Reimagining the Future of the Legal Profession

Essential Qualities of the Professional Lawyer

Paul A. Haskins, Editor

ABA Standing Committee on Professionalism
Center for Professional Responsibility
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Chapter 3

ALTERNATIVE LEGAL SERVICE PROVIDERS: FILLING THE JUSTICE GAP

PAULA LITTLEWOOD AND STEPHEN CROSSLAND

I. Introduction
More than a dozen years ago, the Washington Supreme Court acted upon a simple but profoundly important observation: lawyers were not filling a vast public need for legal services, nor was the legal services marketplace organized in a way that could meet all of that need. The state’s highest court reasoned that its higher obligation was to the interests of justice, not the interests of lawyers. The court persevered through bar opposition in a rule-making process that today has resulted in the nation’s first statewide program licensing a new category of legal service providers narrowly
tailored to make an impact on that unmet need. In doing so, Washington may be setting an example for the nation. Time will tell.

Washington’s limited license legal technician (LLLT) is the nation’s first in what may well turn out to be a series of new limited license professionals who will help serve clients and alleviate the growing justice gap, i.e., lack of access to legal services on the part of the consuming public. The LLLT breakthrough suggests a new regulatory paradigm—one in which the object is not simply to educate and regulate lawyers, but to educate for and regulate a legal services delivery market served by both conventional and new categories of providers.

The perception that the Washington state innovation is breaching a solid wall of lawyer domination over legal services is common, but illusory. The legal profession lost the monopoly on the delivery of legal services decades ago, when real estate agents, bankers, and others began eroding the traditional view that all legal work must be performed by a licensed attorney. More recently, legal services providers such as LegalZoom and Rocket Lawyer have constituted just one element of a picture illustrating that clients are leaving lawyers in large numbers. As the national service economy has evolved over the decades, with an ever-increasing focus on responding to consumer needs, the legal academy and regulators have stood pat, producing a one-size-fits-all practitioner—that is, the JD-lawyer. Yet the needs of the consuming public have never been one-size-fits-all. Perhaps it is time for lawyers to face the fact that the public needs more legal services, in both type and volume, than the legal profession is currently delivering. As this new picture of a legal services delivery market is painted, the profession has an opportunity to maintain control over much of regulated legal work, as long as it lets go of some parts.

One challenge for the profession today is to identify those portions of the practice of law that need to be regulated and licensed through the state supreme courts, and those portions that should be further deregulated, thus enabling other actors to deliver the legal information and services the consuming public needs. There are at least three latent markets that are severely underserved by the legal profession today: (1) low- and moderate-income clients who go without the representation they need in civil matters approximately 80 percent of the time (importantly,
moderate-income families are not the working poor; they are a family of four making $94,000); (2) middle-income clients, 50 percent of whom are estimated to go without the representation they need; and (3) those people who did not even realize they had a legal problem and sought assistance through nonlegal agencies or resources, as discussed in Rebecca Sandefur’s recent research.

Add to this mixture the looming shortage of lawyers coming in the next five to fifteen years due to Baby Boomers transitioning out of the profession in droves, along with a significant decline in law school applications and enrollment, and there is simply no question that a fundamental shift in the legal services delivery system is both necessary and inevitable—it will happen with or without the legal profession at the table.

The significance of the Washington Supreme Court’s action in passing Admission to Practice Rule 28 in June 2012—the rule authorizing licensure of LLLTs—is multifold: (1) the court has maintained control over aspects of the regulation of the practice it feels is necessary from a consumer services and consumer protection perspective; (2) the court stepped over the din of lawyer opposition and reminded us that as a self-regulated profession, our first obligation is to the public; and (3) overall, an environment of innovation in Washington state has been created.

II. Not Everyone Needs a Lawyer

A threshold challenge for many lawyers, if we are to find our place in and have a say over an integrated legal services marketplace, is “letting go” of the idea that only lawyers can competently provide any legal services to clients. The first step in letting go is accepting the reality that not all consumers need lawyers to help them deal with their “legal” problems. Thinking about legal services in terms of scope, or a continuum, begins to allow a visualization of legal services as being delivered by multiple providers, with different types and levels of skill, rather than exclusively by JD-trained lawyers. It is useful to note, by way of analogy, there was a time when only a doctor could draw a patient’s blood. Today that would be a rarity, as blood-drawing is the domain of nurses and various technicians.

In the same vein, legal services can be thought of in segments, or scopes, with only discrete portions truly requiring the training of a JD. Many
other types of legal services could be delivered, if permitted, through other licensed professionals, or others who are not licensed or regulated by the state supreme court.

Think of a pyramid: A member of the public enters the door at the base of the pyramid seeking legal services. This consumer then moves to the floor of the pyramid, where her legal needs will be met. Some consumers may only need information found in a website or publication, whereas someone with a complex legal issue may need a fully licensed attorney. In between these top and bottom “floors” are many options, including courthouse facilitators, limited practice officers, limited license legal technicians, and (as now found in some states other than Washington), navigators and document preparers. The pyramid metaphor helps

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Pyramid of Legal Service Providers

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us not only visualize matching consumers with appropriate types of providers, but also identify potential opportunities for additional provider types limited by scope of service, perhaps including both “licensed legal professionals” and “nonlegal professionals.” Making available a diversity of professionals and information fulfills the individual consumer’s legal needs in a more efficient and effective manner. Importantly, LLLTs will have a license to practice law from the state supreme court. In this respect, they are distinguishable from “nonlawyer” providers.

