanation and permit states to incorporate additional ABE criteria. The first one underscores that it is the responsibility of the states' highest courts to establish a system of admission and regulation for protecting the public.[60] The second provision notes that this responsibility belongs solely to the states' highest courts.[61] Whatever the reasons for not including the additional criteria, states are well advised to adopt some or all of the ABE criteria as additional safeguards for protecting the public from problem lawyers.

The ABA considered a variety of information in adopting the ABE Resolution. One key source was the twelve-page report submitted by Mary Cranston, the chair of the ABA Commission on Women in the Profession.[62] The Cranston report incorporates other important sources of information, for example, Department of Defense (DOD) studies and reports.[63] Some of the information in the Cranston report was reflected in a different report submitted to the CCJ for its consideration in adopting Resolution 15.[64]

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57. *Id.* at 1.
58. *Id.*
59. *Id.*
60. *See Resolution 15*, *supra* note 14.
61. *Id.*
62. CRANSTON, *supra* note 22.
63. *See id.*
64. *See supra* note 40 (discussing the report before the PCB Committee when it was considering possible action concerning military dependents who are lawyers).

There was ample support for the CCJ's conclusion that military spouse lawyers face unique licensing problems because of "short-term, compulsory moves" and that "issues relating to knowledge of local law can be addressed through a mandatory educational component."[65] Stated differently, the CCJ decided that the traditional justification for requiring a written examination for lawyers, specifically to protect the public from unqualified lawyers—in effect, creating a territorial barrier to entry—was unnecessary for military spouse lawyers. A number of states have adopted Resolution 15's recommendations and admit military spouse lawyers on motion where examination is generally required for other lawyers.[66]

Resolution 15 promotes client and public welfare in several ways. First, Resolution 15 increases the supply of lawyers available to provide legal services. This increase in lawyer supply, albeit in small number, nevertheless is a plus for consumer choice and competition in any given market.

Military spouse lawyers also offer a special type of legal service because of their unique experiences and insights about military life.[67] This special quality may be attractive to military personnel, their families, and veterans. A significant percentage of these clients may be from low- or middle-income brackets and unable to obtain legal services. Thus, military spouse lawyers may promote access to justice for these economically challenged clients.

Resolution 15 also promotes the public's interest by protecting the public from unqualified lawyers by requiring those who waive in to attend a mandatory educational program that can address any deficiency in knowledge of local law.[68]

Resolution 15 also makes it easier for individual military spouse lawyers to realize a return on their significant investment of time and money in obtaining a law degree. In general, Resolution 15's benefits are important to consumers, the profession, and the courts.

B. Extending Resolution 15's Reach

Resolution 15's doctrinal change to eliminate admission by examination for military spouse lawyers is expressly tied to the "unique licensing . . . challenges" resulting from compulsory and frequent moves "in support of the nation's defense."[69] More important, the doctrinal change is premised

65. *Resolution 15*, *supra* note 14; *see also supra* note 40.

66. *See, e.g.*, ARIZ. SUP. CT. R. 38(i); IDAHO BAR COMM'N R. 229; ILL. SUP. CT. R. 719; RULES GOVERNING ADMISSION TO PRACTICE LAW N.C. R. 0503; S.D. SUP. CT. R. 13-10; TEX. OCC. CODE ANN. § 55.004 (West 2012).

67. CRANSTON, *supra* note 22, at 9.

68. *Resolution 15*, *supra* note 14.

69. *Id.* The ABE Resolution language is similar: "[To] accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense . . . ." AM. BAR ASS'N, *supra* note 14, at 1. State courts will occasionally exempt a certain class of lawyers from general bar requirements, for example, permitting unlicensed lawyers to practice law if it is on a pro bono and temporary basis. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 14 (2013); *infra* note 121 (discussing this trend).

on the belief that eliminating the examination requirement will not increase the risk of harm to the public from incompetent or unethical lawyers.[70]

Resolution 15's mandate should be extended to all lawyers to eliminate the need for a written examination for lawyers who cannot meet the "practice requirements" for admission by motion. This is especially true in an era of increased lawyer mobility and new technologies that make it possible for lawyers to relocate across state borders and still serve clients.

There are many lawyers, besides military spouse lawyers, who cannot meet the practice requirements for admission by motion. These lawyers are faced with the daunting prospect of taking an onerous written examination to relocate and hopefully to pursue their profession. A total of 90,973 lawyers graduated from ABA-accredited law schools over a two-year period from 2011 to 2013.[71] None of these graduates would meet the three-year practice requirement for admission by motion.

Like military spouse lawyers, some of these lawyers may feel compelled to move at the behest of their employer or to follow a spouse who moved at the request of an employer. More important, whether the lawyer is seeking to move to another state voluntarily or not should not be the deciding factor and overshadow the fact that the lawyer is still facing the same barriers and related costs to relocation as military spouses, principally, taking a bar examination.

The benefits of eliminating examinations for military spouse lawyers who move to another state also apply to nonmilitary spouse lawyers who move. Nonmilitary-related lawyers who move offer the prospect of increased competition in another state market, which theoretically should drive down the cost of legal services. Also, the lawyer who moves to another state increases consumer choice for legal services. This is especially true for lawyers who relocate because of their client-employer's request. The employer is able to retain its counsel of choice and still realize

70. The CCJ never expressly said military lawyer spouses deserve special treatment and were entitled to admission by motion even if it meant placing the public at increased risk of harm.

71. *See* AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ENROLLMENT AND DEGREES AWARDED 1963–2012 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf. For illustration purposes only, assume that for this two-year period, 70 percent of 90,973 or 63,681 graduates passed the bar exam and found full-time legal employment. The 63,681 lawyers would automatically fall short of the three-year practice requirement under the ABA model rule and many state rules for admission by motion. If 10 percent of these 63,681 lawyers—or 6,368—sought to move to another state, they would be facing the cost and time of taking and hopefully passing another two- to three-day examination. Of course, the illustration's numbers could be higher if you consider that many lawyers may not be able to find full-time employment, especially with today's difficult job market for law graduates. The illustration's numbers do not include additional lawyers who have practiced for more than three years but were then subsequently laid off from work and found only part-time legal work. Some of these lawyers may wish to move to a new state and resume full-time legal employment. They might have difficulty meeting the three years in practice requirement for admission by motion that would further add to the number of lawyers harmed by the examination requirement barrier.

the advantages of having him or her relocate. Some of these lawyers may possess experience and expertise—for example, an immigration lawyer who speaks Spanish—that may fill a consumer need for such services. Finally, like military spouse lawyers, nonmilitary spouse lawyers are able to realize a return on their investment in their legal education and contribute to society's well-being.

