

ACCESS TO JUSTICE AND THE ROLE OF THE PRIVATE PRACTITIONER

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I. INTRODUCTION

This article addresses the role of private practitioners as part of a comprehensive strategy to promote meaningful access to justice. The backdrop to the conversation includes trends involving unmet legal needs, the legal services delivery system, the flood of unrepresented litigants in the courts, the available data on the impact of counsel on case outcomes, and the Access to Justice and Civil Right to Counsel Movements. The evolution of self-help and limited assistance programs, involving initiatives with the courts, collaborations with legal aid programs, and pro bono initiatives, have occurred against the backdrop of these trends. The use of full and limited representation of low- and moderate-income clients, under labels including “low bono” and “unbundling,” has increased as well. Private practitioners can and should play important roles in each of these components to form a comprehensive delivery system.

This article connects the threads of the conversation by urging a three-pronged approach to a coordinated, overarching access to justice strategy that includes: 1) lowering barriers to access and revising the roles of the key players in the court system; 2) increasing use of assistance programs short of full representation, but paired with evaluation measures to prioritize the programs that impact case outcomes; and 3) where lesser steps are insufficient and basic human needs are at stake, the provision of publicly-funded counsel. After illustrating the way in which the prongs are interrelated, the article returns to the question of where the opportunities for private practitioners’ assistance might lie. The coordinated access to justice strategy reveals opportunities and provides a guide to insure that, in their individual capacity and as leaders more generally, private practitioners contribute to meaningful, rather than mere, access to justice.

II. BACKDROP – THE JUSTICE GAP AND CONSEQUENCES

The backdrop for the access to justice conversation involves the interrelated factors of the high incidence of unmet legal needs among the poor and working poor, the shortage of publicly-funded legal services, the high

incidence of self-representation, and the consequences of appearing without counsel in court for many litigants.

1. Unmet Legal Needs. The vast majority of the legal needs of the poor and working poor are currently unmet.¹ Legal-needs studies consistently show that roughly eighty percent of the legal needs of the poor go unaddressed, a trend exacerbated by the recent recession.² Many unmet legal needs involve housing, family, and consumer issues.³ Kansas Legal Services (KLS) turns away two persons for every person it serves;⁴ and that figure does not even reflect the vast numbers of eligible persons who do not reach their intake system.⁵

2. Legal Services. Publicly-funded legal services have never been funded at a level to meet the demand, and have faced crippling cutbacks in recent years.⁶ Legal services offices represent only a fraction of eligible clients seeking assistance.⁷ The same funding crisis that has expanded the numbers of those needing help has decimated the ability of legal services offices to provide assistance.⁸ Due to cuts in funding, KLS has only 53 attorneys and paralegals,

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1. See, e.g., Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 34–36 (2013) [hereinafter “Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice”]; Kansas Legal Services, Inc., *Legal Needs Study 2011: Exploring the changing Legal Needs of Low Income Kansans* [hereinafter “Kansas Legal Needs Study 2011”], available at <http://www.nlada.org/DMS/Documents/1342811520.71/Kansas%20Legal%20Needs%20Study%202011.pdf>.

2. See generally LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 18 (2d ed. 2007) [hereinafter LEGAL SERVS. CORP., DOCUMENTING 2007], available at <http://lsc.gov/sites/default/files/LSC/images/justicegap.pdf>; LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (“The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.”).

3. LEGAL SERVS. CORP., DOCUMENTING 2007, *supra* note 2, at 11 n.12.

4. *Kansas Legal Needs Study 2011*, *supra* note 1, at 19.

5. “A significant finding of this survey is that over 50 percent of all consumer respondents were not aware of Kansas Legal Services before participating in the survey, and over 78 percent had not used KLS services.” *Id.* at 19.

6. *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1, at 34–36.

7. See Alan W. Houseman, *The Future of Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 43–46 (2007).

8. See LEGAL SERVS. CORP., DOCUMENTING 2009, *supra* note 2, at 5–8. Since the end of 2010, programs have lost “1,226 full-time legal services employees, a 13 percent reduction in staffing.” LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION STRATEGIC PLAN 2012–2016, at 2 (Draft June 2012), available at <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSCStrategicPlan-DRAFTforFedRegCommentsJune2012.PDF>.

twenty fewer than in 2011.⁹ Yet, according to 2010 research, 419,408 Kansans lived in poverty, or 14.7 percent of the population.¹⁰

3. Courts as a result face a flood of unrepresented litigants. Most tenants and debtors, many landlords, and most litigants in domestic relations cases appear without counsel.¹¹ Most family law cases involve at least one party without counsel, and often two.¹² Unrepresented litigants are disproportionately minorities and the poor.¹³ They often identify an inability to pay for a lawyer as the primary reason for appearing without counsel.¹⁴

4. Outcomes for many unrepresented litigants. The consequences of appearing without counsel are devastating. Studies repeatedly show that unrepresented tenants, debtors and litigants in domestic relations cases, as well as claimants in administrative proceedings, obtain far worse results than represented ones.¹⁵ The findings are complicated by recent randomized studies, designed to eliminate the possibility that representation might be tied to self-selection by lawyers or clients, potentially skewing the results.¹⁶ Despite the complications, the consistent conclusions across the reports are that a) representation is an important, but only one, variable impacting case outcomes and b) power, the lack of power, and power imbalances are crucial to the analysis.¹⁷ Beyond the fact of representation, variables that affect outcomes of cases include the quality of the representatives and their tactics,¹⁸ the individual decision-maker and features of the forum more generally,¹⁹ and