III. The Mechanics of the LLLT Program

The chief justice of the Washington Supreme Court, Barbara Madsen, calculated that in any given year more than 1.6 million residents of the state of Washington do not have access to the legal system, with the result that their legal needs are unmet.

In 2002, the court put in motion the exploration of “a proposed rule that would authorize nonlawyers to engage in certain defined activities that would otherwise constitute the practice of law as defined in GR 24.” The court at the time also adopted General Rules 24 and 25, with GR 24 defining the practice of law and GR 25 authorizing study of the development of nonlawyer legal service providers. The new rules were responses to rising concern over both lack of access to justice and rampant unauthorized practice of law (UPL). The court’s objective was to eliminate or greatly reduce UPL while potentially addressing the justice gap with a new category of trained, qualified, authorized, and regulated legal service providers.

The Washington Supreme Court, in adopting GR 25, was seeking a better way to serve and protect the public. Around the same time, the court commissioned a Civil Legal Needs Study, which verified the large unmet need for civil legal services as it established that more than 80 percent of the poor and moderate-income residents of Washington did not have their legal service needs met.

General Rule 25 created the Practice of Law Board (POLB). The court directed the POLB to receive complaints about instances of UPL, but also asked the POLB to propose a rule to establish a new legal service provider category. The POLB sought a model for such a rule and, finding
none, spent the following two years developing a proposed rule “from scratch.” The draft rule was first submitted to the Board of Governors of the Washington State Bar Association. The board opposed the rule by a vote of 13-1. Recognizing the opposition by the bar, the Washington Supreme Court then asked the POLB to consider a practice area where the proposed rule might apply.

The POLB considered four areas that were identified in the Civil Legal Needs Study as having high unmet need: family law, immigration, landlord-tenant, and elder law. After consulting with experts in these practice areas, the POLB recommended that the rule be first applied in the area of family law.

The modified rule was resubmitted to the Board of Governors, and again the board opposed it, this time by a vote of 12-2. Some of the criticisms of the proposed new limited license practitioners and a system to regulate them were:

- They would take work away from lawyers.
- They could not be trained to be competent.
- They would commit errors in attempting to deliver legal services.
- The necessary regulatory system would be too complex.

Notwithstanding the bar’s reservations, the Washington Supreme Court requested that the POLB forward the rule on for the court’s consideration. In June 2012, the court adopted Admission and Practice Rule 28 (APR 28) by a vote of 6-3. In drafting the order adopting APR 28, Chief Justice Madsen wrote: “We have a duty to ensure that the public can access affordable legal and law-related services, and that they are not left to fall prey to the perils of the unregulated marketplace.”

In its order, the supreme court established certain criteria for rule implementation:

As required by GR 25, the rule establishes certification requirements (age, experience, pro bono service, examination, etc.) and defines the specific types of activities that a limited license legal technician would be authorized to engage in, the circumstances under which
the limited license legal technician would be allowed to engage in authorized activities (office location, personal services required, contract for services with appropriate disclosures, prohibitions on serving individuals who require services beyond the scope of authority of the limited license legal technician to perform), a detailed list of prohibitions, and continuing certification and financial responsibility requirements.

APR 28 created the Limited License Legal Technician Board (LLLT Board). The LLLT Board consists of 13 members (four of whom are public members and one of whom must be a legal educator). Since the rule was designed to be applied to most any practice area where there is an unmet civil legal need, the first task was to recommend a practice area in which to apply the rule. The LLLT Board recommended the rule be applied to family law, and the Washington Supreme Court agreed in March 2013.

The process next called for the LLLT Board to define the limited authorized scope of LLLT practice in the area of family law. The subcommittee charged with this task invited family law practitioners to assist in the process. The practitioners were first asked to define the universe of family law. Then, working over several months, the subcommittee defined the scope within that universe wherein they felt LLLTs should be trained and regulated. Once the Washington Supreme Court approved the limited scope, the next task was to create admission standards, including an education program that would train LLLTs in a manner that would ensure their competence within their limited scope of practice.

Unexpectedly, a remarkable collaboration ensued within and between the community college system and among the three Washington state law schools. As the LLLT Board worked its way through the process of implementing the rule, three guiding principles emerged that helped direct development of the program—the “3 As”: “Accessible,” “Affordable,” and “Academically Rigorous.” With these guidelines in mind, a curriculum and education delivery system were developed.

The “core courses,” taught by the community colleges, provide the foundation for legal and law-related curriculum (legal writing, civil procedure, professional responsibility, and contracts, to name a few.) These classes fulfill
forty-five of the ninety credits needed for the associate-level degree required by the LLLT program. The “practice area” classes are taught through a collaboration among the law schools, with the classes being administered through the University of Washington School of Law. For family law, these classes are twin-taught over three quarters by a law school professor and an adjunct professor (a lawyer practicing in the area of family law) via live streaming two nights a week. The classes are all interactive and are accessible to students virtually anywhere. The cost for the education component, both the community college portion and the law school courses, is less than $15,000.