Resolution 15 may affect only a very small fraction of the total number of lawyers in the United States.[72] The significance of Resolution 15 lies not in the number of lawyers it affects but rather in its recognition that mandatory educational courses about local law sufficiently protect the public's interest against incompetent lawyers. It is a de facto recognition that written examinations that serve as territorial barriers to entry in the legal services market are unnecessary to protect the public's interest from unqualified or unethical lawyers. Resolution 15 expressly acknowledges that any perceived knowledge deficiency regarding local law and procedure can be remedied by a less restrictive alternative of requiring a mandatory education course.

States should follow Resolution 15's lead and open up the licensure process to admission by motion for all lawyers, assuming they meet other additional criteria like some of those identified in ABE—for example, not being the subject of a pending disciplinary matter. Opening the state markets to increased lawyer competition by admission by motion provides significant benefits to consumers and to the individual lawyers with little, if any, downside. Time will tell whether the CCJ's break with the examination tradition will lead to extending the same benefits to nonmilitary related lawyers but, at the end of the day, territorially based barriers are unnecessary.

II. SHEDDING THE "BARBARIANS AT THE GATE" SYNDROME: ALLOWING NONLAWYERS INTO THE CLUB

Even stronger than the territorial barriers that the legal profession has maintained are the monopolistic barriers it has constructed to defend itself against incursion by nonlawyers into the delivery of legal services. Now, however, a growing recognition of the lack of access to justice has led some in the profession to conceptualize and to implement plans to address the problem not just by permitting—but also by inviting—nonlawyers to the table.

72. Less than 1 percent of Americans serve in uniform. WHITE HOUSE, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT 1 (2011), *available at* http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf. It is estimated that 10 percent of civilian military spouses have advanced degrees, of which a law degree is one of many. *Id.* at 16.

A. The Great Need: Access to Justice

Some observers believe that the U.S. legal system is one of the best in the world.[73] Many Americans do not share that belief. They are financially locked out of the legal system—too poor to afford legal assistance for navigating the system. This lockout, often referred to as the nation's "access to justice crisis,"[74] is a generally accepted proposition. Many scholars and others have commented about the longstanding need to increase access to justice in the United States.[75]

Statistics underscore the enormity and ever-increasing gap between the need for, and the availability of, legal services.[76] More than 100 million people in the United States "are living with civil justice problems, many involving basic human needs" such as retaining housing, employment, and custody of children.[77] Many of these persons never seek assistance for their

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73. *See* TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 51 (2012), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS2012-APPENDICES.pdf [hereinafter REPORT TO CHIEF JUDGE].

74. The phrase "access to justice" may be defined in different ways. Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 78 n.13 (2013). This paper defines "access to justice" as "the ability of individuals, regardless of financial [circumstances], to access the resources necessary to participate meaningfully and equally in our system of civil justice. In our legal system, these resources necessarily include some legal knowledge and training." *Id*.

75. For a recent and helpful article discussing the nation's access to justice crisis, see Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205 (2014). Cooper's article highlights both the enormity and seriousness of the access to justice crisis quoting several sources. *E.g.*, Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*, 13 U. PA. J.L. & SOC. CHANGE 265, 265 (2010) ("[E]qual justice is not a reality for millions of Americans[,] . . . particularly . . . low-income Americans who do not have meaningful access to legal information, advice, assistance, or actual representation in court."). In *Access to Justice Without Lawyers*, Cooper examines three ways to increase access to justice, including the licensing of nonlawyers to provide legal services. *See generally* Cooper, *supra*. This Article builds upon *Access to Justice Without Lawyers* and other works to argue that the Washington Supreme Court's recent decision authorizing nonlawyers to deliver limited legal services represents a significant crack in the profession's monopoly over the delivery of legal services. *E.g.*, Holland, *supra* note 74; *see* DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004); *see also* Deborah L. Rhode, *Lawyers As Citizens*, 50 WM. & MARY L. REV. 1323 (2009). Chief Judge Jonathan Lippman of the New York Court of Appeals is a leading voice concerning access to justice who is not from the academy. *See* REPORT TO CHIEF JUDGE, *supra* note 73, at 51 ("[E]qual justice is fundamental to our society, and something . . . [that] differentiates our country from others . . . in the world[;] . . . access to justice is not a luxury in good times [but is] something that now more than ever, given what is going on in . . . our country is so necessary.").

76. *See* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 101–03 (reporting a recent "renaissance" of empirical and other "research investigating the delivery of legal services and public experience with civil justice," including a 2012 commitment by the Legal Services Corporation to use "robust assessment tools," as well as the American Bar Foundation's establishment in 2010 of an Access to Justice research initiative, and a 2010 Access to Justice Initiative by the Department of Justice; providing an excellent research agenda that includes "how current definitions and understandings of access to justice may blind policy makers to more radical, but potentially more effective, solutions").

77. REBECCA L. SANDEFUR, AM. BAR FOUND. & UNIV. OF ILLINOIS AT URBANA-CHAMPAIGN, CIVIL LEGAL NEEDS AND PUBLIC UNDERSTANDING 1 (n.d.), *available at*

problems from a lawyer or a court; one recent study reports only "14% of civil justice problems were taken to a court or hearing body."[78] Although only a modest 14 percent seek court access for assistance with their civil justice problems, it still creates a significant burden for the courts and system.[79] This is because an ever-increasing number of these cases that make it to court involve pro se litigants who present special challenges for lawyers and judges as they attempt to efficiently and justly resolve disputes.[80]

The legal assistance system in the United States is diverse and fragmented, the product of outputs of many public-private partnerships, most of them small scale.[81] States and communities differ in terms of resources available to fund legal services.[82] They also differ in terms of offering different services to different populations.[83] There is little coordination among the various service providers, making it difficult for the needy to contact the provider who can help.[84] The diversity and fragmentation creates large inequalities between states, and within them, over what legal services are available to which populations.[85] This further

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http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf; *see also* REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., ACCESS ACROSS AMERICA, at v (2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf (providing the first state-by-state portrait of available services to assist citizens to access civil justice).

78. SANDEFUR, *supra* note 77, at 1–2 (noting that most Americans do not consider taking their problems to lawyers or the courts as the most common reason for not seeking assistance, and that a study found that in Great Britain a significant percentage of persons sought legal assistance when they perceived their problem as legal, and not a social, moral, or private matter).