9. E-mail from Marilyn Harp, Exec. Dir. of Kansas Legal Services, Inc., to author (Jan. 23, 2015) (on file with author).

10. *Kansas Legal Needs Study 2011*, *supra* note 1, at 19. The figure translates to approximately 170,491 poor families in the state, with an average of 4.66 legal needs per household over a three-year period. *Id.*

11. *Id.* See also Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 41 (2010) [hereinafter “*Connecting Self-Representation to Civil Gideon*”] (“Most tenants, many landlords, and most debtors appear in court without counsel.”).

12. *Connecting Self-Representation to Civil Gideon*, *supra* note 11, at 41.

13. *Id.*

14. *Id.*

15. See generally *id.*

16. See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, 121 *YALE L.J.* 2118, 2178–96 (2012); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901 (2013) [hereinafter “*The Limits of Unbundled Legal Assistance*”].

17. See Russell Engler, *When Does Representation Matter?*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS*, (Estreicher & Radice ed.) (forthcoming) [hereinafter *When Does Representation Matter?*]; *Connecting Self-Representation to Civil Gideon*, *supra* note 11, at 73–81.

18. *When Does Representation Matter*, *supra* note 17 at 12–14; *Connecting Self-Representation to Civil Gideon*, *supra* note 11, at 79–81.

19. *When Does Representation Matter*, *supra* note 17 at 14–15; *Connecting Self-Representation to Civil Gideon*, *supra* note 11, at 76–78.

the substantive and procedural law at issue in a particular proceeding.²⁰ The characteristics of a litigant impacts not only how a litigant may fare absent assistance, but also how much, and what type of, assistance a litigant may need.²¹ The variables combine to underscore the crucial role of power and power imbalances in the legal system.²²

III. ACCESS TO JUSTICE - LIMITED ASSISTANCE AND SELF-HELP

The issue of unrepresented litigants increasingly gained attention in the 1990's and early 2000's.²³ Conferences of judges and state court administrators adopted resolutions calling for the courts to provide meaningful access to justice.²⁴ The number of state access to justice commissions has increased rapidly, rising from a total of three in 2000 to 38 by 2014.²⁵

The increased focus on access to justice has led to dramatic changes in and out of the courthouse among the judiciary, the private bar, and legal services organizations in an effort to expand access. Inside the courthouse, Access to Justice initiatives include a move toward simplification to reduce procedural barriers, the increased use of technology, and revising the roles of the key players, including judges, clerks and court-connected mediators.²⁶

Both inside and outside of the courthouse, Self-Help and Limited Assistance Programs have proliferated.²⁷ Those programs include self-help services, public legal education and information, advice from nonlawyers, and

20. See *When Does Representation Matter*, *supra* note 17, at 15–16; *Connecting Self-Representation to Civil Gideon*, *supra* note 11, at 75–76.

21. *When Does Representation Matter*, *supra* note 17, at 17–18.

22. *Connecting Self-Representation to Civil Gideon*, *supra* note 11, at 78–79.

23. See, e.g., Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice, *supra* note 1, at 36.

24. See NAT'L CONF. OF STATE COURT ADMINS., POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000), available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/selfreplitigation.ashx>; THE CONFERENCE OF CHIEF JUSTICES, RESOLUTION 23, LEADERSHIP TO PROMOTE EQUAL JUSTICE (2001), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01252001-Leadership-to-Promote-Equal-Justice.ashx>; THE CONFERENCE OF CHIEF JUSTICES, JOINT RESOLUTION 2 (2008), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07302008-In-Support-of-Efforts-to-Increase-Access-to-Justice.ashx> (“In support of Efforts to Increase Access to Justice, and citing with approval Joint Resolution 31, 2008, resolving that “courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status”).

25. See *Resource Center for Access to Justice*, AM. BAR. ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html.

26. See, e.g., Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 157 (2011) [hereinafter “*Access to Justice: The Emerging Consensus*”]; Richard Zorza, *Courts in the 21st Century: The Access to Justice Transformation*, 49 THE JUDGES' J. 14, 15–16 (2010); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 367–68 (2008) [hereinafter *Ethics in Transition*].

27. See, e.g., Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice, *supra* note 1, at 47.

advice and brief services by lawyers in various settings. The programs vary in terms of the services they provide (some provide legal advice and document preparation, and others limit their services to general information and assistance), and the personnel involved (including publicly funded lawyers, volunteers from the private sector, and an array nonlawyers, such as paralegals, law students, court personnel, community groups, and members of social services organizations). The assistance might be provided in person, either inside or outside the courthouse, over the telephone, via e-mail, or over the internet.²⁸

A. Ethical Issues

The innovations and trends toward increased access to justice implicate a package of familiar ethical issues in unfamiliar contexts, including the scope of representation, the measure of competent representation, the establishment of the lawyer-client relationship, the application of the conflict of interest rules, and the duty of candor.²⁹ Because the issues of unbundled legal services and ghostwriting, which often involve private practitioners, have captured the lion's share of the legal profession's attention, this section discusses those scenarios first before turning to the broader array of ethical issues involved with assistance short of full representation by counsel and self-representation.³⁰

