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Access to Justice: Commemorating the 50th Anniversary of the Criminal Justice Act
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1:40 – 2:10pm  Ethics - .5 CLE credit ethics

“Re-conceptualizing Supervision of Non-lawyer Legal Professionals to Increase Access to Justice”
Professor Laurel Rigertas, Northern Illinois University College of Law
Re-conceptualizing Supervision of Nonlawyer Legal Assistants to Increase Access to Justice

Laurel Rigertas, Associate Professor
Northern Illinois University
College of Law
Those who have access to the private market of lawyers because they have lots of $$$$ or they have a good contingency fee claim.

Those who can pay something $-$$, but not enough for the full services of a lawyer.

Those who cannot afford to pay anything for legal services.
Attempts to assist those who can pay something $-$ $$, but not enough for the full services of a lawyer
PRO SE RESOURCES: Limitations

• Geared toward self-help in litigation settings
• Limited, if any, ability to ask questions about what forms to select, what information to include, etc.
UNBUNDLED LEGAL SERVICES: The Limitations

• Public awareness?

• Lawyer concerns
  • Meeting competency standards – ABA Model Rule 1.2(c) – “A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”
  • Being able to withdraw after limited appearances
NON-LAWYER MARKET SOLUTIONS: The Limitations

- Unauthorized practice of law prohibitions (and the related issues with defining the practice of law)
- Consumer protection concerns
- Lack of regulations or licensing that ensure quality
- Lack of ability to interact with knowledgeable people who could answer questions
The Regulation of Nonlawyer Legal Professionals

- Washington State LLLTs
- Other states in various exploratory stages
  - New York
  - California – Limited License Working Group
  - Oregon State Bar – Task Force on Limited License Legal Technicians
Washington’s Limited Licensed Legal Technicians (“LLLTs”), APR 28

The scope of practice for LLLTs, which is currently just in the area of family law, allows LLLTs to engage in a variety of services, including:

(1) Obtain relevant facts, and explain the relevancy of such information to the client;

(2) Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding;

(3) Inform the client of applicable procedures for proper service of process and filing of legal documents;

(4) Provide the client with self-help materials prepared by a Washington lawyer or approved by the Board that contain information about relevant legal requirements, case law basis for the client’s claim, and venue and jurisdiction requirements;

(5) Review documents or exhibits that the client has received from the opposing party, and explain them to the client;
Washington’s Limited Licensed Legal Technicians (“LLLTs”), cont.

(6) Select, complete, file, and effect service of forms that have been approved by the State of Washington, either through a governmental agency or by the Administrative Office of the Courts or the content of which is specified by statute; federal forms; forms prepared by a Washington lawyer; or forms approved by the Board; and advise the client of the significance of the selected forms to the client’s case;

(7) Perform legal research;

(8) Draft legal letters and documents beyond what is permitted in paragraph (6), if the work is reviewed and approved by a Washington lawyer;

(9) Advise a client as to other documents that may be necessary to the client’s case, and explain how such additional documents or pleadings may affect the client’s case;

(10) Assist the client in obtaining necessary documents or records, such as birth, death, or marriage certificates.
The definitions in the limited practice rule include the following:

“Reviewed and approved by a Washington lawyer” means that a Washington lawyer has personally supervised the legal work and documented that supervision by the Washington lawyer’s signature and bar number.

“Supervised” means a lawyer personally directs, approves; and has responsibility for work performed by the Limited License Legal Technician.

WASHINGTON APR 28 (B)(6) and (8).
What does “supervision” traditionally mean in the area of legal services?
ABA Model Rules of Professional Conduct that Address Supervision

- Rules that address supervision
  - Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers
  - Rule 5.3 Responsibilities Regarding Nonlawyer Assistance
Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
ABA Model Rule 5.5(a)

“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” (emphasis added)

Comments (in part):

[1] ….Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer’s direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.
Comments to ABA Model Rule 5.5, cont.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. *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.* See Rule 5.3. (emphasis added).
Ethics Opinions

• ABA Formal Op. 08-451 – “Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer. We note only that if the activities of a lawyer, nonlawyer, or intermediary employed in an outsourcing capacity are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).”
Traditional Model

Client hires lawyer or law firm

Lawyer/firm is responsible for work

Lawyer may delegate tasks to non-lawyers with adequate supervision; non-lawyers cannot practice law

Lawyers may outsource some tasks to non-lawyers
Client hires LLLT

LLLT has a scope of practice that allows LLLT to engage independently in a variety of activities.

If LLLT drafts legal letters and documents beyond what is permitted by rules, that work is reviewed and approved by a Washington lawyer.
Different Models in the Delivery of Health Care Services
Different Advanced Practice Registered Nurse Models

- Independent
- Supervision
- Collaboration
Different Approaches (Source: Federal Trade Commission, Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses (March 2014))

- APRNs can practice independently within their scope of practice
- Or APRNs need to practice in some type of collaboration with physicians
  - Supervision could be required for all activities
  - Supervision could be required for certain types of activities, such as prescribing drugs
  - Supervision does not have to necessarily be on-site. Some states require the doctor to be within some geographical distance of the APRN, or require on-site visits a certain number of times per month, or require regular communication by phone or otherwise.
  - Supervision/collaboration could mean that the physician review all or some percentage of APRN charts at some set intervals (e.g. 10% of all charts each month)
  - Some states limit the number of APRNs that a physician can supervise.
Written collaborative agreements.

(a) A written collaborative agreement is required for all advanced practice nurses engaged in clinical practice. Collaboration does not require an employment relationship between the collaborating physician and advanced practice nurse. The collaborative relationship under an agreement shall not be construed to require the personal presence of a physician or podiatric physician at the place where services are rendered. Methods of communication shall be available for consultation with the collaborating physician or podiatric physician in person or by telecommunications in accordance with established written guidelines as set forth in the written agreement.
Mississippi Nursing Practice Law
§73-15-5(4)

....Advanced practice registered nurses must practice in a collaborative/consultative relationship with a physician or dentist with an unrestricted license to practice in the state of Mississippi and advanced nursing must be performed within the framework of a standing protocol or practice guidelines, as appropriate.
20:62:03:03. Collaboration with a licensed physician or physicians. A nurse practitioner or nurse midwife may perform the overlapping scope of advanced practice nursing and medical functions defined in SDCL 36-9A-12 and 36-9A-13, in collaboration with a physician or physicians licensed under SDCL chapter 36-4. Collaboration by direct personal contact with each collaborating physician must occur no less than twice each month unless it is established in the collaborative agreement that one of the twice monthly meetings may be held by telecommunication. Collaboration with each collaborating physician shall occur at least once per month by direct personal contact.
What might the comparison teach us about other models for the delivery of legal services?

- The entry requirements for LLLTs are quite extensive.
- Are there other areas of high need (housing, immigration, family law, etc.) where nonlawyers could play a role with less training if lawyers were involved in other types of collaboration or supervisory models?
- What would be the pros and cons to such approaches?