79. *See, e.g.*, Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 42 (2002); Vincent Morris, *Navigating Justice: Self-Help Resources, Access to Justice, and Whose Job Is It Anyway?*, 82 MISS. L.J. SUPRA 161, 165 (2013) ("The increasing number of unprepared self-represented litigants is causing a strain on court resources, resulting in congestion and delays within the court system.").

80. *See* Paula J. Frederick, *Learning To Live with Pro Se Opponents*, GPSOLO, Oct.–Nov. 2005, at 48, 50 (reporting that lawyers often complain about the "headaches" of dealing with pro se litigants); *see also* Morris, *supra* note 79. For example, pro se litigants, sometimes referred to as unrepresented litigants, are generally unfamiliar with the law and court rules. This may delay or prevent dispute resolution. *See* Benita Pearson, Judge, U.S. Dist. Court for the N. Dist. of Ohio, Panel Remarks at University of Akron School of Law Symposium: Navigating the Practice of Law in the Wake of Ethics 20/20: Globalization, New Technologies, and What It Means to be a Lawyer in These Uncertain Times (Apr. 5, 2013) (transcript on file with the author) (reporting a noticeable increase in the number of pro se cases and that this development presents challenges for the judge).

81. SANDEFUR, *supra* note 77, at 2; SANDEFUR & SMITH, *supra* note 77, at 9.

82. SANDEFUR, *supra* note 77, at 2; SANDEFUR & SMITH, *supra* note 77, at 2 (noting that the most recent survey, now twenty years old, "of low- and middle-income households in the U.S. found that about half of the households were experiencing at least one problem that had civil legal aspects . . . and [that] was potentially actionable under civil law").

83. SANDEFUR & SMITH, *supra* note 77, at 12.

84. *Id.* at 21.

85. *Id.* at 9.

complicates access to justice for many and places a premium on the location rather than the nature of the request for legal services.[86]

More than 80 percent of the legal needs of the poor[87] and 67 percent of the legal needs of middle-income Americans go unmet.[88] Traditional methods of providing access to justice for these people are inadequate given the magnitude of the need.[89] The vast need dwarfs the positive contributions of publicly funded legal aid and charitable-based organizations, pro bono efforts, and law school clinics—all of which are facing their own financial challenges in these difficult economic times.[90] New York Court of Appeals Chief Judge Jonathan Lippman recently described the cuts to funding for civil legal services at the national level as "devastat[ing]."[91] He further noted that support for legal services at the state level is also under stress. Funds from New York's Interest on Lawyer Trust Accounts (IOLTA) program that helps finance some legal services for the poor plummeted from $36 million to $6 million.[92] New York's experience is not unique; many states are experiencing decreases in IOLTA funds.[93]

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86. *Id.* (observing that "[i]n this context, geography is destiny:" physical location and not the problems or services needed by the population determines the available legal assistance).

87. Cooper, *supra* note 75, at 205; *see also* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 14–15 (2005), *available at* http://www.mlac.org/pdf/Documenting-the-Justice-Gap.pdf; AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 77 (1995) (reporting that between 70 and 80 percent of the poor's legal needs are unmet); Albiston & Sandefur, *supra* note 76, at 110 ("Studying access to justice by focusing only on the poor . . . limits our understanding of the relationship between legal services and inequality. In the United States, access to justice is often treated as an aspect of anti-poverty policy, which belies the fact that we know surprisingly little about inequalities in access to civil justice.").

88. RHODE, *supra* note 75, at 3; *see* Cooper, *supra* note 75, at 205–06; *see also* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2241 (1999) (asserting that "many moderate-income households" are unable to access the justice system). Although the poor may be the most significant group concerning the unmet need for legal services, other population groups are eligible for aid, including approximately 55 million elderly, 2.5 million American Indians, over 22 million veterans, over 600,000 homeless people, more than 36 million people with disabilities, and more than 1 million people with HIV/AIDS. SANDEFUR & SMITH, *supra* note 77, at 10.

89. Gillian K. Hadfield, *Summary of Testimony Before the Task Force To Expand Access to Civil Legal Services in New York*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG 1 (Oct. 1, 2012), http://richardzorza.files.wordpress.com/2012/10/hadfield-testimony-october-2012-final-2.pdf; *see* Cooper, *supra* note 75, at 205–09 (arguing that this scenario requires fundamental change in the way that the judiciary regulates the practice of law); *see also* Rhode, *supra* note 75, at 1330–31.

90. Hadfield, *supra* note 89; *see Cooper*, *supra* note 75, at 206.

91. REPORT TO CHIEF JUDGE, *supra* note 73, at 50; *see also infra* notes 94–98 and accompanying text (discussing national funding for civil legal services).

92. REPORT TO CHIEF JUDGE, *supra* note 73, at 50.

93. *See, e.g.*, Cliff Collins, *Leading the Way*, OR. ST. B. BULL., Dec. 2011, at 21, 22; Janet Eveleth, *Interest Rate Drop Hurts IOLTA*, MD. B. BULL. (Apr. 2009), http://www.msba.org/departments/commpubl/publications/bar_bult/2009/april/interestratedrops.asp; *IOLTA Grant Information*, IDAHO L. FOUND., http://www.isb.idaho.gov/ilf/iolta/grants.html (last visited Apr. 26, 2014); *see also* Morris, *supra* note 79, at 165 (predicting an

There is little prospect of a massive injection of governmental money to fund legal services for the poor.[94] The trend seems to be in the opposite direction. Congressional funding for legal aid from the Legal Services Corporation (LSC) in fiscal year 2012 was reduced again from a total of $348 million to under $341 million.[95]

Some argue that allocating additional money for legal services alone will not resolve the access to justice crisis. For example, in 2012, Professor Gillian Hadfield testified before New York's Task Force to Expand Access to Civil Legal Services in New York.[96] She emphasized that the kind of legal services that ordinary New Yorkers need cannot be addressed by merely increasing the expenditure of public funds.[97] She observed that the scale of the problem is too large—the legal services demand far outstrips both publicly funded and charitable supplies of lawyers' services.[98]

Instead, Hadfield argued that a fundamental restructuring of the delivery-of-legal-services market is necessary to allow nonlawyers to deliver certain lower-cost legal services.[99] Lawyers are too expensive for many low- and middle-income persons and the government cannot afford to subsidize enough lawyers to resolve the access to justice crisis.[100]

Opening the legal services market to nonlawyers may seem like a radical proposal. Hadfield points to nurse practitioners in the medical field as an example of how lower-cost service providers have helped narrow that industry's demand-supply gap.[101] Hadfield argues that the legal profession needs to find nonlawyers to deliver lower-cost legal services and notes that

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increase in unrepresented or pro se litigants because "federal funding . . . [IOLTA] grants, and state financial support continues to decrease for many free legal services and pro bono organizations").