1. Unbundling, Ghostwriting and Limited Assistance Programs Generally

As with other ethics issues, the rules related to unbundling vary from jurisdiction to jurisdiction. "Unbundled legal services is a practice in which the lawyer and client agree that the lawyer will provide some, but not all of the work involved in a traditional full service representation."³¹ The primary ethical issue beyond ghostwriting involves the scope of representation: to what

28. For a more detailed discussion of the variety of potential programs and ethical issues that flow from the varying structures, see Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance In Providing Access to Justice for Middle-Income Earners*, in MIDDLE INCOME ACCESS TO JUSTICE 145 (Michael J. Trebilcock et al. eds., 2012).

29. See, e.g., Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, 43 CLEARINGHOUSE REV. 377, 381–82 (Nov.-Dec. 2009).

30. See, e.g., *id.* at 378–81; Kansas Limited Representation Rule, Kansas District Court Rule 115A [hereinafter "Rule 115A"], available at http://www.kscourts.org/rules/New_Rules_and_Amendments/Rule%20115A%20updated/115A_Updated.pdf.

31. Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L. J. 1107, 1108 (2002). See also Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENVER U. L. REV. 825, 828 (2012) ("unbundling occurs when a licensed attorney provides a limited set of legal services, in a litigation matter, accompanied by the expectation that the client will proceed pro se on all other aspects of the matter"); AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 4 (2003) ("By 'limited scope legal assistance', we mean a designated service or services, rather than the full package of traditionally offered services. [footnote omitted]. The client and lawyer select the service the lawyer will provide [footnote omitted].").

extent do the ethical rules permit a lawyer-client relationship that delivers services short of full representation?³² Kansas' Limited Representation Rule responds to these concerns, allowing an attorney to "make a limited appearance on behalf of an otherwise unrepresented party."³³ The rule requires written consent, provides a mechanism for filing a notice of limited entry, provides restrictions on limited appearances, and provides a mechanism for withdrawal.³⁴

The controversy surrounding one unbundled task—ghostwriting—predates the move toward self-help. Ghostwriting involves a lawyer's preparation of pleadings or other court papers for a litigant who appears without counsel. This fact pattern challenges the unstated assumption in the ethics rules that litigants either are or are not represented by counsel. Decisions characterize ghostwriting as fraud and misrepresentation, arising from the appearance that the litigant is without counsel when a lawyer is pulling the strings.³⁵ The cases rarely allege specific harm from the alleged deception; that a litigant has received assistance is usually obvious from the court papers.³⁶ The Kansas Limited Representation Rule authorizes and regulates ghostwriting, allowing an attorney to "help a party prepare a pleading, motion, or other paper to be signed and filed in court by the client."³⁷

The broader array of assistance programs can raise each of the following ethical issues³⁸:

Lawyer-Client Relationship. Is a lawyer-client relationship created? Programs that offer information only, without advice, do so in part to make clear that no attorney-client relationship exists.³⁹ Of course, the line between information and advice is hard to recognize in practice.⁴⁰ The use of disclaimers and retainer forms is important, and the briefer the encounter the

32. See, e.g., Richard Zorza, *Discrete Task Representation, Ethics and the Big Picture*, 40 FAM. CT. REV. 19 (2002).

33. Rule 115A, *supra* note 30, at (b).

34. See *id.* at (a) and (b).

35. See, e.g., ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007), available at <http://bit.ly/PIR7p>; ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978) (discussing Rules 1.2(d), 3.3(b), 4.1(b) and 8.4(d) and their predecessors); *Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971) (discussing FED. R. CIV. P. 11).

36. Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L. J. 1145, 1147-78 (2002).

37. Rule 115A, *supra* note 30, at (c). The rule further provides that the paper should include a notation that the document was "prepared with assistance of a Kansas licensed attorney," but the attorney is not required to sign the paper and the filing of the document "does not constitute an appearance by the preparing attorney." *Id.*

38. Unless otherwise indicated, I refer in this section to the American Bar Association's Model Rules of Professional Conduct (MRPC), which are available at <http://bit.ly/7XDwe>.

39. See, e.g., Zorza, *supra* note 32, at 22.

40. See, e.g., John M. Greacen, "No Legal Advice from Court Personnel": What Does that Mean?, 34 JUDGES' J. 10 (Winter 1995).

less likely an attorney-client relationship is created. Case law analyzing the relationship starts from the client's perspective, so clarity is crucial.⁴¹

Scope of Representation and Competence. Lawyers may limit the scope of representation with the client's informed consent under Rule 1.2(c).⁴² While permission to limit the scope of representation does not alleviate the need to provide competent representation, the standard for competence relates to the extent of the assistance.⁴³ A Colorado Ethics Opinion on unbundling illustrates the interrelationship between the scope of representation and unbundling. "[A] lawyer may not so limit the scope of the lawyer's representation as to avoid the obligation to provide meaningful legal advice, nor the responsibility for the consequences of negligent action;" however, "the duty of competence of Rule 1.1 is circumscribed by the scope of the representation agreed to by Rule 1.2."⁴⁴

