

**AMERICAN BAR ASSOCIATION**

**CENTER FOR INNOVATION**

**STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES**

**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**STANDING COMMITTEE ON PROFESSIONAL REGULATION**

**STANDING COMMITTEE ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES**

**REPORT TO THE HOUSE OF DELEGATES**

**REVISED RESOLUTION**

1 RESOLVED, That the American Bar Association encourages U.S. jurisdictions to  
2 consider innovative approaches to the access to justice crisis in order to help the more  
3 than 80% of people below the poverty line and the many middle-income Americans who  
4 lack meaningful access to effective civil legal services.  
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6 FURTHER RESOLVED, That the American Bar Association encourages U.S.  
7 jurisdictions to consider regulatory innovations that have the potential to improve the  
8 accessibility, affordability, and quality of civil legal services, while also ensuring necessary  
9 and appropriate protections that best serve clients and the public, including the provision  
10 of legal counsel as a matter of right and at government expense for children facing  
11 essential civil legal matters and for low-income individuals in adversarial proceedings  
12 where basic human needs or a loss of physical liberty are at stake.  
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14 FURTHER RESOLVED, That the American Bar Association encourages U.S.  
15 jurisdictions to collect and assess data regarding regulatory innovations both before and  
16 after their adoption to ensure that changes are effective in increasing access to legal  
17 services and are in the interest of clients and the public.  
18

19 FURTHER RESOLVED, That nothing in this Resolution should be construed as  
20 recommending any changes to any of the ABA Model Rules of Professional Conduct,  
21 including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized  
22 practice of law, or any other subject.

## **REVISED REPORT**

### **I. Introduction**

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people with low incomes as well as many middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody and support, debt collection, eviction, and foreclosure.<sup>1</sup> Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.<sup>2</sup> Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs.<sup>3</sup> As a result of these and related problems, the United States ties for 99th out of 126 countries in terms of the accessibility and affordability of civil legal services.<sup>4</sup>

Even where legal aid support is available, lawyers often carry extraordinary caseloads in an effort to help as many individuals in need as possible. Moreover, legal services organizations often lack appropriate assistance from trained professionals, such as paralegals, social workers, and investigators. As a result, in 2017, Legal Services Corporation providers were only able to offer some form of legal assistance to 59% of the eligible problems for which low-income Americans sought help.<sup>5</sup>

For decades, the legal profession and the organized bar have tried to address these problems by calling for increased funding for civil legal aid, more pro bono work, and the recognition of a right to a lawyer for low-income individuals at government expense in certain matters involving essential civil legal needs (referred to, in the past, as civil *Gideon*). These efforts must continue and increase, as the crisis is only becoming more severe,<sup>6</sup> and the ABA's longstanding policies on the right to counsel should remain unchanged.<sup>7</sup> But even the most avid proponents of the right to counsel acknowledge that it is a long-term movement that will take decades to accomplish in its entirety. Thus, we need to find ways to supplement and expand existing efforts to address the public's unmet

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<sup>1</sup> LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6, 22 (2017) (prepared by NORC at the University of Chicago), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [hereinafter THE JUSTICE GAP REPORT]; DEBORAH L. RHODE, ACCESS TO JUSTICE 3, 79 (2004).

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

<sup>3</sup> See Jack Karp, *No Country for Old Lawyers: Rural U.S. Faces A Legal Desert*, LAW360 (Jan. 27, 2019, 8:02 PM), <https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert>.

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

<sup>5</sup> THE JUSTICE GAP REPORT, *supra* note 1, at 42 (2017).

<sup>6</sup> See, e.g., Anna E. Carpenter et al., *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 284 (2018) (noting "[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se").

<sup>7</sup> See, e.g., HOWARD H. DANA, JR., AM. BAR ASS'N, REPORT TO THE ABA HOUSE OF DELEGATES ON RESOLUTION 112A 2-3 (2006), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06\\_A112A.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06_A112A.authcheckdam.pdf).

civil legal needs.<sup>8</sup>

In recent years, a number of innovative ideas have emerged to address the pervasive problems that exist. Examples include the use of online dispute resolution,<sup>9</sup> the development of new tools and forms of assistance for pro se litigants,<sup>10</sup> the expansion of virtual court services,<sup>11</sup> the adoption of streamlined litigation processes,<sup>12</sup> the use of technology to facilitate pro bono work,<sup>13</sup> and the implementation of technology and innovation to help lawyers deliver their services more efficiently.<sup>14</sup>

In addition, U.S. jurisdictions, through their supreme courts and bars, are considering regulatory innovations. For example, regulators and bar associations in several states, including Arizona, California, Connecticut, Florida, the District of Columbia, New Mexico, Oregon, Utah, and Washington, are considering or have adopted substantial regulatory innovations.<sup>15</sup> In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise,

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<sup>8</sup> The word “public” is intended to refer to both clients and members of the public who do not currently receive assistance from a lawyer.