94. The enormity of the kind of injection needed is highlighted by the fact that almost 57 million people were eligible for free legal services in 2009 according to a 2010 financial means test created by the federal Legal Services Corporation—the central funder of civil legal assistance in the United States. SANDEFUR & SMITH, *supra* note 77, at 10. Under the 2010 means test, a family of four making $27,641 or less would qualify for legal assistance. *Id.*

95. *LSC Funding*, LEGAL SERVS. CORP., http://www.lsc.gov/congress/lsc-funding (last visited Apr. 26, 2014). In 1974, Congress established the LSC to "fund . . . 134 independent nonprofit legal-aid programs in every state, the District of Columbia, and U.S. territories." Press Release, Legal Servs. Corp., Funding Cuts Expected To Result in Nearly 750 Fewer Staff Positions at LSC-funded Programs (Aug. 15, 2012), *available at* http://www.lsc.gov/media/press-releases/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc-funded (reporting that an LSC survey showed that "local legal aid programs expect to reduce staffing by nearly 750 employees in 2012, including 350 attorneys, because of funding cuts . . . represent[ing] a reduction of eight percent of full-time-equivalent (FTE) positions from the end of 2011"); *see* Morris, *supra* note 79, at 165 (citing the above LSC press release regarding staff reductions and contending that this "will likely continue [the] increase in the volume of self-represented litigation").

96. Hadfield, *supra* note 89, at 1.

97. *Id.*

98. *Id.* at 2–3.

99. *Id.*

100. *Id.*

101. *Id.* at 4.

Washington has already decided to do this and that other states are considering similar action.[102]

The ABA Task Force on the Future of Legal Education (Task Force) recently echoed the concerns of Hadfield and others that many low- and middle-income populations cannot afford to hire lawyers and embraced the idea of nonlawyers delivering legal services. The Task Force noted that there are rarely alternatives to obtaining legal assistance other than from fully trained lawyers who have passed the bar.[103] These populations will remain underserved because lawyers are unavailable to these clients unless the government or a private benefactor subsidizes their services—an unlikely prospect, especially in these difficult economic times.[104]

The ABA Task Force reported that the high cost of lawyers' services "has facilitated the use (or proposed use)" of nonlawyers "to deliver lower-cost legal services," including issuing limited licenses to deliver categories of legal services.[105] Moreover, the ABA Task Force recommended to state regulators of law practice to authorize nonlawyers to provide limited legal services, either by licensing systems or other mechanisms ensuring proper education, training, and oversight.[106] This recommendation reflects the new momentum for resolving the access to justice crisis by opening the legal services market to nonlawyers, especially in light of recent developments in Washington.

B. Washington's Limited License Legal Technicians Rule—Enhancing Consumer Welfare?

On June 15, 2012, a divided Washington Supreme Court issued a landmark order, the new APR 28.[107] For the first time in the nation's history, a state's high court opened the market for the delivery of legal services to nonlawyers—a new professional class of legal service providers

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102. *Id.* at 5–6.

103. AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., DRAFT REPORT AND RECOMMENDATIONS 3 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf. The primary focus of the ABA Task Force's draft report concerned the urgent problems confronting the U.S. legal education system and the diminished public confidence in the system. *Id.*

104. *Id.*; *see* REPORT TO CHIEF JUDGE, *supra* note 73, 56 (stating that "millions of New Yorkers today cannot meaningfully protect their rights because they *can't afford to hire an attorney*" and acknowledging that "two point three million mostly low income New Yorkers are unrepresented in civil proceedings . . . every year" (emphasis added)).

105. AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., *supra* note 103, at 12–13. The ABA Task Force acknowledged that the cost of a lawyer is unaffordable for many low- and some middle-income persons even though the supply of lawyers may exceed demand in some sectors of the economy. *Id.*

106. *Id.* at 30–31. The Task Force also recommended that they commit to establishing uniform national standards for admission to practice as a lawyer. *Id.* at 30.

107. The vote was six to three. *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-10005 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.

titled limited license law technicians.[108] LLLTs can open a professional practice giving some legal advice and assistance directly to clients without lawyer supervision—a radical paradigm shift because lawyer supervision is generally a prerequisite for nonlawyer legal services work. This judicially authorized incursion into the profession's monopoly over legal services, albeit in one state, is still very new and its impact is an open question.[109] APR 28, however, has attracted significant attention from other states[110] and scholars and it promises to be an important part of the ongoing dialogue addressing the access to justice problem.[111]

The Washington Supreme Court highlighted the state's "wide and ever-growing gap in necessary legal . . . services for low and moderate income persons."[112] In issuing APR 28, the court also described Washington's

108. Holland, *supra* note 74, at 91. The court also established an LLLT board to oversee the implementation of the LLLT program. WASH. ADMISSION TO PRACTICE R. 28(C); *see also* Kristen Kyle-Castelli, *Foreword, Poverty Access to Justice Symposium*, 82 MISS. L.J. SUPRA, at i, iii (2013) (describing APR 28 as "Washington's pioneering [LLLT] rule"). *See generally* Amy Yarbrough, *Limited-Practice License Idea Faces Challenging Path*, CAL. B.J. (May 2013), http://www.calbarjournal.com/May2013/TopHeadlines/TH1.aspx. In the late 1980s and early 1990s, the California Bar studied the idea of licensing legal technicians as did the American Bar Association in the mid-nineties. *Id.* The studies supported the idea but the licensure never occurred. *Id.*

109. *See* Yarbrough, *supra* note 108. Robert Hawley, deputy executive director of the California Bar, stressed that for years in the legal services marketplace, "the supply of lawyers has risen, the demand for legal services has risen and the cost of legal services has risen. '*Under the economic laws of supply and demand, this is not possible . . . . It can occur only in a monopoly* and perhaps it is time for lawyers to give up their monopoly on the practice of law.'" *Id.* (emphasis added).