Confidentiality. While the measure of competence is affected by the scope of representation, the duty to preserve client confidentiality is not. The prohibitions, and exceptions, set forth in Rule 1.6 apply to both full and partial representation.⁴⁵

Candor. The duty of candor is embodied in provisions related to fraud, candor, and truthfulness.⁴⁶ The duty of candor also explains Rule 1.6(b)'s exceptions to the duty to preserve confidentiality.⁴⁷

Conflicts of Interest. Model Rule 6.5 was adopted to avoid the problems caused by applying traditional conflict of interest rules to limited assistance programs. The traditional rules, by creating the risk that an entire law office would be "conflicted out" in subsequent encounters with a client, placed an enormous burden on providers of high-volume assistance programs and diminished the pool of those willing to assist. Rule 6.5, not yet adopted in Kansas, responds to these concerns by modifying the conflict of interest rules for lawyers who provide limited legal services "under the auspices of a

41. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (holding that plaintiff was injured when defendant attorney advised her that she had no medical malpractice claim, despite attorney's claim that no attorney-client relationship was formed).

42. American Bar Association (ABA) Model Rule 1.2(c) authorizes lawyers to limit the scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." See MODEL RULES OF PROF'L CONDUCT R. 1.2(c), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. The American Bar Association's Ethics 2000 Commission proposed the rule modification discussed in this section. See *Ethics 2000 Commission*, AM. BAR ASS'N, available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html.

43. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2013).

44. Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998), available at http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_101_2011.pdf.

45. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

46. *Id.* R. 1.2(d), 3.3(b), 4.1(b), 8.4(d).

47. *Id.* R. 1.6.

program sponsored by a nonprofit organization or court.”⁴⁸ Under Rule 6.5, the conflict of interest rules only apply where the individual lawyers knows that the representation involves a conflict of interest, and the lawyer’s firm similarly is only disqualified if there is actual knowledge of the conflict.⁴⁹ The goal of the rule is to avoid having the limited nature of the representation under Rule 6.5 lead to a broader disqualification of the firm’s other clients.⁵⁰

Nonlawyers. When nonlawyers staff assistance programs, the ethics analysis depends on the tasks performed by the nonlawyers and the supervisory structure. Rules 5.3 and 5.5, regulating Responsibilities of Nonlawyer Assistants and Unauthorized Practice of Law, govern.⁵¹ If nonlawyers are not supervised by lawyers, the analysis turns on the tasks involved. By definition, the unauthorized practice of law prohibitions bar the practice of law. Since providing legal advice is a core component of the practice of law, the distinction often turns on the murky line between information and advice.⁵²

Law Students. Student practice rules frame the analysis where law students are involved. Outside the scope of the student practice rule, law students are lay advocates. Within the scope of the student practice rule, the rules that apply to lawyers apply to law students, establishing obligations for supervisors as well.

2. Challenges for lawyers opposing unrepresented litigants

A different ethical issue arises when lawyers deal with unrepresented adverse parties, which often occurs in the negotiation context in unmonitored settings.⁵³ The ethical rules do not speak directly to negotiations. Rule 4.1 (Truthfulness in Statements to Others) is the primary source of restrictions where negotiations are between lawyers; Rule 4.3 governs when adverse parties are unrepresented.⁵⁴ Rule 4.3 prohibits a lawyer from stating or

48. *Id.* R. 6.5(a). The Kansas Rules are available online at <http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys> [hereinafter “Kansas Rules”].

49. *Id.* R. 6.5(a).

50. *Id.* R. 6.5, cmt. [4].

51. MODEL RULES OF PROF’L CONDUCT R. 5.3, 5.5. Rule 5.5, Comment [2] illustrates the connection: “This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.” *Id.* R. 5.5 cmt. [2].

52. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2588 (1999) (identifying the three categories prohibited by unauthorized practice statutes: 1) representation of another in a court or administrative proceeding, 2) preparing legal instruments or documents that affect legal rights and responsibilities, and 3) advising another of the person’s legal rights and responsibilities). While unauthorized practice of law statutes, and cases interpreting them, often proscribe specific activities, exceptions to the statutes may include lay representation before certain local courts and state administrative agencies. *Id.*

53. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79 (1997) [hereinafter “*Out of Sight and Out of Line*”].

54. MODEL RULES OF PROF’L CONDUCT R. 4.3 (2013).

implying “that the lawyer is disinterested” and from giving “legal advice to a person who is not represented by a lawyer, other than the advice to secure counsel. . . .”⁵⁵ The analysis applies to interactions with all unrepresented persons, including witnesses, in adverse positions.⁵⁶

Lawyers must refrain from overreaching, misleading, pressuring, and threatening when negotiating with an unrepresented party.⁵⁷ Lawyers must avoid persuading an unrepresented litigant to adopt certain terms, making predictions about what will happen in court, and opining on the applicability of the law to the facts of the case beyond the exceptions articulated in the comment.⁵⁸ Available evidence suggests widespread noncompliance with Rule 4.3, particularly in the hallways of high volume courts.⁵⁹

3. Judges, Court-Connected Mediators & Clerks

Where access to justice issues involve the roles of judges, court-connected mediators, clerks and other personnel, assistance while remaining impartial and without providing legal advice is the subject of much analysis.⁶⁰ There is a trend toward increased emphasis at conferences and trainings on judges playing an active role in protecting the rights of litigants,⁶¹ the publication of materials to guide judges in actively assisting litigants while remaining neutral,⁶² and the issuance of protocols or guidelines to assist judges in the handling of their cases involving self-represented litigants.⁶³ Reflecting the trend toward acceptance of the more active judicial role, the ABA added a new

55. *Id.* The restoration of this language from the comment to the rule was part of a package of amendments to the model rules as recommended by the Ethics 2000 Commission. See *Ethics 2000 Commission*, *supra* note 42. Kansas has not amended its version of the Rule 4.3. Kansas Rules, *supra* note 48, at R. 4.3.

56. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2013).

57. *Out of Sight and Out of Line*, *supra* note 53.

58. *Id.* at 93–101. Permissible behavior includes negotiating the terms of a transaction or settling a dispute and informing the unrepresented person of the terms on which the lawyer's client will settle; the lawyer may prepare documents requiring the person's signature and explain the lawyer's own view of the meaning of the document or the underlying legal obligations. MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2.

59. See *Out of Sight and Out of Line*, *supra* note 53.

60. See *Ethics in Transition*, *supra* note 26.

61. *Id.* at 367–68.

62. The materials to which judges have access include a national bench guide and a curriculum, complete with PowerPoint slides, case scenarios, and videos. The National Bench Guide, SELF-REPRESENTED LITIG. NETWORK, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A NATIONAL BENCH GUIDE FOR JUDGES (2008), is available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/accessfair/id/250>. The Curriculum is available at <http://www.ncsc.org/microsites/access-to-justice/home/Curriculum.aspx>.

63. Minnesota, followed by Idaho, developed proposed protocols in the mid-1990s, focusing entirely on evidentiary hearings. Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J. (Winter 2003), at 18. Massachusetts promulgated more comprehensive guidelines a decade later covering all aspects of the proceedings. See *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants*, MASS. COURT SYS., <http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/jud-institute/jg-self-rep.html>.

comment to the Model Judicial Code allowing judges “to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”⁶⁴ As of 2014, twenty-seven jurisdictions have adopted either the exact wording of the ABA comment or a revised and expanded version.⁶⁵

B. Evaluation of Limited Assistance Programs

The evaluation of limited assistance programs has focused less on case outcomes and more on “customer satisfaction.”⁶⁶ The programs tend to be popular, but the extent to which they are sufficient is harder to assess without comparable data and data points.⁶⁷ While the dearth of reliable studies of assistance programs and case outcomes suggests the need for further research, the reports on the impact of representation provide important clues for the design of such programs: the greater the imbalance of power between the parties, extensive assistance more likely will be necessary to impact the case outcome.

IV. CIVIL RIGHT TO COUNSEL

The years after 2003, the fortieth anniversary of *Gideon v. Wainwright*,⁶⁸ saw a sharp increase in activity supporting a civil right to counsel.⁶⁹ Advocates pursued test cases⁷⁰ and legislative strategies,⁷¹ attempting to establish the right to counsel in various contexts. In 2006, the American Bar Association (ABA) unanimously adopted Resolution 112A, urging the provision of “legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody,” as determined by each jurisdiction.⁷² The adoption of ABA

64. MODEL CODE OF JUDICIAL CONDUCT § 2.2 (2007).

65. See Cynthia Gray, *Pro se litigants in the code of judicial conduct*, JUDICIAL CONDUCT REPORTER, no. 3, 2014, at 1, available at <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics.aspx>, and on file with author. For a comparison of state variations to the Model Judicial Code, see A.B.A. Ctr. for Prof'l Responsibility, *Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html (last visited Jan. 5, 2013).

66. *Connecting Self-Representation to Civil Gideon*, supra note 11, at 3.

67. See *id.* at 66–73; *The Limits of Unbundled Legal Assistance*, supra note 16.

68. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

69. See, e.g., *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, supra note 1, at 36–37.

70. See, e.g., *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003); *King v. King*, 174 P.3d 659 (Wash. 2007) (en banc).

71. See, e.g., Laura K. Abel & Max Rettig, *State Statutes Providing for Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006), available at http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf; Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132–33 (2009).

72. AM. BAR ASS'N, RESOLUTION 112A (2006), available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc>.

Resolution 112A spurred activity often coordinated with, and bolstered by, the work of state access to justice commissions.⁷³

The more frequent litigation activity has been in the state courts in the aftermath of *Lassiter v. Department of Social Services*.⁷⁴ *Lassiter* held that, as a matter of federal constitutional law, due process did not require a categorical right to counsel where termination of parental rights is involved.⁷⁵ In 2006, Clare Pastore summarized litigation post-*Lassiter*, citing close to one hundred cases in the article.⁷⁶ Beyond litigation, legislative and administrative initiatives provide an alternative strategy to pursue an expanded civil right to counsel.⁷⁷ A third strategy to expand the civil right to counsel and promote increased access to justice involves the growing use of pilot projects and experimentation, often paired with data collection and empirical work.⁷⁸