<sup>9</sup> See JOINT TECHNOLOGY COMMITTEE, CASE STUDIES IN ODR FOR COURTS: A VIEW FROM THE FRONT LINES 1 (2017),

<https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx>; RICHARD SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE (2019); Erika Rickard & Amber Ivey, *Can Technology Help Modernize the Nation’s Civil Courts?*, PEW (Mar. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/03/04/can-technology-help-modernize-the-nations-civil-courts>.

<sup>10</sup> See, e.g., COMM’N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS’N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 19 (2016), <https://www.srln.org/system/files/attachments/2016%20ABA%20Future%20of%20Legal%20Services%20-Report-Web.pdf>; Tyler Technologies, *Increased Access to Justice for All*, NAT’L ASS’N COUNTIES (Apr. 8, 2019), <https://www.naco.org/blog/increased-access-justice-all>.

<sup>11</sup> COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 10, at 19.

<sup>12</sup> *Id.* at 46.

<sup>13</sup> See, e.g., *Our Work*, PRO BONO NET, <https://www.probono.net/our-work/> (last visited Feb. 10, 2020); *What Is ABA Free Legal Answers?*, AM. BAR ASS’N FREE LEGAL ANSWERS, <https://abafreelegalanswers.org/> (last visited Feb. 10, 2020).

<sup>14</sup> See, e.g., Brooke Moore, *ABA TechReport 2019: Solo & Small Firm*, AM. BAR ASS’N: LAW TECH. TODAY (Dec. 4, 2019), <https://www.lawtechnologytoday.org/2019/12/techreport-2019-solo-small-firm/>; Press Release, Legal Servs. Corp., LSC Awards More Than \$4 Million in Technology Grants to Legal Aid Organizations, (Oct. 10, 2019), <https://www.lsc.gov/media-center/press-releases/2019/lsc-awards-more-4-million-technology-grants-legal-aid-organizations>.

<sup>15</sup> See, e.g., ARIZONA SUPREME COURT, TASK FORCE ON DELIVERY OF LEGAL SERVICES REPORT AND RECOMMENDATIONS 1-5 (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750>; THE UTAH WORK GROUP ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>; *Committee on Technologies Affecting the Practice of Law*, FLA. BAR, <https://www.floridabar.org/about/cmtes/cmte-me104/> (last visited Feb. 10, 2020); *Legal Innovation Regulatory Survey*, AM. BAR ASS’N CTR. FOR INNOVATION, <https://legalinnovationregulatorysurvey.info/> (last visited Feb. 10, 2020); Press Release, State of N.M. Supreme Court Admin. Office of the Courts, Supreme Court Work Group to Consider Non-Attorney Option for Providing Civil Legal Services in New Mexico (May 21, 2019), [https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71caea83/News\\_Release\\_Working\\_Group\\_to\\_Consider\\_Licensed\\_Legal\\_Technicians.pdf](https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71caea83/News_Release_Working_Group_to_Consider_Licensed_Legal_Technicians.pdf); *Task Force on Access Through Innovation of Legal Services*, ST. BAR CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services> (last visited Feb. 10, 2020).

rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public and clients.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with public protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA models rules, such as the Model Rules of Professional Conduct or other policies. The ABA should nevertheless play a leadership role by encouraging states to consider jurisdictionally tailored regulatory innovations that are consistent with public and client protection, collect and analyze relevant data both before and after the implementation of any innovations, and use the data to shape future reform efforts. Such state-based reviews should engage broad and diverse stakeholders, including bar associations and client communities.

## II. Data Should Be Collected and Analyzed

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

One example of such an effort is the recently launched *Unlocking Legal Regulation* project of the Institute for the Advancement of the American Legal System.<sup>16</sup> Among other initiatives, the project will “[a]ssess and support pilot projects for risk-based regulation in Utah and other states, including identifying metrics and conducting empirical research to evaluate outcomes.”<sup>17</sup>

## III. Conclusion

Justice Louis Brandeis once wrote that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>18</sup> The Resolution calls for precisely this kind of courageous experimentation.

Respectfully submitted,

Don Bivens  
Chair, Center for Innovation  
February 2020

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<sup>16</sup> *Unlocking Legal Regulation*, U. DENVER INST. FOR ADVANCEMENT OF AM. LEGAL SYS., <https://iaals.du.edu/projects/unlocking-legal-regulation> (last visited Feb. 10, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).