110. In January 2013, California's State Bar Board of Trustees expressed an interest in a limited-practice law licensing program, with one trustee stating that many consumers cannot afford market rates for a lawyer's service. Laura Ernde, *State Bar To Look at Limited-Practice Licensing Program*, CAL. B.J. (Feb. 2013), http://www.calbarjournal.com/February2013/TopHeadlines/TH1.aspx. Assistant State Chief Trial Counsel Dane Dauphine reported that the state bar receives annually hundreds of complaints about the occurrence of UPL. *Id.* State Bar Executive Director Hawley noted that what constitutes the practice of law involves some difficult line drawing but "interpreting legal authorities and customizing them to fit a consumer's specific needs does invoke the practice of law, at least theoretically." *Id.* Another trustee urged his colleagues to examine Washington's LLLT program because many persons in California are forced to turn to unregulated nonlawyers to address the public's need for legal services. *Id.*; *see* Press Release, Laura Ernde, State Bar Group To Hold Public Meeting on Limited-Practice Licensing (Apr. 4, 2013), *available at* http://www.calbar.ca.gov/AboutUs/News/Archives/2013NewsReleases/201306.aspx (reporting that the Limited License Working Group, involving a number of trustees and California Bar President Patrick M. Kelly, will review similar programs in Washington and Canada as a way to increase access to affordable legal services and protect the public). At an April hearing of the California Bar's Limited License Working Group, Washington State Bar Executive Director Littlewood described the state's adoption of APR 28 as "a 10-year, pretty hard-fought battle" to permit nonlawyers to provide limited legal services to clients. *See* Yarbrough, *supra* note 108. Littlewood stated that "consumer protection is one of the 'highest ideals' of her state's program" and "cited figures indicating that eighty-five percent of indigent . . . families . . . are not being served anyway." *Id.* "The needs of the consuming public have never been 'one size fits all' . . . . There is so much work to go around. How can you take it away from people?'" *Id.*; *see also* Hadfield, *supra* note 89.

111. *See, e.g.*, Cooper, *supra* note 75; Holland, *supra* note 74.

112. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-10005 (stating that the 2003 Civil Legal Needs Study indicated

adversarial civil legal system as "complex [and] unaffordable," placing many pro se litigants at a disadvantage and "forcing [them] to seek help from unregulated, untrained, and unsupervised 'practitioners.'"[113] The court and advocates of APR 28 hope that LLLTs will narrow the gap between the public's ever-increasing need for legal assistance and available resources.[114]

The Washington Supreme Court also noted a particular need for legal assistance in the family relations area in part because it is governed by a myriad of statutes.[115] "[T]housands of unrepresented (pro se) individuals seek to resolve important" matters in court and are unable to obtain legal assistance "from an overtaxed, underfunded civil legal aid system."[116]

As a result, the court subsequently approved regulations that became effective September 3, 2013, authorizing domestic relations as the first practice area for LLLTs.[117] The regulations permit LLLTs, without the

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that 85 percent of indigent families' legal needs were not being served). APR 28 was first submitted by the Washington Supreme Court's Practice of Law Board in 2008 and revised in 2012 after many comments. *Id.* at 1. The majority of the Washington Supreme Court noted in its order that "the 2003 Civil Legal Needs Study documented moderate income people [too] (defined as families with incomes between 200% and 400% of the Federal Poverty Level)." *See* Telephone Interview with Steve Crossland, Chair of LLLT Board (Oct. 11, 2013).

113. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-10005. The Washington Supreme Court's description of its civil legal system is likely applicable to other states.

114. The ABA Task Force on the Future of Legal Education is one recent, albeit unexpected, advocate of the principle underlying Washington's decision to license nonlawyers. *See* AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., *supra* note 103, at 12–13 (reporting that "[t]he relatively high cost of the services of lawyers has facilitated the use (or proposed use) of persons who have not received a J.D. to deliver lower-cost legal services" and noting that changes are under way like in Washington with APR 28 to create "systems of limited licenses to deliver categories of legal service by persons who are not lawyers admitted to practice").

115. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-10005.

116. *Id.* The serious issues and enormous unmet need for legal assistance in the family relations field is a national problem. For a recent discussion highlighting the inability of legal aid to handle the increasing number of requests for legal assistance concerning family law matters in Cleveland, see Kari White et al., *Pro Se Divorce and Pro Se "Plus" Divorce Clinics—Helping Families Move On*, CLEVELAND METRO. B.J., July/Aug. 2013, at 6, 38. "Legal aid is unable to help many of the individuals who need assistance with divorce and other family law matters." *Id.* at 38. As a result, many low-income individuals go without legal assistance with potentially profound consequences, including forcing some to "remain married to their spouse for many years, unable to navigate the maze of court pleadings and courtroom procedures." *Id.* For some individuals, this means

> they cannot adequately prepare for the future, because surviving spouses have certain rights that cannot be defeated by a will. For others, it may mean that they are the presumptive parent of a child who is not their biological child—a legal presumption that carries with it a variety of additional obligations, including the obligation to support the minor child.

Id. The article emphasizes that "[t]he Domestic Relations Court urgently needs help in properly processing Pro Se divorce cases, which are on the upswing." *Id.* at 39.

117. In commenting on the need for help in the domestic relations area in its APR 28 order, the court further noted: "Legal practice [in family relations] must conform to specific statewide and local procedures [and involve] standard forms developed at both the statewide

supervision of lawyers, to "advise and assist clients (1) to initiate and respond to actions and (2) regarding motions, discovery, trial preparation, temporary and final orders, and modifications of orders" in domestic relations.[118]

The LLLT services permitted in the domestic relations area would generally constitute the practice of law in most states; this would be true for Washington too except for LLLT licensure.[119] Nonlawyers who provide legal "advice and assistance" without the supervision of a lawyer would be subject to prosecution under state UPL statutes.[120] UPL laws are designed to protect the public, the profession, and courts from incompetent or otherwise unscrupulous legal service providers. UPL laws are also seen by some as a construct for limiting competition from nonlawyers and unlicensed lawyers delivering legal services.[121]

Washington's LLLT program promises more affordable legal services. It also promises to protect consumers from harm. The Washington Supreme Court made the public's interest its lodestar in issuing APR 28. "[T]he basis of any regulatory scheme including our exercise of the exclusive authority to determine who can practice law . . . , must start and end with the public interest . . . ensur[ing] that those who provide legal and law related service have the education, knowledge, skills and abilities to do so."[122] Washington State Bar Executive Director Paula Littlewood similarly emphasized that protecting the public is one of the bar's "highest

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and local levels." *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-10005. The Washington Supreme Court approved domestic relations as the first LLLT practice area in March 2013. The LLLT board is currently receiving expressions of interest in the LLLT program since the domestic relations area rules became effective on September 3, 2013. *See* Interview with Steve Crossland, *supra* note 112.