Thirty years after *Lassiter*, the United States Supreme Court's decision in *Turner v. Rogers*⁷⁹ created a stir in the civil-right-to-counsel and access-to-justice communities. A unanimous Court ruled that there was no categorical right to counsel under the Due Process Clause in a civil contempt case based on failure to pay child support, even where the contemnor faced incarceration. The majority nonetheless found that South Carolina's procedures violated due process. The Court reached this result after considering not only the rights at stake in the proceeding, but potential drawbacks from the appointment of counsel, and steps short of creation of a categorical right to counsel that might sufficiently protect against an erroneous deprivation of liberty. The Court identified "procedural safeguards" that, when taken together, might provide the necessary protection for a defendant in a civil contempt case for failure to pay child support.⁸⁰ Because Mr. Turner was not appointed counsel and the South Carolina procedures failed to provide necessary procedural safeguards, the Court held that Turner's incarceration violated due process.⁸¹ Since the Court declined to find a categorical right to counsel, but nonetheless found that South

73. Chief Judge of the State of New York Jonathan Lippmann issued one call for an expanded civil right to counsel in a speech to the Central Synagogue of New York on February 5, 2010. Jonathan Lippmann, C.J. N.Y., Address at Central Synagogue of New York: "Justice, Justice Shall You Pursue:" The Chief Judge's Perspective on Justice and Jewish Values (Feb. 5, 2010) (on file with author). The Maryland Access to Justice Commission also called for creation of a civil right to counsel., *Implementing a Civil Right to Counsel in Maryland*, MD. ACCESS TO JUSTICE COMM'N (2011), available at http://www.mdcourts.gov/mdatjc/pdfs/implementinga_civilrighttocounselinmd2011.pdf.

74. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981).

75. *Id.*

76. Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 186 (2006).

77. See, e.g., *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1, at 48–49.

78. *Id.* at 49–50.

79. *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

80. *Id.* at 2519.

81. *Id.*

Carolina's procedures violated the constitution, *Turner v. Rogers* is generally analyzed as a Civil Right to Counsel loss and an Access to Justice win.⁸²

V. SYNTHESIS: A COMPREHENSIVE ACCESS TO JUSTICE STRATEGY

While Access to Justice and Civil Right to Counsel initiatives can at times be viewed as in conflict with one another, they can most effectively be understood as components of a comprehensive Access to Justice strategy, involving a three-pronged approach. Prong 1: Lowering barriers to access in the courts and revising the roles of key players in the court system, so they provide the key assistance to litigants they are permitted to provide. Prong 2: Increasing use of, and experimentation with, forms of assistance programs short of full representation, paired with evaluation to measure which innovations impact case outcomes and which instead achieve other goals, such as reducing headaches for the courts or otherwise making cases proceed more quickly or smoothly. Prong 3: Where lesser steps are insufficient, and the interests at stake involve basic needs, provision of counsel for representation⁸³

A. *Prong 1: Lowering barriers to access in the courts and revising the roles of key players in the court system.*

Prong 1 involves expansion of the roles of the court system's key players, such as judges, court-connected mediators, and clerks, to require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights.⁸⁴ These individuals must play an active role to maintain the system's impartiality and ensure that unrepresented litigants do not forfeit rights due to the absence of counsel. At the same time, the court must take steps to simplify procedures, provide assistance to litigants in various forms, more effectively utilize technology, and reduce barriers to meaningful participation that currently impede those without counsel.

B. *Prong 2: Increasing use of, and experimentation with, forms of assistance programs short of full representation, paired with evaluation*

Prong 2 encourages the increased use of a variety of assistance programs, but requires that the programs be rigorously evaluated to identify which most effectively protect litigants from the forfeiture of rights.⁸⁵ This prong covers assistance programs beyond the work of court personnel and short of full representation by counsel, including hotlines, technological assistance, clinics, pro se clerks' offices, "Lawyer of the Day" programs, and self-help centers,

82. See generally *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1.

83. See, e.g., Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006) [hereinafter *Towards a Context-Based Civil Gideon*].

84. *Id.* at 198–200.

85. *Id.* at 200–01.

discussed above.⁸⁶ These programs are an important component in the strategy to increase access to justice. Yet, a comprehensive access-to-justice strategy requires evaluation of the programs to identify which programs help stem the forfeiture of rights and which only help the courts run more smoothly, without affecting case outcomes. Programs not affecting case outcomes may be worthwhile, but they are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

C. Prong 3: Where lesser steps are insufficient, and the interests at stake involve basic needs, provision of counsel for representation

Prong 3 calls for the adoption of a civil right to counsel where the expansion of the roles of the key players and the assistance programs do not provide the necessary help to vulnerable litigants.⁸⁷ When revising the roles of judges, mediators, and clerks and using assistance programs short of full representation are insufficient, a denial of access and routine forfeiture of rights are unacceptable outcomes, and a civil right to counsel must be established, at least where basic human needs are at stake.⁸⁸

How extensive the right to counsel must be depends on the effectiveness of prongs 1 and 2. The more the courts succeed in lowering barriers to access and the more the innovations at prong 2 truly stem the forfeiture of rights due to the absence of counsel, the less extensive the right to counsel must be. Where courts resist the needed innovations and the assistance programs fail to impact substantive as opposed to process, the more extensive the right to counsel must be.

VI. ACCESS TO JUSTICE AND THE ROLE OF PRIVATE PRACTITIONERS

The three prongs of a coordinated access to justice system reveal the opportunities for important roles for individual private practitioners at every juncture, not only with respect to their handling of individual cases, but in their leadership role as well.