The next step in the process was to develop rules of professional conduct for LLLTs, keeping in mind that the overarching mission of the program is to “serve and protect the public.” Under those newly minted rules, LLLTs are held to the same standard of care, and rules of ethics and discipline, as fully licensed attorneys. This subcommittee literally took the Rules of Professional Conduct (RPC) for lawyers and adapted them to the LLLT program. Development of the LLLT RPC led to approved changes to the lawyer RPC so that both are consistent. One of the changes is that LLLTs and lawyers can be co-owners of a law firm, but there are limitations on that relationship to protect the ethical independence of the lawyer and prevent an LLLT from being a majority owner.

The final step in the process of defining admission standards was to create an examination that would fairly test the education that LLLTs receive, as well as ensure an understanding of the LLLTs’ scope of responsibility and ethical duties. Three exams are used in order to achieve this goal: (1) an exam on the core education, the Paralegal Core Competency Exam (PCCE), which is a national exam for paralegal certification; (2) an exam in each practice area in which an LLLT wants to be licensed, mirroring in form the Uniform Bar Exam with a multiple-choice portion, an essay portion, and a practical exam; and (3) an exam on ethics. Once passed, the core education and ethics exams do not have to be repeated when an LLLT seeks to be licensed in a new practice area. The initial practice-area exam and ethics exam are scheduled for spring 2015.

The LLLT Board will work through the process of developing a practice-area curriculum and exam each time it recommends an additional
practice area to the Washington Supreme Court. The board spent the fall of 2014 seeking input from constituents on areas of significant unmet need to help determine the next practice area for education and regulation.

In addition to the educational requirements, LLLTs must also complete a 3,000-hour practicum under the supervision of an attorney licensed in Washington. These hours can be completed prior to starting the education component, during the educational training, or after completion of the exams. This format allows the licensure pathway to be less time-consuming; in other words, if the LLLT had to first complete the education component and the various exams, then complete the 3,000-hour practicum, the time required for completion would be much longer. Working under the supervision of a lawyer during the educational segment also creates an enriched, hands-on learning environment.

The Washington Supreme Court was mindful, in authorizing training and licensure of LLLTs, that there was no precedent for its action and thus no real guidance to rely upon. Accordingly, the rule creating LLLTs was issued with an acknowledgment that a need to “tweak” it may well arise from time to time, codifying those lessons to be learned in the implementation process.

The LLLT Board has already identified aspects of the rule that may warrant modification—in particular, existing provisions in APR 28 that LLLTs shall not:

- represent a client in court;
- negotiate a client’s rights; or
- communicate with another regarding a client’s position.

Since the rule was adopted, the LLLT Board has come to believe that those restrictions may hinder the ability of LLLTs to adequately serve and protect the public. Importantly, the ability to represent the client in court or negotiate on his or her behalf would not, in the board’s view, expand the scope of the LLLT’s role. Rather, it would give the LLLT the needed tools to help the client through the scope of representation authorized.

It is assumed that LLLTs may choose from several different business models for serving the public and the profession. In light of the fact that they will have a Washington Supreme Court-issued license to practice law
in a limited fashion, they can be “sole practitioners” and have free-standing, independent businesses. Some law firms are already sending their para-legals to be licensed; other lawyers are discussing business models that include working with LLLTs. Significantly, LLLTs will bring clients to law firms that otherwise might not have sought the services of a lawyer. And since the regulations require that LLLTs refer clients to a lawyer when needed services exceed the limit of an LLLT’s licensed scope of work, joint ventures between LLLTs and lawyers make much sense. It is also possible that civil legal-aid providers and volunteer lawyer programs may employ LLLTs in order to stretch limited program dollars. For example, in Washington one of the current candidates for licensure in the spring of 2015 is considering opening her own business and contracting with a law firm, as well as with an agency providing volunteer legal services in her area. Both entities have reached out to her to explore opportunities.

IV. Conclusion

The justice gap that prompted creation of a new form of licensed legal service provider in the state of Washington is hardly limited to that state, or to that corner of the United States. Studies nationwide in scope have established beyond any question that lack of access to legal services is a national dilemma. Beyond crafting a creative partial solution to its own state’s legal services crisis, the Washington Supreme Court has blazed a path that other states may pursue or, at the very least, closely consider in formulating their own solutions to the justice gap. Those states that choose the same or similar solutions would benefit from the Washington experience by not having to reinvent the particulars of that solution.

For states pursuing this path, involvement and support by the highest court is critical. In Washington, the leadership of the state supreme court in establishing this program was indispensable, creating and driving the process from the outset. Another key has been an emphasis on consistently reminding detractors that the limited license practitioner is highly trained, qualified, and regulated. Many lawyers have convinced themselves, and the consuming public, that only a lawyer can provide legal services. Yet, through regulation and training of limited license legal technicians, consumers can
be given greater access to the services they need, with assurance that the provider is a competent and qualified legal professional.

**Sources/Reading**


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