118. WASH. ADMISSION TO PRACTICE R. 28 reg. app. 2:B2.

119. *See, e.g.*, Cleveland Metro. Bar Ass'n v. Davie, 977 N.E.2d 606, 612 (Ohio 2012) (holding that a paralegal who helped prepare litigation forms for child custody performed the unauthorized practice of law).

120. *See, e.g.*, *In re* Anderson, 79 B.R. 482, 485 (Bankr. S.D. Cal. 1987) (holding that a paralegal who gave advice to clients regarding bankruptcy matters engaged in the unauthorized practice of law); People v. Milner, 35 P.3d 670, 686 (Colo. 2001) (holding that a paralegal who met with a client at an initial interview without an attorney's oversight and advised the client to seek temporary custody of the client's children and not to discuss the children's welfare with social services engaged in unauthorized practice of law).

121. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 247–48 (1988) (arguing, in part, that the enforcement of UPL laws "prop[s] up legal fees" without promoting any other important public good). The public protection rationale for UPL laws is questionable. For example, in Missouri, there is a special rule that allows unlicensed lawyers to practice if their work qualifies as pro bono. If the UPL rationale is to protect the public from unqualified or at least locally unregulated lawyers, then why place pro bono clients—perhaps some of society's more vulnerable clients—in harm's way? One could argue that the Missouri UPL rule is really more about restricting competition from lawyers not licensed in Missouri for clients who can pay for legal services than protecting the public. Missouri's pro bono exception to its UPL rule places pro bono clients at risk of harm by permitting unlicensed Missouri lawyers to provide them with legal services. MO. SUP. CT. R. 8.105.

122. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-10005.

ideals" when discussing APR 28 before a California bar committee considering nonlawyer legal service providers.[123]

Washington's LLLT program appears to accomplish the state supreme court's goal of protecting the public, in part, by requiring significant educational and experiential qualifications. These requirements provide assurances to the judiciary and the public that LLLTs possess adequate educational and experiential skills for acting as fiduciaries and delivering legal services—essentially practicing law in a limited capacity.[124]

LLLT applicants must have an associate of arts (AA) degree.[125] They must also complete the LLLT core education requirement of forty-five credit hours in basic courses, such as contracts, civil procedure, and professional responsibility.[126] The core education requirement also includes eight credit hours of legal research and writing—important skills courses.[127] LLLT applicants can apply the forty-five credit hours of core LLLT courses towards earning their AA degree, generally a degree program that is two years or a total of sixty semester credit hours.[128] "This will make the LLLT education even more affordable."[129]

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123. *See* Yarbrough, *supra* note 108. Littlewood stated that "consumer protection is one of the 'highest ideals' of her state's program" and "cited figures indicating that 85 percent of indigent . . . families . . . are not being served anyway." *Id.*

124. Qualifications for taking the licensing application were amended on July 14, 2013. APR 28 requires applicants to be eighteen years old and to demonstrate good character and fitness to practice as an LLLT. One also needs the following: "an associate level degree . . . ;" forty-five credits of core education requirements in legal studies at an ABA-approved law school or ABA-approved paralegal program; practice area courses in each practice area the applicant wishes to be licensed; and "3,000 hours of substantive law-related work experience." WASH. ADMISSION TO PRACTICE R. 28.

125. *Id.*

126. The Washington curriculum regulations read as follows:

> A. Core Curriculum. An applicant for licensure shall have earned the following course credits at an ABA approved law school or ABA approved paralegal program:
>
> 1. Civil Procedure, minimum 8 credits;
> 2. Contracts, minimum 3 credits;
> 3. Interviewing and Investigation Techniques, minimum 3 credits;
> 4. Introduction to Law and Legal Process, minimum 3 credits;
> 5. Law Office Procedures and Technology, minimum 3 credits;
> 6. Legal Research, Writing and Analysis, minimum 8 credits; and
> 7. Professional Responsibility, minimum 3 credits.
>
> The core curriculum courses in which credit is earned shall satisfy the curricular requirements approved by the Board and published by the WSBA. If the required core curriculum courses completed by the applicant do not total 45 credits as required by APR 28D(3)(b), then the applicant may earn the remaining credits by taking legal or paralegal elective courses at an ABA approved law school or ABA approved paralegal program.

Id. R. 28 app. reg. 3(A).

127. *Id.*

128. *See, e.g.*, OHIO ADMIN. CODE § 3333-1-04(C)(6) (2010) (listing the standards for approval of associate degree programs and requiring a minimum of sixty semester credits). An LLLT applicant is not required to earn an AA degree before enrolling in LLLT courses; both can be accomplished simultaneously. For example, an applicant "may obtain an AA degree in paralegal studies which includes completion of the 45 [core] credits." *See* E-mail

In addition to satisfactory completion of the core, the LLLT applicant must complete the "practice area curriculum requirements."[130] In the domestic relations practice area, an applicant must take a total of fifteen credit hours of domestic relations, with five of those credits in basic domestic relations subjects and another "ten credit hours in advanced and Washington specific domestic relations subjects."[131] This intensive concentration in family law strongly suggests LLLT graduates are more knowledgeable about domestic relations than their law school counterparts, who may take one general family law course. In the law school curriculum, family law is typically a three–credit hour elective course.[132]

The LLLT board and Washington's three law schools are collaborating to provide the family law courses.[133] The family law courses will be offered by a law school faculty member and probably at a law school.[134] The courses will be available online at state community colleges and accessible from home.[135] The easy access for the courses is in line with what one LLLT board member described as a three-prong approach, or the "Three As": affordability, accessibility, and academic rigor.[136]

There should be a ready supply of recent community and baccalaureate college graduates who may find the LLLT career attractive, especially in these difficult economic times.[137] LLLTs acquire professional status and

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from Thea Jennings, Ltd. License Legal Technician Program Lead, Regulatory Servs. Dep't, Wash. State Bar Ass'n, to author (Dec. 3, 2013, 14:40 EST) (on file with author).

129. *See* E-mail from Thea Jennings, *supra* note 128.