A. Roles for Individual Private Practitioners

Private practitioners can help increase access to justice not only for the poor, but the near poor and many middle-income litigants who cannot afford counsel. While Prong 1 focuses on the courts themselves, and the changes that should occur within the court system, court-based initiatives such as self-help centers often depend on volunteers in order to staff the programs. Moreover, leadership from the private sector can be important in the establishment of the programs in the first-place. In Massachusetts, for example, a private attorney

86. See Part III, *supra* notes 27–28 and accompanying text.

87. *Towards a Context-Based Civil Gideon*, *supra* note 83 at 201–02.

88. The 2006 ABA Resolution is an important starting point. See *supra* note 72 and accompanying text.

played an important leadership role in the creation of the initial court service centers.⁸⁹ Private attorneys also will play a crucial role in the ethics changes needed to allow judges, court-connected mediators, and clerks provide needed levels of assistance to those without counsel. Private attorneys will play a role both in the adoption of new ethics rules and in the educational efforts necessary so that the private bar will embrace, rather than resist the changes.

Prong 2 covers the array of initiatives between those handled entirely by the court in Prong 1, and full representation by counsel at Prong 3. Each of the mechanisms that provides limited assistance, such as hotlines, pro se clinics, and lawyer-for-the-day programs depend on the participation by private lawyers. For example, KLS offers hotlines that focus on elders and veterans, in which the participation of private attorneys is crucial.⁹⁰ KLS programs funded by Interest on Lawyers Accounts (IOLTA) monies offer pro se clinics and form preparation and also involve private practitioners.⁹¹

With the advent of unbundling and limited representation, private practitioners can include in their fee-generating practices the limited representation of clients. Richard Zorza lists unbundling (along with pro bono work) as the primary contributions from the private bar to what he calls the “the emerging consensus” on access to justice, involving the courts, the private bar and legal aid.⁹² Kansas Rule 115A specifically authorizes this approach, and removes many of the questions that might have inhibited limited representation in the absence of the rule.⁹³ As with the ethical issues involved at Prong 1, the array of ethical issues presented by limited assistance programs, and the challenges for all involved with growing numbers of unrepresented litigants,⁹⁴ require private practitioners to take the lead in the adoption and promulgation of new ethical rules, or interpretations of existing ones, to facilitate increased access.

At Prong 3, involving full representation, private practitioners are crucial in their representation of low and moderate income clients both on a pro bono and fee-generating basis. The Legal Services Corporation has issued multiple reports as to the importance of increased pro bono services to help meet the Justice Gap,⁹⁵ and includes in its requirements for recipient programs that a

89. See *Court Service Centers Open in Boston, Greenfield*, MASS. ACCESS TO JUSTICE COMM’N (Sept. 24, 2014), <http://www.mass2j.org/a2jwp/?p=443>.

90. See, e.g., KAN. LEGAL SERVS., INC., 2013 ANNUAL REPORT, at 5, available at http://www.kansaslegalservices.org/sites/kansaslegalservices.org/files/2013%20Kansas%20Legal%20Services%20Annual%20Report_0.pdf.

91. *Id.*

92. See *Access to Justice: The Emerging Consensus*, *supra* note 26, at 5–6.

93. See Rule 115A, *supra* note 30.

94. See Part III, *supra*.

95. See, e.g., LEGAL SERVS. CORP., *Report of the Pro Bono Task Force* (Oct. 2012), available at <http://lsc.gov/media/reports/report-pro-bono-task-force>; LEGAL SERVS. CORP., *Help Close the Justice Gap, Unleash the Power of Pro Bono* (2007), available at http://lsc.gov/sites/default/files/LRI/LSC_2007_Action_Plan_for_PAI.pdf.

percentage of the funds go to Private Attorney Involvement (PAI).⁹⁶ KLS, for example, runs both pro bono and reduced fee panels, dependent on the participation of private practitioners,⁹⁷ and more generally has developed a Private Attorney Involvement Plan.⁹⁸

Beyond pro bono and reduced fee cases, attention increasingly is being focused on the ability of private practitioners to develop, as part of their private practices, so-called “low bono” work, in which the representation produces income for the lawyers while at the same time providing representation to clients who would otherwise fall in the justice gap. The ABA’s recent publication, *Reinventing the Practice of Law: Emerging Models to Enhance Affordable Legal Services*,⁹⁹ includes an array of practice opportunities along these lines. In one model, the lawyers have built their practice entirely on fee-shifting cases, so that the clients they serve are not charged a fee, but the lawyers nonetheless recover their fees at the end of successful litigation.¹⁰⁰

The reality that the practice of law is changing, and lawyers must graduate from law school with the experience and skills necessary to allow them to represent clients in the areas most crucial to the justice gap, implicates legal education and the bar examination. It is for this reason that Massachusetts became the first state in the country to add the topic of Access to Justice to the Bar Examination. The background memorandum in support of the change lays out the reasoning that connects the threads of lawyers ill-prepared to take on cases in which low- and moderate-income desperately need representation, the apparent failure of many law schools to insure that their students receive relevant experiences in this area, and the possible role the Bar Examination can play in ameliorating the situation.¹⁰¹

Even the portion of Prong 3 that focuses on an expanded civil right to counsel can involve private lawyers. San Francisco, for example, has declared itself to be the first “right to counsel” city, striving to ensure representation and assistance to all tenants facing eviction. The lawyers are not funded by public

96. See, e.g., LSC’s latest rulemaking in the PAI area, with notice and comments designed to increase pro bono services, 45 C.F.R. §§ 1614.1–1614.10 (2014).