130. WASH. ADMISSION TO PRACTICE R. 28 app. reg. 3(B).

131. The Washington regulations state:

> B. Practice Area Curriculum. An applicant for licensure in a defined practice area shall have completed the prescribed curriculum and earned course credits for that defined practice area, as set forth below and in APR 28D(3)(c). Each practice area curriculum course shall satisfy the curricular requirements approved by the Board and published by the WSBA.
>
> 1. Domestic Relations.
>
> a. Prerequisites: Prior to enrolling in the domestic relations practice area courses, applicants shall complete the following core courses: Civil Procedure; Interviewing and Investigation Techniques; Introduction to Law and Legal Process; Legal Research, Writing, and Analysis; and Professional Responsibility.
>
> b. Credit Requirements: Applicants shall complete five credit hours in basic domestic relations subjects and ten credit hours in advanced and Washington specific domestic relations subjects.

Id.

132. *See, e.g.*, *Family Law: Course Description*, NYU L., http://its.law.nyu.edu/courses/description.cfm?id=11325 (last visited Apr. 26, 2014).

133. *See* Interview with Steve Crossland, *supra* note 112.

134. *See id.*

135. *See id.*

136. *See id.*

137. The U.S. Department of Education reported that in 2010, 41.6 percent or 379,425 of the twenty-five- to thirty-four-year-olds in Washington held some kind of postsecondary degree (e.g., AA). It estimates that percentage will increase to 60 to 62 percent or between 655,000 and 676,000 by 2020. Press Release, U.S. Dep't of Educ., New State-by-State College Attainment Numbers Show Progress Toward 2020 Goal (July 12, 2012), *available at* http://www.ed.gov/news/press-releases/new-state-state-college-attainment-numbers-show-progress-toward-2020-goal; *cf.* Donna Gordon Blankinship, *Number of College Grads Drops*

the ability to earn a living, either independently, or as an employee of a private or governmental entity. For example, LLLTs might work for a social services agency or a law firm. Law firms may find LLLTs attractive hires because, unlike paralegals and legal assistants, LLLTs will be able to assume more complete and direct responsibility for certain aspects of client matters—for example, advising clients on the selection of forms and how to respond to interrogatories. This should free lawyers to focus on other important aspects of practicing law, such as directly negotiating contracts or settling claims with opposing parties and participating in hearings and trials.[138] One expert on Washington's LLLT rule noted that "[n]ot surprisingly, we have found that some forward-looking lawyers are considering how employing or working with LLLTs may fit into their business model."[139]

C. LLLTs: Some Concerns

Some critics of LLLTs fear that they may be more likely to harm the public by committing fraud or engaging in unethical conduct.[140] Like lawyers, there is no guarantee that LLLTs will avoid such offenses. However, LLLTs will be subject to an ethics code and a disciplinary regime that is modeled after the state's lawyer disciplinary system with presumably similar consequences for violating professional norms.[141] LLLTs are already subject to Washington's attorney-client evidentiary privilege and its lawyer fiduciary obligations.[142]

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in Washington, 14 Other States; Recession Blamed, SEATTLE TIMES (July 12, 2012, 9:30 PM), http://seattletimes.com/html/education/2018675041_collegedegrees13.html (reporting that the recession and state cuts in higher education dollars were partly to blame for the drop in the number of college degrees held by twenty-five- to thirty-five-year-olds but that Washington still ranked fifteenth in the nation for college attainment).

138. *See generally* Rachel Zahorsky & William D. Henderson, *Who's Eating Law Firm's Lunch?*, A.B.A. J., Oct. 2013, at 33, 33 (highlighting the need to deliver legal services in an efficient manner and discussing how legal services companies are more efficiently performing some legal services by, for example, "review[ing], manag[ing,] and analyz[ing] documents for large-scale litigation" than law firms).

139. *See* E-mail from Thea Jennings, Ltd. License Legal Technician Program Lead, Regulatory Servs. Dep't, Wash. State Bar Ass'n, to author (Dec. 10, 2013, 15:38 EST) (on file with author). The LLLT board recently considered possible business relationships for LLLTs while drafting LLLT Rules of Professional Conduct. The LLLT board concluded that LLLTs may not form business relationships with nonlawyers. For example, companies like Wal-Mart could not own and operate a chain of LLLTs. *See id.* However, at its November 2013 LLLT board meeting, the board approved joint ownership of firms with lawyers, provided that LLLTs (i) may not direct a lawyer's professional judgment, (ii) have direct supervisory authority over a lawyer, or (iii) possess a majority interest or exercise controlling managerial authority in a firm. *Id.* It is important to note that such an LLLT provision is subject to further review by the LLLT board or state bar association and would only become effective upon additional review and approval by the Washington Supreme Court. *Id.*

140. *See* Yarbrough, *supra* note 108.

141. *See* Interview with Steve Crossland, *supra* note 112 (stating that an LLLT board committee is working on an ethics code and determining which lawyer ethics rules are transferable to LLLTs).

142. *See* WASH. ADMISSION TO PRACTICE R. 28(K)(3); Holland, *supra* note 74, at 112.

Another concern regarding LLLTs involves their ability to earn sufficient income from their limited type of law practice. The fear expressed by some is that LLLTs may "not find the practice lucrative and that the cost of establishing and maintaining [an LLLT] practice . . . will require them to charge rates close to attorneys"—which ultimately would not increase access to justice.[143]

The legal services market should deter LLLTs from charging rates near or at the same amount as lawyers. When the rates become similar, consumers will presumably hire lawyers given their ability to provide a fuller range of legal services—for example, appearing before tribunals. The ability of lawyers to offer a wider array of legal services should keep LLLT fees significantly below lawyer rates.

Whether LLLTs can find the legal services market sufficiently lucrative to sustain their practice is an important and open question. There are reasons to believe that LLLTs can survive economically and still offer affordable legal services.

First, LLLT's may serve a broader population than just low- to middle-income persons. Even if that is not the case, the unmet need or potential demand for LLLT services is high. Washington State Bar Executive Director Littlewood cited "figures indicating that 85 percent of indigent . . . families . . . are not being served" and asserted that "'[t]he needs of the consuming public have never been 'one size fits all' . . . . There is so much work to go around. How can you take it away from people?'"[144]

Second, LLLTs probably will not have the high debt burden that afflicts many law graduates. An LLLT graduate at a minimum will have to fund forty-five core credits and another fifteen credits in a practice area curriculum specialty. All or some of these credits can be applied to the LLLT applicant's completion of the required two-year AA degree.[145]

In contrast, a law graduate will have at least invested approximately twice as much—and probably much more—time and money as an LLLT, attending both a four-year baccalaureate program and then three years of law school. The average law student today graduates with a $77,728 debt burden.[146] The prospect of LLLTs earning sufficient money in their practice is enhanced by virtue of not having to pay down a high education debt like many law graduates and other professionals.