97. KAN. LEGAL SERVS., INC., 2013 ANNUAL REPORT, *supra* note 90, at 5.

98. See KAN. LEGAL SERVS., INC., 2015 PRIVATE ATTORNEY INVOLVEMENT PLAN, available at <http://www.kansaslegalservices.org/sites/kansaslegalservices.org/files/2015%20Private%20attorney%20involvement%20plan..11-6-14.pdf>.

99. See *Reinventing the Practice of Law: Emerging Models to Enhance Affordable Legal Services*, ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES (Herrera ed., 2014).

100. See Singen et al., *Dollars and Sense: Fee Shifting*, in ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES 87–110 (Herrera ed., 2014).

101. See Memorandum of the MA Access to Justice Commission supporting the addition of the topic of “Access to Justice” to the Massachusetts Bar Examination, available at <http://www.massaccessjustice.org/resources/amendment-bbe-rules-proposal.pdf>; *The Massachusetts Bar Examination and Access to Justice*, MASS. ACCESS TO JUSTICE, available at <http://www.massaccessjustice.org/resources/amendment-bbe-rules-brief-description.pdf> (providing definition of Access to Justice).

monies. Rather, the only money involved is for the administration of the program, and representation is provided by pro bono lawyers.¹⁰²

A. Leadership Roles for the Private Bar

The recitation of the roles available to private practitioners understates the importance of the private bar in general in the struggle to provide meaningful access to justice. Chief Judge Lippmann of New York contends persuasively that the judiciary must lead on access to justice issues.¹⁰³ Yet, the judiciary cannot act alone, and will lead more effectively when joined by the private bar. In Massachusetts, for example, the co-chairs of the two most recent iterations of the Access to Justice Commission have been a sitting justice of the state's highest court and a leader of the private bar.¹⁰⁴ It was a leader of the private bar in Massachusetts who dedicated his term as President of the Boston Bar Association to creating and supporting a task force to identify strategies to expand a civil right to counsel in Massachusetts.¹⁰⁵ A different private lawyer dedicated his efforts to creating a blue ribbon task force, and enlisting consultants, to make the case for expanded legal services not simply based on the justness of the work but by demonstrating the dramatic cost savings to the state that would result from each dollar expended on legal aid.¹⁰⁶ Across the county, the private bar is crucial both in raising money for legal services so that offices may reach more clients and providing leadership by serving on the boards of directors of the legal services organizations.¹⁰⁷

102. See SAN FRANCISCO RIGHT TO COUNSEL PILOT PROGRAM DOCUMENTATION REPORT, JOHN AND TERRY LEVIN CENTER FOR PUBLIC INTEREST AND PUBLIC SERVICE, STANFORD LAW SCHOOL (2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/341183/doc/slspublic/SF%20RTCC%20Documentation%20Report.pdf>.

103. Hon. Jonathan Lippman, *The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569 (2014).

104. The membership and leadership of the commission is available on the Commission's website: MASS. ACCESS TO JUSTICE COMM'N, http://www.massaj.org/a2jwp/?page_id=30 (last visited Mar. 15, 2015).

105. See Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, BOSTON BAR ASS'N (2008), available at https://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

106. The Boston Bar Association's website describes the Task Force's activities, findings and membership. See BOSTON BAR ASS'N, <http://www.bostonbar.org/public-policy/statewide-task-force-to-expand-civil-legal-aid-in-ma> (last visited Mar. 15, 2015). Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, *Investigating in Injustice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts*, BOSTON BAR ASS'N (Oct. 2014), <http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf>.

107. The KLS Board of Directors includes a number of private practitioners, and IOLTA and Bar Sponsored Revenues are important components of the KLS budget. KAN. LEGAL SERVS., INC. 2013 ANNUAL REPORT, *supra* note 90, at 17, 19.

VII. CONCLUSION

The issue is not whether there are important roles for private practitioners in the fight for increased access to justice, but that the participation and leadership of the private bar is essential if we are to uphold the promise of access to justice. We face a crisis in the courts and administrative agencies that threatens the ability of our legal system to uphold the promise of equal justice under the law in many civil cases involving low and moderate income litigants. We are well past the days when we can expect legal services organizations alone to handle issues involving those who cannot afford counsel. The courts, with the private bar serving as an essential partner, must provide leadership in what Chief Judge Lippmann has labeled the “Access-to-Justice Revolution.” The challenges require not just innovation and effort, but a careful assessment as to what types of responses work best with which litigants in which settings, to insure that we make the highest and best use of scarce resources. The Access to Justice leaders must, along the way, insure that we are correctly defining the problems we are trying to solve and adopting appropriate evaluation measures to insure that our progress is helping to stem the forfeiture of important rights due to the access of counsel, rather than merely making sure the machinery of the courts is operating more smoothly. In this way, the private bar can play its crucial role in insuring that our efforts to promote access move beyond providing mere access, and help achieve the goal of providing meaningful Access to Justice.