Third, there is an important lesson to be learned from the growing number of legal vendors or services companies assisting large corporate clients or law firms, for example, in managing and reviewing their documents. "[T]echnology and law are the wave of the future."[147] The

143. *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-10005, slip op. at 8 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.

144. *See* Yarbrough, *supra* note 108.

145. *See, e.g.*, OHIO ADMIN. CODE § 3333-1-04 (2010).

146. *Statistics*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited Apr. 26, 2014).

147. Zahorsky & Henderson, *supra* note 138, at 35.

market is "developing even more concentrated engines of efficiency and scale."[148] Technology may provide—if it has not already—the means for LLLTs to realize economic success.[149]

There is another related issue about the economics of LLLT practice that concerns equal justice. Some observers fear that the creation of LLLTs creates a two-tier justice system. One tier would be for the poor who rely on the more affordable and limited services of LLLTs, which might be, or at least is perceived as, inferior. A second tier would be for more affluent persons who would rely on lawyers, a more educated and versatile group of legal services providers. Unlike LLLTs, lawyers can engage in direct negotiations with opposing parties and appear before adjudicatory bodies.

Professor Brooks Holland provides an excellent discussion of the equal justice concern.[150] He notes that the LLLT service is not inequitable simply because it offers a service at a better price.[151] He cites the medical profession and nurse practitioners as a poignant example of less costly service providers who have become a "more widely used, professionalized, and respected component of the health care market."[152] Holland ultimately concludes that even if the "competitive market vision" for LLLTs does materialize as its proponents hope, then a more pragmatic approach should govern the debate about "equal-justice concerns." "[M]ore exceeds less in the real world,"[153] and if the LLLT program results in something less than equal justice but instead "'adequate access to justice," then that is positive achievement.[154]

CONCLUSION

The assault continues on the profession's monopoly of the legal services market. Various market forces, including advances in technology making access to legal services more readily available to the public; pressure from corporate and other clients to lower the cost of legal services, cutting into lawyers' profit margins; global competition from lawyers and nonlawyers to provide legal assistance; and an oversupply of lawyers have compelled the profession to change its mode of doing business. As a result, the profession has already discarded, voluntarily or involuntarily, some of its

148. *Id.* (quoting Professor Oliver Goodenough of Vermont Law School). Goodenough further notes "that the traditional law firm 'is no longer the best game in town for delivering high-quality legal service through scaling and flexibility. Rather . . . new [technology] service companies'" provide this kind of service. *Id.*

149. *Id.* at 38 ("[A] technology-driven revolution is overturning how America practices law, runs its government and dispenses justice." (quoting Professor Goodenough)).

150. *See* Holland, *supra* note 74, at 118–27.

151. *Id.* at 124.

152. *Id.* at 125 (citing Jay S. Markowitz, Letter to the Editor, *I Am Your Nurse. Please Call Me 'Doctor*,*'* N.Y. TIMES, Oct. 5, 2011, at A26).

153. *Id.* at 128.

154. *Id.* (quoting Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 61 (2003)).

Byzantine rules of self-regulation crafted under the banner of protecting the public but more often serving the profession's self-interests.[155]

Resolution 15 and Washington's LLLT rule also represent significant changes for the profession in the delivery of legal services. They both enhance competition, but they will do so in different ways.

Resolution 15 promotes competition from within the bar by facilitating movement of lawyers from one territorial market to another. For now, such movement is limited to the dependents of service members, a relatively small percentage of the bar. This small number should nevertheless not overshadow the significance of their being free from geographical restraints to earn a livelihood and offer the public additional service providers. More important, the CCJ has officially recognized that it is still possible to protect the public and simultaneously strike down these barriers by requiring moving lawyers to acquire knowledge of local law through mandatory education programs.[156]

There is no reason why the same safeguard cannot work for other lawyers. Resolution 15's mandate to further lawyer mobility for military spouse lawyers should be extended to the entire bar, given the potential economic and other benefits to lawyers, their families, and the public.

Washington's LLLT rule promotes competition from professionals—nonlawyer technicians—who are outside the bar. For the first time, consumers have the opportunity to obtain legal assistance from nonlawyers free from lawyer supervision and related surcharges for such oversight. The nonlawyer service should cost less than retaining a lawyer for the same service. More important, it should open access to justice for many Americans.

Also, LLLTs may offer another benefit. Like Jeffersonian notions of democracy, having more persons participate in the economy and the legal system—in this case, LLLTs and hopefully some of those who previously have not accessed the justice system—is a good thing for the profession and society.[157]

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155. *See* WOLFRAM, *supra* note 1, at 776 (noting that the desire of some in the bar to control competition played a role in the profession's resistance to advertising).

156. Another important safeguard not expressly stated in Resolution 15 is to make certain that the moving lawyers are in good standing in the profession; for example, there are no pending disciplinary investigations. This important qualification may be subsumed in another provision of Resolution 15. It recognizes that "state bar admission authorities and state supreme courts remain responsible for making admission decisions and enforcing their own rules for admission . . . ." *Resolution 15*, *supra* note 14; *see also* Akron LawIT, *Miller Becker: Navigating the Practice of Law in the Wake of Ethics 20/20 2013*, YOUTUBE (Apr. 5, 2013), http://www.youtube.com/watch?v=2pf_MxxQdCM (predicting a regulatory system in the next fifty years that permits lawyers who are admitted in one state to practice in other states after notifying them and taking a preparatory course on local law).

157. LUBAN, *supra* note 121, at 251 ("[T]o deny someone [access and] equality before the law delegitimizes our form of government."); *see* Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 3–10 (2012) (reporting that some experts argue that corporate ownership of law firms, such as ownership by Wal-Mart, may result in a more efficient and affordable delivery of legal services, increasing access to legal

Both Resolution 15 and the LLLT rule are designed to promote consumer welfare by enhancing competition for and access to the delivery of legal services. Whether one or both will produce a net increase in consumer welfare remains an open question. As the Washington Supreme Court said, it has "[n]o . . . crystal ball" to predict the impact of APR 28.[158] The same might be said of Resolution 15. At the very least, however, both developments loosen the profession's monopolistic grip on the legal services market. They also both offer significant promise of enhancing competition in the delivery of legal services and overall consumer welfare.

representation, and identifying a First Amendment basis for corporations delivering legal services through ownership of law firms).

158. *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-10005, slip op. at 8 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.